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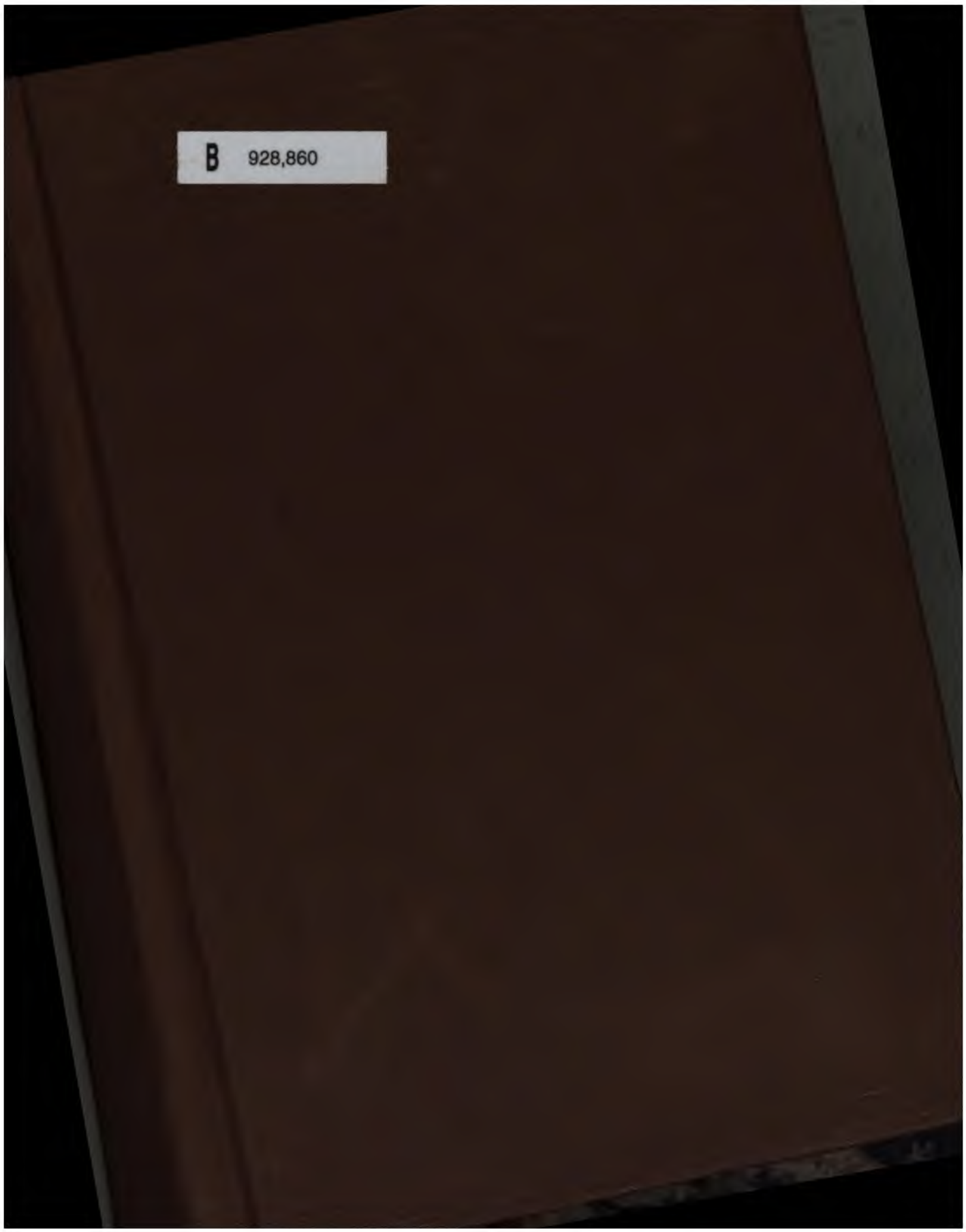
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HISTORY AND DIGEST

OF THE

INTERNATIONAL ARBITRATIONS TO WHICH THE UNITED STATES HAS BEEN A PARTY,

TOGETHER WITH

APPENDICES CONTAINING THE TREATIES RELATING TO SUCH ARBITRATIONS, AND HISTORICAL AND LEGAL NOTES ON OTHER INTERNATIONAL ARBITRATIONS ANCIENT AND MODERN, AND ON THE DOMESTIC COMMISSIONS OF THE UNITED STATES FOR THE ADJUSTMENT OF INTERNATIONAL CLAIMS.

BY

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CHAPTER LIX.

ARREST, IMPRISONMENT, AND DETENTION.

1. By Civil Authority.

Dr. Baldwin's Minatitlan Claims.

In 1824 Dr. John Baldwin, a citizen of the United States, purchased a league of land on the river Coatzacoalcos, south of the port of Vera Cruz, Mexico, and established there a settlement, to which was given the name of Minatitlan. He opened a house for the sale of merchandise and built a number of sawmills, and for a time was prosperous. In 1827, however, one Tadeo Ortiz came to the colony as commissioner, with extensive powers. Upon his arrival he and Dr. Baldwin became involved in difficulties. One of their early controversies seems to have arisen out of a demand which Dr. Baldwin made upon Ortiz for payment for lumber purchased for the use of the public in building a church and a government house. The quarrel having begun, Ortiz employed his political power for purposes of persecution and oppression. The property and effects of Dr. Baldwin were sequestered under an order issued by Ortiz, who also decreed his expulsion from the colony. Subsequently, Ortiz directed certain judicial proceedings to be undertaken. These proceedings were set on foot by a letter which Ortiz addressed to one Montalvo, a person in his employ and constituted by him an alcalde for the occasion, ordering him to institute an action against Dr. Baldwin. This letter charged Dr. Baldwin with want of respect to the authorities, with robbing the state of timber, with being a smuggler, and with litigious conduct. Montalvo instituted the action and took certain alleged depositions, which were afterward declared to be fraudulent, and entitled the action as a proceeding ordered to be instituted by the commissioner, Tadeo Ortiz, against the foreigner John Baldwin, accused of "various crimes." One of

the depositions charged that Dr. Baldwin had broken a contract with certain laborers whom he had imported; another, that he had refused to pay a certain person for the pasturage of cattle; another, that he had once given a customs guard on one of his vessels some liquor, so that the guard went to sleep, from which it was inferred that Dr. Baldwin had put opium into the liquor to put the guard to sleep in order that he himself might smuggle. Another deponent was reported to have sworn that on a certain occasion, when he went on Baldwin's land to shoot wild hogs, the latter ordered him off and threatened to kill him if he returned. Another deposition, by Ortiz's secretary, accused Baldwin of cutting timber on government land. Other depositions referred to a certain cargo of corn, which Baldwin alleged that he imported and offered for sale at a small price, at the request of the authorities, when the colony was in a needy condition, and which he alleged that the customs officials had seized when it was imported, and sold at a high price to the people.

Ortiz sent a record of the proceedings against Baldwin to the governor of the State of Vera Cruz, together with the orders for the privisional seizure of Baldwin's property and his banishment from the colony of Minatitlan. The governor, on examining the papers, refused to confirm the decree of banishment, and being advised that the case was one of judicial and not of political cognizance, sent the documents to the judge at Acayucan, in the district in which Baldwin resided. The judge referred the *expediente* to his assessor, who advised him to call for the original papers, it appearing that they had not been sent in, and to take the declaration of the accused and of any witnesses cited by him. An order was then communicated to the alcalde for the original papers, but he refused to send them; a second and third demand were equally fruitless. The papers were only obtained toward the close of 1829, after a fifth demand for them and an appeal to the minister of justice. Ortiz was then absent from the colony. The motive for the withholdment of the papers was alleged to be the fact that the depositions were fraudulent. Indeed, they purported to have been signed by the alcalde, who, as it appeared, could not write his name.

The proceedings before the judge at Acayucan were begun October 11, 1829. On the 26th of the same month Baldwin appeared and made his declaration. It was then ordered that

he be confronted with his alleged accusers and that the evidence of certain other persons be taken. The investigation continued from time to time till July 1831. In the mean time Ortiz was succeeded as commissioner by one Hoyos, who seems to have instituted a new set of prosecutions, based chiefly on Baldwin's litigious disposition and generally unacceptable deportment. But there was also a charge that he had killed a woman at Tabasco by flogging, and had whipped other persons. These prosecutions were brought before an alcade at Minatitlan, named Rosaldo, who, after taking a number of *ex parte* depositions, transmitted the papers to Hoyos, who sent them to the governor, from whom orders were obtained for further proceedings. Baldwin was then absent at Tehuantepec, and it was decreed that he should on his return be arrested and required to answer the new accusation. The American commissioners contended that this proceeding was but a continuation by Hoyos of that begun by Ortiz, and that the whole was fraudulent and malicious and intended to drive Baldwin from the country and to get possession of his property. Baldwin was subsequently arrested and imprisoned, and the trial was continued. Upon his being confronted with some of the alleged deponents, they denied their alleged depositions, and the charges against him were disproved. The court found that certain of the alleged depositions were forgeries, declared that the charges contained in them were refuted, and ordered that the whole proceeding be discontinued, and the prisoner released. This was on February 7, 1834.

The testimony of some of the witnesses traced the forgery of the depositions to Ortiz, and a summons was issued in April 1834 for Montalvo and certain other persons to be examined on that subject. Owing, partly, to political disturbances in the country, the examination was not pressed, and it slept until 1836. Several of the witnesses who were to be examined had then died, and the investigation made little progress. On the 3d of July 1837 the assessor to whom the case was referred for advice ordered that Baldwin be allowed a defender if he desired it. Baldwin, however, preferred to make his own defense. On the 9th of August 1837 the assessor at the city of Jalapa gave an opinion to the effect that Baldwin should be absolved from all charges preferred against him, with the proviso that the judgment be confirmed by the judge of the second jurisdiction. This judge confirmed the

order of the inferior court, and thus the proceedings were ended, including the charge of murdering the Tabasco woman.

As to the law of the case, the Mexican commissioners contended that where an American citizen voluntarily placed himself under the municipal laws of another country he must take them as they were, and that he had no greater right to complain than the Mexicans themselves if the laws should be bad and imperfectly administered. The American commissioners answered that if Mexico wished to maintain rank and fellowship among the civilized nations of the earth she must place her laws on a footing with the laws of other nations, so far as related to intercourse with foreigners. What oppression they might practice upon their citizens was one thing; the practice of similar oppressions upon foreigners was another thing. The latter had the right to appeal to the protection of their government, if injured. They referred to the case of Meade against Spain for the purpose of showing an acknowledgment by Spain of liability for the palpable misconduct of judicial tribunals. In that case Meade was ordered by the court to pay over the sum of $50,000 into the royal treasury. The money was in his hands as a depositary, and after he had paid the money into the treasury the depositor obtained from the same court a decree directing Meade to pay over the money to him. As it was impossible for him to obey these contradictory decrees he was sent to prison. The Spanish Government admitted the justice of his claim. The case of Dr. Baldwin, said the American commissioners, was much stronger than that of Meade, since not only was there gross injustice and oppression, but a most palpable fraud on the part of the oppressors. The convention afforded the only means of redress for Dr. Baldwin, unless the United States should resort to an act of force.

The American commissioners demanded the following sums: (1) $21,450, with interest from October 6, 1828, to January 20, 1842, for loss of effects, of property, and of merchandise, seized by Ortiz in 1828; (2) $11,500, with interest from November 14, 1828, to January 20, 1842, for suspension of work in Dr. Baldwin's mill during the sequestration of his property and his banishment in 1828; (3) $15,000, as indemnity for his banishment and the expulsion of his family, and for the suspension of his agricultural business for three months in 1828; (4) $2,750, with interest from October 1, 1828, for the seizure of

timber and other property; (5) $50,000, as indemnity for his imprisonment and the suspension of his work during twelve months, and for expenses of defense; (6) $100,000, for loss of property, including land, mills, a coffee plantation, and divers implements, and also for the loss of the product of his capital, of his labor, and of his enterprise during fifteen years; (7) $243, for costs of translation, etc.

The umpire awarded, February 23, 1842, the sum of $100,000 in gross.

Another claim was made by Dr. Baldwin for personal injuries suffered at the hands of the Mexican authorities while he was residing as a merchant and carrying on an extensive business in the settlement or colony of Coatzacoalcos. On December 31, 1831, he received a written notification from the alcalde of Minatitlan, requiring him to appear and answer for a small account for debt. Upon the reception of this notice Dr. Baldwin, in accordance with the law of Mexico, procured an *hombre bueno*, or arbitrator, and set out for the office of the alcalde. When he reached the alcalde's house, he had, it was alleged, no sooner entered than several armed soldiers appeared to prevent his egress, while the alcalde addressed him in violent language, and after some words ordered him to be put into the stocks. Dr. Baldwin, being satisfied that an outrage was meditated upon his person, declared that he would not submit to the indignity, and attempted to escape. He succeeded in reaching his house, where he made hasty preparations to fly to Acayucan, but was pursued by armed men and a number of people hastily got together by order of Hoyos, the commissioners of the colony, by whom the proceedings were alleged to have been maliciously instigated. In his efforts to escape from his pursuers Dr. Baldwin fell and fractured his leg. Thus disabled he was taken by the soldiers past his own house, where his wife entreated that he might be permitted to remain in his injured condition, and back to the town and confined with his broken leg for two hours in the stocks.

Meanwhile, another division of his pursuers proceeded to his house, which they searched, with great indignity to its occupants. After Dr. Baldwin was released from the stocks he was detained in prison for several days and was then transferred to the prison at Acayucan on a litter, against the advice of a French surgeon then present. In the prison at Acayucan he was permitted to remain for eighty-four days, during the

greater part of which time he had no surgical assistance. The imprisonment of Dr. Baldwin was for two alleged crimes, (1) disobedience to the alcalde in flying at the time the sentence of imprisonment was imposed, and (2) in afterward firing a shot at those who by order of the alcalde went to apprehend him.

The American commissioners maintained that, without considering whether the determination of the judge to imprison Dr. Baldwin was just and in conformity with law, or whether he had committed a crime, it was certain that for such offenses he had suffered a disproportionate punishment. As to the charge of firing the shot, it was disproved. While he had a gun with him, it was found, when he was arrested, to be loaded. The American commissioners awarded (1) for the outrage on Baldwin's person, by placing him in the stocks with a broken leg and then detaining him in prison as a criminal for eighty-four day, $20,000; (2) for permanent incurable injury to his leg, $10,000; (3) for the interruption of his business, and the injury to him as a merchant, $10,000; (4) for the expenses necessarily incurred in consequence of his criminal prosecution, and in the presentation of his claim, $5,000; and (5) for costs of translation and consulting a physician, $174.75—in all $45,174.75.

The umpire, February 23, 1842, adopted the award of the American commissioners.

Dr. John Baldwin v. *Mexico:* Commission under the convention between the United States and Mexico of April 11, 1839.

Gahagan's Case.

Dennis Gahagan, a citizen of the United States, was the agent at Tabasco, Mexico, of Aaron Leggett, a merchant of New York. In 1832, while in the interior on business, he was arrested. He was soon released, but after returning to Tabasco was imprisoned again and in other ways ill treated. The principal cause of his persecution seems to have been that he gave advice looking to the rescue from the hands of the Mexicans of Mr. Leggett's vessel which had been seized by them and impressed into service in a political contest then prevailing. Mr. Leggett also preferred a claim for his own losses. The American commissioners said:

"Neither in the papers accompanying his (Gahagan's) memorial, nor in the voluminous documents of Leggett's case, can we discover the slightest pretense or provocation for the

wanton outrages inflicted upon him. His conduct was in all respects legal, circumspect, and respectful to the public authorities, and to individuals; yet he was imprisoned by both parties, loaded with irons, thrown into the most loathsome dungeons, kept from starvation while there by the charity of his countrymen, his assassination attempted, his health by a wanton exposure in a sickly climate and season destroyed, and his mind for a time became partially alienated in consequence of his severe mental and bodily sufferings. No particular cause for this barbarous treatment has ever been assigned, though sought for at the time by the sufferer and his friends; none has since been alleged."

The American commissioners awarded "for imprisonment, barbarous treatment, loss of health, and suffering in consequence thereof," $10,000, and "for loss of his employment, and expenses resulting therefrom, the sum of," $6,000. The umpire, February 23, 1842, rendered an award in accordance with that of the American commissioners.

Commission under the convention between the United States and Mexico of April 11, 1839.

Hammonds' Case. Claimants were the owners of certain merchandise which they were transporting from St. Louis, in Missouri, to Santa Fé, then (in 1828) in Mexico. It had been transported in a wagon most of the way, but because of mountains and bad roads it became necessary to transfer a portion of the goods to pack horses. While these were on their way to the custom-house in Santa Fé, in charge of a Mexican driver employed for the purpose, they were seized on the pretense that he intended to smuggle them, and without any judicial proceedings or trial whatever were sold and the proceeds converted by the Mexican authorities.

The American commissioners awarded damages for the taking of the goods and the umpire sustained them.

The claimants also asked damages for alleged wrongful action of the customs authorities in 1830, in withholding permits for the transportation of goods. It seems that they at the time took some action against the authorities, the precise nature and results of which were not disclosed. The American commissioners awarded $500 on this score, with interest, but the umpire disallowed it.

***Eli E. and Jervis S. Hammond* v. *Mexico*:** Commission under the convention between the United States and Mexico of April 11, 1839.

Bolles's Case.

"The claimants above named, citizens of the United States, being temporarily domiciled at Monterey, in California, in the year 1840, were, with some sixty or seventy other foreigners, forcibly seized and imprisoned by order of the governor of California upon the pretext that they had attempted to excite an insurrection. The prisoners were placed on board a Mexican vessel and carried to Santa Barbara, where they were confined about ten days. They were then sent to San Blas where they were again confined as close prisoners. From the latter place they were sent to Tepic, where they were brought to trial before a Mexican tribunal, by which they were fully acquitted and discharged. During the whole time of their imprisonment they were treated with extreme harshness and cruelty, and frequently refused the means of subsistence for several days together. From this inhuman and barbarous treatment many of the prisoners would doubtless have perished, but for the charitable interposition of strangers, who furnished them with food and by other means mitigated their sufferings. The claimants upon their return to Monterey, after their acquittal, found the little property which they had left confiscated by order of the governor, and they were left without any means of subsistence. The seizure and imprisonment of the men appears to have been wholly without cause, as there was not the slightest evidence to show that they had taken part in the political disturbances of the country. It was a wanton act of arbitrary power and without even the color of law to justify or excuse it, and could have been prompted only by unfounded suspicions or a hatred of foreigners. In the opinion of the board the claims * * * are valid, and the same are allowed accordingly."

Cases of Joseph Bolles and John Christian: Opinion of Messrs. Evans, Smith, and Paine, commissioners, December 4, 1850, under the act of Congress of March 3, 1849. An award was made in favor of Bolles for $2.821.25—$1,850 principal, and $971.25 interest; and in favor of Christian for $1.374.50—$902 principal, and $472.50 interest. Awards were made in other cases growing out of the same transaction. All these awards were for losses of property. It appeared that the Mexican Government at the prisoners' release offered an indemnity for their imprisonment, amounting in some cases to $250 and in others to $300 or $400, and that, with the exception of one Isaac Graham, they accepted it, through the American minister at the City of Mexico, reserving, however, their right to claim for loss of property. Graham's case was the most aggravated of all. "He was," said the commissioners, "shot at and wounded, cut with a sword, and

in various ways treated with exceeding cruelty and indignity. He was possessed of considerable property and was doing a profitable business as a distiller, and sustained great loss in consequence of his long absence." He refused to receive the amount that was offered to him. The commissioners awarded him for injuries in person and in property $38,125—principal $25,000 and interest $13,125.

Hannum's Case.

About the time of the invasion of Sonora by Crabb and his followers from the United States, in 1857, claimant, a citizen of the United States, was arrested and taken before the proper authorities for examination on suspicion of complicity with the filibusters, but was discharged after a brief detention. The commissioners dismissed the claim. "Claimant," said Mr. Wadsworth, "seems to have had a fair hearing and a reasonably prompt acquittal and discharge. * * * I do not think the action of the authorities in the premises, under the surrounding circumstances of alarm and danger, created by the action of citizens of the United States, forms any just ground of claim by the United States."

A. B. Hannum v. *Mexico*, No. 321, convention of July 4, 1868.

Ballenger's Case.

The commissioners, Mr. Palacio delivering the opinion, refused to allow a claim growing out of the prosecution of certain citizens of the United States in Mexico for carrying Mexican doubloons (gold coins) from Durango to Mazatlan, on the coast, without a permit, the laws of Mexico prohibiting the carrying of coined money from the interior of the country into the seaports, unless a written permit should have been previously obtained. "The Mexican authorities," said Mr. Palacio, "by complying with these legal provisions, have injured nobody and limited themselves to fulfill their duty."

Charles D. Gibbes, Exr. of Henry Ballenger, v. *Mexico*, No. 134, convention of July 4, 1868, MS. Op. I. 136.

Halstead's Case.

In 1854 President Santa Anna issued a decree reviving a Mexican law of 1828, forbidding foreigners to enter or travel in Mexico without passports, subject, if they were found without them, to arrest and detention, unless they could prove that their omission was not culpable. The occasion for reviving this law was found chiefly in the attempts made from the United States by Walker and other filibusters to invade Spanish-American countries. After the revival of the law, one Halstead went

from San Francisco to Acapulco, then in the possession of General Alvarez, to obtain a cargo of corn. He had no passport. After remaining at Acapulco for several days he went to Manzanillo, but failing to obtain a cargo there went to Colima, in the interior, where he was informed that the corn could be purchased. At Colima he was arrested for being without a passport, the penalty for which was a fine of $20 and imprisonment for ten days.

The commissioners being unable to agree, the case was referred to the umpire, Dr. Lieber, who said:

"At a period when civil commotions were chronic in Mexico and when America almost looked with shame upon Walker's repeated piratical attempts to establish a 'military democracy,' as he called it, in countries with which his country was at peace, at this period Halstead entered Mexico without a passport, committing not 'a criminal violation of the laws of Mexico'—passports are a matter of police—but an offence for which he was arrested according to the laws of Mexico. He was legally arrested and kept legally in prison for a couple of weeks, but he was held a prisoner for something like four months, plainly not according to right and justice."

A. H. Halstead v. *Mexico*, No. 18, convention of July 4, 1868, MS. Op. I. 251. The umpire having decided that Halstead was illegally detained in prison, the commissioners awarded him $1,600.

Collier's Case.

"William Collier resided for fifteen years in Mexico, chiefly, or wholly so, at Tepic, in the Mexican State of Jalisco, on the coast of the Pacific. Claimant [Collier] was the superintendent, or director, as it was called there, of a cotton factory, belonging to the firm of Barron, Forbes & Co. In January 1856 the unfortunate country was once more disturbed after the expulsion of Santa Anna and during the attempts made to settle a government of the Liberals. * * * Barron and Forbes were expelled from Tepic; the cotton factory was assaulted by some persons who were driven away, but the business went on, when, toward the end of January, Collier attracted the displeasure of the Mexican national guards and of the authorities, perhaps by discountenancing the entering of the people occupied in the factory into the national guards, a body of volunteer militia, or by other acts, real or merely suspected. According to his own statement he did not act wisely toward the Mexican authorities. Claimant, as appears from several of his own letters on the docket and from the answer which he re-

ceived from Mr. Gadsden, the American minister at Mexico, seems to have been of a temper not too placid or patient, which may very naturally have contributed to the feelings or views entertained by the Mexican authorities toward him.

On the 28th of February Collier and his brother-in-law, Hale, were assaulted and robbed. Collier was wounded, whether severely or not does not appear, by a man, Jesus Gutierrez Garcia (called acting adjutant of the national guards), saying, as it is given in the papers on the docket, that he committed this crime at the instigation of José Landeros Cos, commandant of the guard, and of someone else, in order to ascertain whether Collier and Hale carried any interesting papers about them. (See paper No. 39 and others.) The whole statement is somewhat undefined, and, what seems surprising, not plainly mentioned again in the claim for damages.

"On the 2d of April Collier was arrested by Pens, the political chief, at the request of Acibo, the prosecuting fiscal or public prosecutor, and confined at the barracks of the national guard until April 5th—three days—when he was discharged on parole, and after forty days more the whole prosecution was abandoned. While Collier was imprisoned the factory was searched, the arms which Collier kept by license from the authorities for the protection of the factory were seized, and it is mentioned that during this search people outside the factory called, 'Death to the foreigners!' and 'Death to Guillermo Collier!' Everything indicated a suspicion, probably a pretty general suspicion, against Collier, either that he favored the cause opposed to those then in power, or that he was not loyally disposed toward Mexico or its rulers in general, we have no means of ascertaining which, at this distance of time and space.

"We have, then, two alleged wrongs complained of, the robbery of Collier by Garcia, and Collier's detention in the barracks for three days, while, as the learned commissioner of the United States urges, the constitution of 1824, in force in April 1856, declares that no one shall be detained on suspicion only (*solamente por indicios*) for more than sixty hours. I have not the constitution of 1824 with me, but I readily admit the citation. * * * But it appears that there was no constitution existing at the time claimant was arrested. The federal constitution of 1824 ceased to exist in 1853, and from that date to February 12, 1857, there was no constitution in

existence, because the whole country was under the rule of three successive dictators, Santa Anna, Alvarez, and Comonfort. The overthrow of Santa Anna and the so-called clerical party caused a long and general revolution, especially serious in the State of Jalisco, and the constitution of 1824 can not be said to have existed at this time. If, however, it had existed as the active law of the land, would it not be admitted on all hands that the difference between seventy-two hours, the time of the three days' imprisonment, and the sixty hours allowed by the suspended or canceled constitution, in short the difference of the ten or twelve hours, is not very startling in a country so disturbed by military disloyalty and political violence as Mexico was at that time? * * *

"The habeas corpus principle, as the Constitution of the United States calls the protection of the individual against arbitrary or hasty imprisonment, and the insurance of a speedy trial, embodied in the immortal habeas corpus act of 1679 which England bestowed upon our race as one of the greatest gifts—the habeas corpus principle, I say, of which the mentioned passage in the constitution of Mexico somewhat partakes, is a sacred principle indeed for all people that value liberty, but it is not absolute, and can not be so. The very Constitution of the United States provides for cases where it may be suspended. The Americans were obliged to suspend it during the recent civil war, and I do not know whether martial law did not exist in the State of Jalisco at the time when claimant was arrested; but whether martial law existed or not, the certain fact is that Jalisco was in a state of political disturbance, and that Collier was not detained on suspicion over seventy-two hours, perhaps not even fully for that time. * * *

"There seems to have been fair reason for the suspicion manifested against Collier. Not that he committed the offense of which he was suspected—we know nothing about that—but that his conduct occasionally or generally was such that it naturally led to suspect him of that which he was believed to have committed, namely, the using of his influence to prevent people employed in his establishment from enlisting in the volunteer troops destined to protect the State, or the immediate neighborhood, and of sympathizing with the domestic enemy of Mexico. After three days' imprisonment claimant is dismissed. Some measure of security is continued for some weeks, perhaps more *pro forma* than otherwise, perhaps because it was believed necessary. There was at all events

no *maltreatment* in this. * * * I can not come to the conclusion that any award is due to the United States from the Republic of Mexico for the benefit of claimant, and consequently decide that the case must be dismissed."

Lieber, umpire, *William Collier* v. *Mexico*, No. 118, convention of July 4, 1868, MS. Op. II. 323.

Twohig's Case.

Claimants used insulting language to a magistrate before whom they were sued, and the magistrate had them arrested by armed men and thrown into prison for contempt. They were released after three hours' detention. The commissioners held that both sides acted in bad temper and improperly, and dismissed the case.

John Twohig and Joseph Deutz v. *Mexico* Nos. 349 and 350, convention of July 4, 1868, MS. Op. II. 313.

Barnes's Case.

Claimant went from San Francisco to Guaymas on the *Patrita*, a vessel bearing the Chilean flag. There were on board sixty-eight men, all of whom went as passengers to the State of Sonora. The same vessel, then under the name of the *Anita*, had brought Walker with his expedition to Toros Santos, in Lower California; and when she arrived again under the Chilean flag and under another name, in ballast and with sixty-eight passengers, the Mexican authorities seized her and put the passengers ashore on an island off the coast, without shelter, exposed to the smallpox and fed with insufficient food. Claimant bore a passport as a citizen of the United States, visèed by the Mexican consul at San Francisco. The excuse made for his detention and for that of his companions was that they were suspected of being engaged in a filibustering expedition. After sixty days' detention, claimant was released without trial, although in the mean time he had been subjected to other hardships in other places of imprisonment than that referred to. The commissioners, being of opinion that his detention was arbitrary and unreasonably harsh, made him an award of $5,100.

William P. Barnes v. *Mexico*, No. 29, convention of July 4, 1868, MS. Op. II. 295. Awards were made in favor of other *Patrita* prisoners, as follows: *Jos. M. Bryant* v. *Mexico*, No. 26, 2 MSS. Op. 295; *James L. Springer* v. *Mexico*, No. 359, id. 299; *Peter Blohm* v. *Mexico*, No. 463, id. 302; *George Lauer* v. *Mexico*, No. 464, id. 303; *Isaac G. Israel* v. *Mexico*, No. 325, id. 304; *Edgar Warren* v. *Mexico*, No. 47, MS. Op. III. 565.

Rice's Case.

"Francis W. Rice, claimant, a native citizen of the United States of America, was consul of the United States at Acapulco, in the Republic of Mexico. On the 11th of June 1852, while consul, he was arrested by order of the Mexican authorities and kept in jail for three days, after which he remained a prisoner in his own house; that is to say, he was ordered by the Mexican court to remain such, but he states himself that he utterly disregarded the order. He was several times again 'imprisoned in his house,' as he avers himself, and now asks for the sum of $50,000, made up of losses sustained by the prevention of business which he would have done, by the loss of his consular fees, and, I must suppose, by a sum of money to be paid for the indignity offered to him as consul by the original imprisonment put upon him, if any were, for it does not appear very clear how he was imprisoned after his first detention in jail. * * *

"It is well established in the law of nations, and has been so ever since the full development of this branch of jurisprudence, that a consul is not a diplomatic agent enjoying ambassadorial privileges; but, on the other hand, it is also acknowledged that a consul ought to be treated with international regard and respect, a rule on which the American Government has repeatedly and signally acted, and which, in the case of Rice, it seems has not been strictly observed by the Mexican authorities; and on the other hand there is no doubt that claimant's conduct as consul had been occasionally objectionable. * * *

"As to the portion of the damages claimed which may be imagined to arise out of consequential damages, the umpire desires to lay down as one of the requisites for consequential damages, that there must be a manifest wrong, the effect of which prevents the direct and habitual lawful pursuit of gain, or the fairly certain profit of the injured person, or the profit of an enterprise judiciously planned according to custom and business. A mere device of speculation, however probable its success would have been or may appear to the projector, can not enter into the calculation of consequential damages. The umpire finds it impossible to say what the loss of profits may have been to claimant, if there were any, for he can not find out whether claimant pursued any distinct line of business. * * * The Mexican judge kept Rice for more than the sixty hours (that is to say, for three days and nights) allowed by the

Mexican constitution of 1824, on suspicion alone. To this it is replied that Rice's acts were 'public and notorious, multifarious and proved,' and did not require any specified charge of offenses; but it will be observed that 'notorious and public acts,' though they be notorious, form no substitute for that habeas corpus principle, as it may be called for brevity's sake, which among other requisites demands a statement of the reason of the arrest, issued by lawful authority. * * * After much weighing and careful comparing, I have come to the following award, that the Republic of Mexico pay to the United States of America the sum of $4,000 in United States currency, no interest."

Lieber, umpire, April 10, 1872, *Francis W. Rice* v. *Mexico*, No. 7, convention of July 4, 1868, MS. Op. II. 471.

Atwood's Case.

Claimant endeavored in 1857 to export from Mexico a lot of live stock, including some mares. At the time, the exportation of mares was forbidden by law, and in consequence claimant was on several occasions detained by the authorities, though finally, by some arrangement with them, he was permitted to pass with all the animals into Texas. The commissioners held that he could not make a claim for detention, as the business in which he was engaged was illegal, and the arrangement finally made with the authorities, whatever it was, unlawful.

John W. Atwood v. *Mexico* No. 128, convention of July 4, 1868, MS. Op. III. 101.

Bennett's Case.

Claimant had some goods in the store of one Milmo, at Piedras Negras. Milmo, being charged with crime, was arrested, and an embargo placed on all the property in his store. Claimant asked damages for alleged losses by depreciation in value of the goods from the time of their seizure till their restitution, for the expenses incurred in obtaining their restitution, and for the abstraction of some of the goods and damage done to others while they were in the possession of the Mexican authorities. The umpire said:

"The umpire is of opinion that, considering that the embargo of Milmo's goods was made by a judicial order, the authorities had a right to seize everything that was found on his premises, and that the burden of proof that a part of it belonged to the claimant was upon the latter. It was his misfortune that the consignee of his goods was accused of a crime, and it was a part of that misfortune that he was obliged to go to some

expense to prove that the property belonged to him. But the umpire does not think that the Mexican Government can be made responsible for his expenses on that account."

The evidences of unreasonable detention of the goods before restitution were deficient, as well as of damage and abstraction while they were in the possession of the Mexican Government. The umpire therefore dismissed the claim.

Thornton, umpire, *William M. Bennett* v. *Mexico*, No. 557, convention of July 4, 1868, MS. Op. III. 217, IV. 616.

Cramer's Case.

"In the case of *John D. Cramer* v. *Mexico* No. 950, the umpire is of opinion that the charges made against the Mexican authorities are not sufficiently proved to justify his condemning the Mexican Government to make compensation to the claimant. It must be remembered that at the time of the claimant's arrest the guaranties of the constitution were suspended, and a simple order by a military or civil authority was a sufficient warrant of arrest. It is clear that there was a suspicion that the claimant was implicated in an attempt at revolution against the government, and the authorities were justified in detaining the prisoner for the purpose of inquiring into the grounds of that suspicion, especially as an American citizen with whom the claimant had had communications had at the time attempted to raise a revolution against the Mexican Government. Nor does the umpire think that thirty-five days was an unreasonable time for making these inquiries, considering that it was not unlikely that they were partially made in the United States. Anyone who carefully reads the evidence of the three witnesses, one of whom was the United States consul, will acquire the conviction that it was obtained principally from hearsay. In the claimant's memorial it is stated 'that he was finally able to get his case to the ear of the American consul at Mazatlan,' but Mr. Sisson himself gives his evidence as if he had well known the circumstances of the case from the moment of the arrest. With regard to the ill treatment complained of in prison, not one of the witnesses, not even Ellert, who was in the same prison with the claimant, asserts that he saw the claimant beaten. They say that they knew it, but do not say how they knew it. The statements as to losses suffered by the claimant in consequence of his imprisonment are utterly devoid of proof and are merely unfounded opinions of the witnesses, who must have derived

those opinions from information furnished by the claimant. Neither did the claimant avail himself of his right to bring an action for damages against the prefect, nor even to report the case to the Mexican Government. It is still more remarkable that neither the claimant nor the United States consul appears to have registered any written protest or to have made any representations to their own government, although the affair is alleged to have involved a loss to the claimant of $250,000. The umpire is of opinion that the Mexican Government can not be called upon to pay compensation in this case."

Thornton, umpire, July 22, 1876, *John D. Cramer* v. *Mexico*, No. 950, convention of July 4, 1868, MS. Op. VI. 501.

Jonan's Case.

Claimant was arrested and had his papers taken from him by order of Alvarez, dictator of Guerrero. He was held in prison for long periods in 1853 and 1854, on charges not within the jurisdiction of the courts. The following decision was made:

"It appears to the umpire that the arrest of the claimant in December 1853 was illegal in form; that almost the whole of the accusations against him were not within the jurisdiction of the Mexican courts * * *; that the fact of their trying claimant upon accusations over which they had no jurisdiction prolonged the proceedings most unjustly toward the claimant; that from the beginning to the end of the proceedings the forms of law were infringed to the prejudice of the accused; that the legation of the United States at Mexico called the attention of the Mexican Government to the want of jurisdiction of the tribunals over the questions at issue, and that the Mexican Government having been thus warned, and having abstained from attempting to prevent these illegal acts, which it had full power to do, assumed the responsibility of those acts."

Thornton, umpire, November 20, 1875, *Augustus Jonan* v. *Mexico*, No. 70, convention of July 4, 1868, MS. Op. IV. 91, VII. 355. An award was made to the claimant of $35,000 Mexican gold, with interest.

Case of the "Emily Banning."

The bark *Emily Banning*, having arrived at Acapulco in distress, was detained and her captain and crew imprisoned on suspicion of being fillibusters. The detention was long and the imprisonment harsh. The umpire held that the whole proceeding was unjustifiable and made an award in favor of claimants.

Thornton, umpire, *Nautilus Submarine Pearl Fishing Co., owner of the bark*, v. *Mexico*, No. 136, convention of July 4, 1868, MS. Op. III. 14, 334; *Martha E. Thatcher, widow and administratrix of Anthony Thatcher, captain of the bark*, No. 137, MS. Op. III. 22, 336.

Pierce's Case.

Claimant was arbitrarily arrested by an officer of local police in Mexico and kept all night a prisoner in a house. It appeared that the authorities had proceeded against this official, fined and reprimanded him, and dismissed him from office. It was held that the claimant was not, under the circumstances, entitled to an award against the Mexican Government.

John R. Pierce v. *Mexico*, No. 806, convention of July 4, 1868, MS. Op. VII. 28.

Brito's Case.

"The arrest of the claimant in the city of Havana having been effected in violation of the stipulations of treaty, and his health having been injured by imprisonment, he has a right to recover damages to the amount of $600, with interest at 6 per cent a year, since the 12th of February 1869, to this day."

M. Bartholdi, umpire, November 14, 1874, *José Vicente Brito* v. *Spain*, No. 23, Spanish Claims Commission, agreement between the United States and Spain of February 11–12, 1871.

Griffin's Case.

The claimant demanded $25,000 damages, on the ground that he was without probable cause, and maliciously and oppressively, arrested and imprisoned. It appeared that on April 4, 1871, he was master of an American brig, then lying at Sagua la Grande in Cuba. On the day when the vessel was ready to sail, a slave belonging to the charterers was discovered secreted in the hold, and was taken out by their agent, who reported the circumstance to the authorities. The authorities ordered the arrest of the claimant on the charge of attempting to aid a slave to escape, and he was imprisoned from the 4th of April till the 13th of the following month, when he was discharged on nominal bail. He claimed damages for costs and charges incurred by reason of his imprisonment, for losses and damages suffered, for damage to vessel and cargo, etc. The commission awarded him $500 in American gold.

Joseph Griffin v. *Spain*, No. 87, April 10, 1875, Spanish Claims Commission, agreement of February 11–12, 1871.

Moliere's Case.

"In the case of *Pedro Moliere* v. *Spain*, No. 4, it is my opinion that the claimant has no right to recover damages from the Spanish Government for the injuries he received in a private quarrel on the 30th of August 1870. But inasmuch as the claimant was subsequently arrested, and though it is not possible to decide

from the testimony brought before the commission if his arrest was or was not ordered upon sufficient ground, as there is no doubt that he was not tried, as he ought to have been, before a competent tribunal, and that after sixteen days of imprisonment, it was only owing to the exertions of the consul-general of the United States that he was released, it is my opinion that the claimant has a right to recover damages to the amount of $3,000, with interest at 6 per cent per annum, from the 1st of September 1870 to the day of payment."

M. Bartholdi, umpire, October 25, 1875, *Pedro Moliere* v. *Spain*, No. 4, Spanish Claims Commission, agreement of February 11-12, 1871.

Case of Cabias.

In the brief of the advocate for Spain it was stated that the wrongs of which the claimant complained were that he was arrested on the 15th of January 1869, conducted to Havana, confined in a dark cell for fifty-five days, tried upon a charge of complicity in a political riot in which two policemen were shot, and condemned, though on appeal he was acquitted; that he was then, March 12, removed from the dark cell and placed in the stocks, and kept there for fifteen days and nights; that he was then, about March 27, taken from the stocks and placed in the gallery of the prison, and there detained until July 21, when he was released and taken by two policemen to a steamer bound for Key West, on which he was forced to sail, being furnished with a passport for that island; that during his imprisonment he was tried upon charges of being a Freemason, of vagrancy, and of insolence and defiance of Spanish authority.

The evidence showed that the claimant was acquitted on the charge of complicity in the insurrection, but when he was expelled the charge of vagrancy was still pending. He claimed damages to the amount of $187,363.25 for imprisonment, loss of health, expenses, etc. The arbitrators awarded him $3,000, with interest at 6 per cent from January 15, 1869, till final payment of the award.

Teodoro Cabias v. *Spain*, No. 10, March 17, 1877, Spanish Claims Commission, agreement of February 11-12, 1871.

Jones's Case.

The claimant, who was the master of an American brig, was on August 8, 1871, arrested at Santiago de Cuba on the charge of having aided a revenue accountant who had stolen public money and stamps to escape from Cuba, by conveying him in

the brig on a former voyage to the Island of Haiti. His bail was fixed at from $17,000 to $20,000; but after thirty-one days' imprisonment he was, through the intervention of the United States consul, released on $200 bail. After his release the claimant resumed command of his vessel and returned to New York. The judgment of the court on the charge against him was not delivered until September 3, 1874. This judgment declared that there was no proof, though there might have been suspicions, that the claimant knew of the crimes of the revenue accountant when he conveyed him away in his vessel.

The arbitrator for the United States thought that the proceedings against the claimant were irregular, because it was not until two years after his arrest that the prosecution was begun against the fugitive accountant. The arbitrator, treating the latter as principal and the claimant as accessory, contended that no trial of the claimant could regularly have been held until the trial of the principal offender, the fugitive accountant.

The Spanish arbitrator held that the fact that the claimant was found to be innocent did not entitle him to damages when the formalities of the law had been observed, and when the authorities were not actuated by malice against him.

It was also maintained by the advocate for Spain that the claim did not come within the jurisdiction of the commission, because it had no connection with the insurrection. In support of this contention he referred to the title of the agreement of February 12, 1871, in which it is described as providing for an arbitration of claims arising "since the commencement of the present insurrection." By the fifth article of the agreement, however, the arbitrators were expressly invested with "jurisdiction of all claims," etc., "for injuries done to citizens of the United States by the authorities of Spain in Cuba since the 1st day of October 1868."

The umpire rendered the following decision: "The umpire is of opinion that the arrest was legal, but that, inasmuch as the amount of bail required was exorbitant, the treaty of 1795 was violated, and that the claimant under the circumstances is entitled to some indemnity; and the umpire hereby decides that an amount of $5,000, without interest, be paid on account of this claim."

Count Lewenhaupt, umpire, December 27, 1880, *William A. Jones* v. *Spain*, No. 89, agreement between the United States and Spain of February 11–12, 1871.

Case of Waydell & Co.

The owners of the vessel referred to in the preceding case demanded $35,000 damages for her detention, by reason of the arrest of the master; for sickness which befell the crew in consequence of their detention, involving another month's delay, and for the odium that attached to their house by reason of the arrest of the master of the vessel, which was engaged in a regular trade between New York and Cuba. On this claim the umpire made the following award:

"The umpire is of opinion that if any time was lost between the 8th and 14th of August 1871 by suspension of work, such delay was the result of gross mismanagement, for which Spain is not responsible, but that it is reasonable to suppose that the owners suffered some loss by being illegally deprived of the services of the captain for about a month; and the umpire decides that an amount of $1,000, with 6 per cent interest a year from the 16th of September 1871 to this day, be paid on account of this claim."

Count Lewenhaupt, umpire, December 27, 1880, *Waydell & Co.* v. *Spain*, No. 88.

Trumbull's Case.

"The memorialist represents that he is a citizen of Chile, at present a member of the Chilean Congress, residing in Santiago; that on February 5, 1891, he was authorized by the vice-president of the Senate of Chile and the president of the Chamber of Deputies, who together represented the authority of the Chilean Congress in its efforts to put down the dictatorship of Balmaceda, to proceed to the United States to purchase the arms and ammunition which were needed; that upon his arrival in New York he consulted some of the leading lawyers in regard to his right to ship arms and ammunition, and was in every case informed that such shipment was not in violation of the laws of the United States; that he accordingly bought from Messrs. Hartley and Graham, of New York, five thousand rifles and two million cartridges; that he cabled the Chilean Government at Iquique to send one of their steamers to San Diego, California; that he arranged to ship the arms and ammunition to San Francisco, where they were put on board the American schooner *Robert and Minnie*, which was towed to the Island of Catalina, where she was to await the arrival of the Chilean steamer *Itata;* that the *Itata* was delayed two weeks, and although she had instructions from him not to enter the port of San Diego but to await outside for

orders, want of coal obliged her to put into San Diego on May 3, 1891; that the presence of the *Robert and Minnie* had in the mean time been discovered, and it was suspected that the *Itata* had come to get the arms and ammunition which composed her cargo; that this suspicion led to the *Itata's* arrest soon after her arrival in San Diego; that on the 6th of May 1891, without obtaining clearance papers, the *Itata* weighed anchor and left San Diego; that on the 11th of May 1891 he left San Francisco, California, for New York, but on arrival at Oakland was detained by two detectives on board the ferryboat and taken back to San Francisco like a common criminal; that he was taken to the marshal's office and informed by the United States district attorney that he must go to jail unless he could furnish bond for $15,000; that he protested against his arrest without a warrant and asked by whose orders he was arrested. The district attorney replied that he was arrested by order of the Attorney-General of the United States; that having asked why he was arrested the district attorney informed him that he was arrested for having violated the neutrality laws of the United States in fitting out and arming the schooner *Robert and Minnie* to cruise and commit hostilities against the Republic of Chile; that he was able to furnish the bond for $15,000 and allowed to go free, but was informed that he could not leave San Francisco, where he must wait the indictment of the grand jury of Los Angeles; that being thus detained he sent a telegram to the Assistant Secretary of State, Wharton, on the 15th of May, which is set out in the memorial; that to this telegram he received no reply; that having been indicted by the grand jury he was obliged to go to Los Angeles to stand his trial, which was postponed until September, and then returned to New York, and the trial having again been postponed to October he was obliged to return to Los Angeles and await the result of his trial, until the 3d of November, when Judge Ross, of the district court of the United States for the southern district of California, delivered his opinion and instructed the jury to find a verdict of not guilty. The memorialist then proceeds to quote the opinions of several of the officials of the United States Government to show that he had the right to purchase arms and munitions of war in the United States and to ship such articles abroad. He represents that he was detained by the civil authorities of the United States from May 11 to November 3, 1891; that by the prose-

cution of the civil authorities of the United States he was obliged to suffer great inconvenience; that he was damaged in his reputation and suffered considerable pecuniary losses, for all of which he claims the sum of $32,500.

"The agent of the United States has demurred to the memorial of the claimant as insufficient under the treaty and in law to entitle him to maintain his claim against the United States. We are of opinion that the demurrer should be sustained.

"Section 5283 of the Revised Statutes of the United States provides:

"'*Every person* who, within the limits of the United States, fits out and arms, or attempts to fit out and arm, or procures to be fitted out and armed, or knowingly is concerned in the furnishing, fitting out, or arming of any vessel, with intent that such vessel shall be employed in the service of any foreign prince or state, or of any colony, district, or people, to cruise or commit hostilities against the subjects, citizens, or property of any foreign prince or state, or of any colony, district, or people with whom the United States are at peace, * * * shall be deemed guilty of a high misdemeanor, and shall be fined not more than ten thousand dollars and imprisoned not more than three years.'

"The Supreme Court of the United States, in the case of Carlisle et al. *v.* The United States, reported in 16 Wallace, p. 147, has decided that—

"'Aliens domiciled in the United States owe a local and temporary allegiance to the Government of the United States. They are bound to obey all the laws of the country not immediately relating to citizenship during their residence in it, and are equally amenable with citizens for any infraction of those laws.'

"In 1793 Mr. Jefferson, Secretary of State, in a letter to Mr. Genet, held:

"'Aliens residing in the United States are as much responsible for breach of neutrality laws as are citizens; aliens, while within our jurisdiction and enjoying the protection of the laws, being bound to obedience to them, and to avoid disturbance of our peace within, or acts which would commit it without, equally as citizens are.' (Second Wharton's International Digest, sec. 203, p. 503.)

"Mr. Webster, Secretary of State, December 23, 1851, held:

"'Every foreigner-born residing in a country owes to that country allegiance and obedience to the laws as long as he remains in it, as a duty imposed upon him by the mere fact of his residence, and the temporary protection which he enjoys,

and is as much bound to obey its laws as native subjects or citizens. This is the universal understanding in all civilized states, and nowhere a more established doctrine than in this country.' (Wharton's Digest, sec. 203, p. 504.)

"Mr. Marcy, Secretary of State, July 20, 1855, said:

"'If a native-born citizen of the United States goes into a foreign country and subjects himself to a prosecution for an offense against the laws of that country, this government can not interfere with the proceedings, nor can it claim any right to revise or correct the error of such proceedings, unless there has been a willful denial of justice, or the tribunals have been corruptly used as instruments for perpetrating wrong or outrage.

"'This government is in the daily practice of trying and punishing the subjects of other states for offenses committed here. Those states have no right nor would they be allowed to interfere with our proceedings against their subjects, upon any other ground than a willful denial of justice, or a corrupt perversion of judicial proceedings for the purpose of wrong or oppression.' (Wharton's Digest, sec. 203, p. 505.)

"Mr. Cass, Secretary of State, in 1858, said:

"'Every independent state has the right to regulate its internal concerns in its own way, taking care to avoid giving just cause of offense to other nations. In almost all the European states there are police and administrative powers exercised by the governments, which enable them to exert a very arbitrary authority over residents, whether natives or foreigners. When our citizens enter those countries, they enter them subject to the operation of the laws, however arbitrary these may be, and responsible for any violation of them.' (Wharton's Digest, sec. 203, p. 505.)

"Mr. Blaine, Secretary of State, stated, November 25, 1881:

"'Every person who voluntarily brings himself within the jurisdiction of the country, whether permanently or temporarily, is subject to the operation of its laws, whether he be a citizen or a mere resident, so long as, in the case of the alien resident, no treaty stipulation or principle of international law is contravened.' (Wharton's Digest, sec. 203, p. 507.)

"Mr. Frelinghuysen, Secretary of State, November 25, 1881, says:

"'If an alien, while within the United States, violates a law here in force, he is liable to arrest and punishment according to the local practice, and because of his foreign citizenship he has no privileges or immunities other than those enjoyed by a citizen of this republic.' (Wharton's Digest, sec. 203, p. 507.)

"It is proper to say that these citations of authority have been taken from the brief of the counsel of the United States. Many other citations to the same effect might be added.

"In view of these well-settled principles of public law it is incumbent upon the claimant to make it appear, before he can maintain his claim, that palpable injustice has been done to him or that he has been deprived of such a trial as a citizen of the United States would have received if he had been arrested under similar circumstances and charged with the commission of a similar offense. There is no such allegation in his memorial. On the contrary, it appears from his own statement that he was arrested by order of the Attorney-General of the United States upon suspicion that he had violated the neutrality laws of the United States; that he was promptly admitted to bail; that the evidence against him was sufficiently strong to justify an indictment by the grand jury; that he was regularly tried, according to law, and acquitted by a petit jury, under the instructions of the court, within six months from the time of his arrest. He does not complain that due process of law has not been observed in his case, but that he has been tried for a violation of the neutrality laws, of which offense he was not guilty according to the verdict of the jury and the judgment of the court.

"We have been unable to find any precedent for this claim. If it is a valid claim, then it would seem to follow that every person charged with an offense against the laws and acquitted may sue the state and recover damages. Every government that institutes a criminal proceeding for the enforcement of its laws would do so at its peril. No government could long exist if such a doctrine should be recognized as sound. The mere statement of the proposition is sufficient to demonstrate its unsoundness. If this were a suit against a private individual for malicious arrest and prosecution it would be necessary, in order to maintain the suit, to aver and prove malice and want of probable cause. It is not charged in the memorial that the Attorney-General was actuated by malice in ordering the arrest, or that there was want of probable cause. It is fair to presume that in the performance of an official duty he was governed by the facts and circumstances as they appeared to him. 'A public officer is not liable to an action if he falls into error in a case where the act to be done is not merely a ministerial one, but is one in relation to which it is his duty to exercise judgment and discretion even although an individual may suffer by his mistake.' (Kendall *v.* Stokes, 3 Howard, 87.)

"But this is not a claim against the Attorney-General; it is a claim against the United States; *a fortiori* malice and want

of probable cause in the arrest and prosecution complained of should be made to appear. Was there want of probable cause? Probable cause is the existence of such facts and circumstances as would excite the belief in a reasonable mind, acting on the facts within the knowledge of the prosecutor, that the person charged was guilty of the offense. Were not the facts and circumstances disclosed in the memorial calculated to excite the belief, or at least to warrant the suspicion, that the claimant was engaged in violating the neutrality laws of the United States? According to his own statement he came to the United States as the accredited agent and representative of a revolutionary party that was then attempting to overthrow the government of Balmaceda, with which the United States were at peace. He came for the purpose of purchasing the needed arms and ammunition. In the progress of his narrative he says:

"'I accordingly bought from Messrs. Hartley & Graham, of New York, five thousand rifles and two million cartridges.

"'As I did not have the funds necessary for the chartering of a steamer that might bring them directly to Chile, I cabled the Chilean Government at Iquique to send one of their steamers to San Diego, California. In the mean time I arranged the following plan: I shipped the arms and ammunition to San Francisco, where they were put on board the American schooner *Robert and Minnie*, which was towed to the Island of Catalina, where she was to await the arrival of the Chilean steamer *Itata*. Unfortunately the *Itata* was delayed two weeks, and although she had instructions from me not to enter the port of San Diego, but to await outside for orders, want of coal obliged her to put into San Diego on May 3, 1891.

"'The presence of the *Robert and Minnie* had in the meantime been discovered, and it was suspected that the *Itata* had come to get the arms and ammunition which composed her cargo.'

"In addition to these suspicious facts and circumstances, as stated by the memorialist himself, showing secrecy in the transaction on his part, it appears that he was regularly indicted by a grand jury, sworn and impaneled in the district court of the United States for the southern district of California to inquire into all offenses against the laws of the United States within the jurisdiction of that court. It is fair to presume that there was sufficient evidence before the grand jury to justify the indictment found by them, and the indictment itself is sufficient to show that there was probable cause. As it appears upon the face of the memorial itself that the claim-

ant was arrested upon the suspicion that he was engaged in the violation of the neutrality laws of the United States; that he was regularly indicted, tried, and acquitted in accordance with the ordinary proceedings of courts of justice; that he was subjected to no improper treatment while under arrest and to no unnecessary delay in his trial, we are of opinion that he has no legal claim against the United States for damages. If a citizen of the United States, temporarily domiciled in the Republic of Chile, should be arrested under similar circumstances upon a similar charge and in the ordinary course of legal proceedings should be indicted, tried, and acquitted, we apprehend his claim for damages would not be entertained in the Chilean courts. If a citizen of the United States should be subjected to a similar prosecution upon a similar charge or upon any charge in any of the courts of the United States, his suit for damages against the Government of the United States would be wholly unavailing. Certainly it can not be contended that the claimant, a citizen of Chile, and under obligations to obey the laws of the United States while temporarily residing here, is entitled to any greater immunity or protection than would be accorded to a citizen of the United States under like circumstances.

"It is to be regretted that the claimant, an honored citizen of Chile, has been subjected to annoyance and loss; but we are of opinion that the facts stated in his memorial are not sufficient under the treaty or in law to entitle him to recover damages against the United States. The demurrer is sustained and the claim is dismissed.

Opinion of Mr. Goode, for the commission, case of *Ricardo L. Trumbull* v. *Chile*, No. 28, United States and Chilean Claims Commission, convention of August 7, 1892.

Borden's Case.

G. L. Borden, a citizen of the United States, master and seven-eighths owner of the American whaling bark *Hope On*, shipped in November 1882 a Chilean sailor, who, having become mutinous, and having assailed members of the crew with a knife, was several times confined in irons. On January 14, 1883, the sailor, it was alleged, with his consent, was put ashore on the Island of Juan Fernandez, at a point "about two miles from the settlement," and with "food sufficient to maintain him until he could reach the settlement." March 27, 1883, the bark called at Talcahuano to refit for an arctic voyage, but on

April 9, when she was nearly ready for sea, the master was notified that she would not be allowed to depart. April 13 the minister of marine of Chile ordered the bark to be detained till further orders; and on the 16th of the month Borden was arrested and, after a few hours' detention, taken before a judge at Concepción. He gave bail and returned to Talcahuano. Ten days afterward he was ordered to appear at Concepción, which he did. May 15 an order for the release of the bark was given at Borden's instance, but it was countermanded, and the bark was not permitted to depart till May 21, when she sailed under a new master. This master "proved to be incompetent," and the cruise a failure; and in the autumn of 1893 Borden discharged the crew "and sold the bark and outfits for what he could obtain, at a large loss." He himself "remained at Talcahuano until the 27th of June 1883, awaiting notification of his trial, but received none." He then returned to his home in the United States. He claimed damages (1) for his arrest and expenses, and (2) for the detention of his vessel, amounting to $20,130.69.

It appeared by the evidence that no legal proceedings were ever instituted against the bark. The master was arrested for barbarously maltreating the Chilean sailor and for casting him ashore on an uninhabited part of Juan Fernandez Island. It appears, however, that the sailor did not appear as a complainant, but that the prosecution was instituted by the captain of the port of Antofogasta, on the report of the lessee of the island, to whom the sailor told his story.[1]

The damages for the detention of the ship were estimated at $250 a day, which included $50 for wages, $10 for provi-

[1] Mr. Shields, the agent of the United States, in his final report (p. 70), says:

"The record shows that the district attorney of Chile gave as his opinion to the court that it had no jurisdiction of the crime charged against Borden, and that there was no crime against Chilean law committed by him. The case seems to have been appealed to the supreme court of Chile, which held that the court at Concepción had no jurisdiction of the case, and remanded it to the court at Valparaiso for further proceedings, where the case rested for three years, until a demand by the United States Government for information in regard to it was made, when the papers were found among the private papers of the judge, never having been docketed. Every effort was then made by the Chilean Government to perfect the proceedings against the claimant, without success; the district attorney stated to the court that his honor absolutely lacked data to establish the existence of any offense."

sions, $6.66 for interest and insurance, and the rest for the loss of the use of the vessel. No evidence was offered by Chile on the subject of damages.

Arguments.

The contentions of the parties before the commission have been stated by the agent of the United States[1] as follows:

"It was contended on the part of the United States that as there was no complainant and no complaint to serve as the basis for the prosecution, and also no crime against Chilean law alleged, the proceedings were void; that maltreating a sailor on board a United States vessel by the captain on the high seas or within the territorial jurisdiction of Chile is not an offence against the law of Chile nor justiciable in the Chilean courts. (See Field's International Code, p. 433; Kent's Commentaries, p. 204; Pelletier's case (against Hayti), p. 102; United States against Palmer, 3d Wheaton, 610; Opinions of the Attorney-General of the United States, vol. 8, p. 79.)

"A crime committed on board a foreign merchant vessel, in which members of the ship's crew are alone concerned, is not within the jurisdiction of the local courts unless the crime involves a breach of the local peace. (Wildenhus's case, 120 United States, 1; Ortolan, Diplomatie de la Mer, 1, 450; Journal du Droit International Privé, 1876, p. 413.)

"On the question of damages for the detention of the vessel, the following cases were cited: The Baltimore, 8 Wall. 377–385; Cayuga, 14 Wall. 270; Potomac, 105 U. S. 630; Porter, 5 Fed. Rep. 822; 8 Fed. Rep. 170; Brown *v.* Hicks, 24 Fed. Rep. 811; Parsons *v.* Terry, 1 Low. 60; The *Notting Hill*, 9 Pro. Div. 105–113; Parana, 2 Pro. Div. 118; The *Mary Steele*, 2 Low, 370–374; The *Resolute*, 8 Pro. Div. 109; Phillimore, pp. 112, 113; The *Clarence*, 3 Wm. Rob. 283–286; The *Gleaner*, 3 Asp. Mor. Law cas. 582; Morsden, Collision (2d ed.), p. 115; The *James Maury, Alabama* Claims, Op. 47; Williamson *v.* Barrett, 13 How. 101; Walter Pharo, 1 Lowell, 437; *Stromless*, 1 Lowell, 153; *Mayflower*, 1 Brown, adm. 376; *Transit*, 4 Ben. 138; Swift *v.* Brownell, 1 Holmes, 467; The *Antelope*, 1 Low. 130; Brown *v.* Smith, 1 Low 547; Frates *v.* Howland, 2 Low. 36; Hussey *v.* Fields, 1 Sprague, 394–396; Knight *v.* Parsons, *ibid.* 279; 290 Bbls. Oil, *ibid.* 475; Baxter *v.* Rodman, 3 Pick. 435.

"The brief of the agent of Chile claimed that Borden was manifestly responsible for the landing of the sailor on the island of Juan Fernandez, which was within the jurisdiction of Chile. He practically admitted that Chile had no jurisdiction for the acts of claimant on the high seas; that while an error may have been committed by the authorities at Concepción in attempting to take jurisdiction of the case, the error worked no injury to Borden; that the fact that the tribunal at Valparaiso

[1] Shields's Report, 71.

made an order directing the police to search for witnesses leads to the conclusion that that tribunal was of opinion that the criminal code in Chile in some of its provisions was applicable to the offense charged upon Captain Borden. In that view of the case the proceedings at Valparaiso were by due process of law, of which Captain Borden, neither for himself nor as an owner of a large part of the *Hope On*, had any right to complain; that the damages claimed were in large part consequential damages, which by the rules of public and municipal law are excluded from judicial consideration; that the owners of the vessel can have no legal claim for compensation on account of what may have been due to the subordinate officers and men. The claim, if any claim is found to exist, should have been made by them for their respective shares in the product of the voyage. The captain of the vessel would only be entitled to his proportion, and what that is the commissioners are without means of determining; that by the natural process of the voyage, if successful, the expenditure called the outfit would be converted into what is known as the 'catch'—that is, the oil and bone obtained from the whales; that there is no testimony tending to show what the condition of the vessel was in respect to the outfit or in respect to the quantity of oil and bone on board the vessel at the time of her arrival at Talcahuano, hence there is no basis for any estimate of loss, except for the vessel and its detention; that claims for the loss of the vessel or deterioration thereof in consequence of the incapacity of Commander Seymour are consequential damages and outside the jurisdiction of the commission."

Award. The commission, Mr. Gana and Mr. Goode dissenting as to different points, pronounced the following decision:

"In this case the memorialist bases his claim upon three grounds:

"1st. For personal damages, suffering, indignity, and loss of time from the date of his arrest, April 16, 1883, to the date of his arrival at New Bedford, August 20, 1883	$10,000.00
"2d. For actual cash expenses paid by the claimant in consequence of his said arrest and detention, including passage home	943.19
"3d. For damages suffered by the claimant in respect of his seven-eighths ownership of said bark *Hope On* on account of the arrest, seizure, detention, and demurrage of his said bark from April 9, 1883, to May 21, 1883, 42 days, at $250 per day, $10,500—seven-eighths of $10,500	9,187.50

"The majority of the commission, Mr. Commissioner Goode dissenting, are of the opinion that the claimant is not entitled to recover any damages on account of his personal arrest or on

account of actual cash expenses paid by him in consequence of said arrest. While an error may have been committed by the Chilean authorities in ordering the arrest of the claimant, it does not appear that it was done maliciously, without probable cause, or in disregard of due process of law. The decision of the commission in dismissing the claim of Ricardo L. Trumbull *v.* The United States is accepted as a precedent, which should be followed in this case.

"On the other hand, the majority of the commission, Mr. Commissioner Gana dissenting, are of opinion that the claimant is entitled to recover damages on account of the arrest and detention of the vessel. The principle is well established in cases like the present that the loss of the use of the vessel is the proper measure of damages, and that the loss of such use is the loss of her 'probable catch' during her enforced absence from the fishing grounds.

"The testimony adduced by the claimant proves that on account of the detention of the vessel in port she lost forty-two days on the cruising grounds, and that $250 per day is a reasonable estimate of the damages thereby sustained. The respondent government has offered no testimony in rebuttal on this subject.

"Upon this basis the damages for the detention of the vessel amount to $10,500, and the claimant being the owner of seven-eighths of the vessel is entitled to recover $9,187.50, and judgment may be entered accordingly."

Gilbert Bennet Borden v. *Chile*, United States and Chilean Claims Commission, convention of August 7, 1892.

2. By Military Authority.

Case of the "Galaxy."

December 23, 1829, the American schooner *Galaxy* entered the river Tabasco, in Mexico, intending to proceed up the stream to the city of that name. In consequence however of "political disturbances," she was not permitted to do so. Leaving the schooner, then at the mouth of the river, the charterer proceeded in person to the city of Tabasco, ninety miles away, and procured a cargo of logwood. But he was not permitted to take it away. On the contrary, he was detained by the authorities, and the schooner was kept at the mouth of the river from January 1, 1830, till the 5th of the ensuing month, by order of the military commandant of the city of Tabasco, "in consequence of political dissensions in which the said commandant was engaged with the commandant of the principal bar." Such was the statement made in a certificate by the collector of the municipal maritime custom-house at

Tabasco. The vessel was at the time chartered by William H. Shaw, a citizen of the United States, who presented a claim before the commission for damages. The owners of the vessel also presented a claim for her detention, but as there was no proof that she was injured by the detention, and as they had a claim against Shaw, the charterer, for her use, the American commissioners rejected their claim. They awarded compensation to Shaw, both for the detention of the vessel and for his own detention. The umpire sustained them, and on February 23, 1842, allowed Shaw the sum of $2,057.20.

William H. Shaw v. *Mexico:* Commission under the convention between the United States and Mexico of April 11, 1839.

Brent's Case.

Robert T. Brent, a citizen of the United States, domiciled at Boonville, Missouri, in July 1846 introduced five wagonloads of goods into Santa Fé, New Mexico, upon which he paid duties amounting to $3,250. On July 14 he set out with a part of the goods in two wagons for Chihuahua, and while on the way, at a place called the Sand Hills, south of Paso del Norte, "first received certain intelligence of the war then existing between the two countries." Arriving at Chihuahua about the 16th of September, he was immediately required to report himself to the prefect of the place and to sign a pledge not to leave the city without permission. He applied for passports, which were refused him; and until about the 1st of November he was required to report himself daily to the prefect. In January 1847 he was confined in prison for fifteen days, "without any reason being assigned for it, by the authorities, when he was set at liberty." He further alleged that he was detained at Chihuahua until the arrival there of the American troops about the 1st of March 1847, a period of about six months; that in consequence he suffered greatly in his credit and his business; that he was prevented from paying certain notes at maturity, having eventually to pay about $1,000 interest on them; and that his personal expenses, while he was detained, amounted to about $412.50. He claimed these sums, together with $3,000 for injuries to his business and $5,000 for violation of his personal liberty. The commissioners under the act of Congress of March 3, 1849, to whom the claim was presented, said:

"At the time of the restraints imposed upon the memorialist at Chihuahua a public war existed between the United States [redacted] Mexico and an American army was about to invade that

state. A citizen of one country, which is at war with another, found in the territory of the latter, unless protected by some treaty stipulations between the nations, may be regarded as an enemy; and although, agreeably to the milder usages of modern times, he may not be justly treated with the same rigor as combatants taken in arms, he is nevertheless liable to restraints, and may be prevented from leaving the country. Otherwise, the most important information touching the means, plans, and military operations of the country where he is found may be communicated to its invading enemy. The United States has on former occasioned exercised this right and provided for it by law (see act July 6, 1778, ch. 66, entitled 'An act respecting alien enemies. Stat. at L., vol. 1, page 577.')

"The memorialist contends that the injuries of which he complains were in violation of the twenty-sixth and the fourteenth articles of the treaty of 1831, between the United States and Mexico. It will be seen, however, upon reference to the treaty, that the twenty-sixth article relates only to persons *residing* in the country, and secures to them the right of *remaining* there for limited periods. It makes no provision for those who may go there after the commencement of hostilities. The fourteenth article has reference only to a state of peace; and may be considered as abrogated or suspended by a state of war.[1] The board does not perceive by any of the proceedings complained of that Mexico has violated any obligation imposed upon her by treaty, or by the law of nations."

Opinion of Messrs. Evans, Paine, and Smith, commissioners, act of March 3, 1849.

Gatter's Case.

The claimant asked compensation for being summoned or arrested several times and taken before the military authorities in Mexico during a state of war, the cause of the arrest being the desire of the authorities to purchase a piece of property which they wanted to use. The umpire refused to make an award to the claimant. He said that such occurrences were common in a state of war, and no one ever thought of making claims for them.

Thornton, umpire, *Christian F. Gatter* v. *Mexico*, No. 343, convention of July 4, 1868, MS. Op. IV, 457, VII, 416.

Sumpter's Case.

Claimant suffered with others a detention in consequence of a general military measure. Held, that there was no ground of claim.

Thornton, umpire, June 21, 1876, *Jesse A. Sumpter* v. *Mexico*, No. 869, convention of July 4, 1868, MS. Op. v. 478.

[1] Article XIV. provided that the contracting parties should give their "special protection to the persons and property of the citizens of each other," etc.

Edwards's Case.

The claimant, a native citizen of the United States, was employed as an engineer on a sugar estate near Manzanillo, in Cuba. On the outbreak of the insurrection in October 1868 and the establishment of martial law in Manzanillo, the claimant was, through the influence of his employer, provided with a pass from the governor for his free entrance and exit in attending to the business of the estate. On November 22, when in Manzanillo on business, he was arrested by the commissary of police, and without examination or information as to the charges against him committed to prison and confined in a close cell. He was not allowed communication with the acting United States consular agent until November 30. On that day he was arraigned before a military commission on the charge of connivance with the insurgents and of "carrying drinkables in abundance to and from the town, which could have no other object than for the insurgents." The officer who presided at the trial informed the acting consular agent of the United States that the claimant's "innocence was fully established," that he saw "no reason for his imprisonment," and that on the following day he would send the proceedings to the governor, with a "recommendation that he be set at liberty." The governor received the proceedings on the 1st of December, but he forwarded them to the Captain-General at Havana, and kept the claimant in prison till the 2d of January 1869, when he was released. It was afterward discovered that some of his effects had been appropriated by the Spanish soldiers, who had visited the estate during his imprisonment.

On the 15th of February 1869 the claimant, through an attorney, presented a memorial to the Department of State, in which he demanded indemnity in the sum of $50,000.

The Department, in acknowledging the receipt of a dispatch of the vice-consul-general at Havana in which the circumstances of the claimant's arrest and imprisonment were detailed, had said:

"However innocent the conduct and purposes of Mr. Edwards, the fact that he was frequently passing and repassing between the lines of the insurgents and a town garrisoned by loyal troops exposed him to such necessary suspicion as to excuse his temporary detention for the purpose of examining the case. Many foreigners were subjected by the agents of this government to the exceptional police of war during the late rebellion, and it is indisposed to encourage any claim which could be cited as a precedent against us for vindictive or exaggerated

damages. There are some inconveniences attending residence in a country which is the theater of rebellion, which are practically irremediable, and must be borne as a share of the common misfortune. It is to be hoped, therefore, that Mr. Edwards will be sufficiently moderate in his demands as to justify the hope of a speedy settlement when tranquillity shall be restored to Cuba.

The arbitrators awarded the claimant the sum of $5,000 in American gold.

James M. Edwards v. *Spain*, No. 5, December 20, 1873, Spanish commission, agreement of February 11-12, 1871. See also S. Ex. Doc. 108, 41 Cong. 2 sess. 203, 204.

Story's Case.

"Henry Story, a citizen of the United States, in order to arrange some outstanding business, settled with his family in a district of the Island of Cuba lying between the lines of the Spanish troops and the Cuban insurgents. He was thus fully aware that he exposed himself to all the casualties necessarily incident to the *de facto* war in those regions. He claims for the destruction of two houses on the Vegas, and of their contents, for the disappearance of some furniture in a town house in Puerto Principe, and for the ill treatment to which he was subjected. * * *

"With reference to his claim for damages on account of ill treatment, it appears from the documents in this case that he and his family were arrested by the Spanish troops and subjected to treatment not required by any military necessity, nor justified by the political behavior of the claimant or of his family. This is proved by the fact that the governor of Puerto Principe, before whom they were brought, declared them innocent, and released them. The manner in which Story and his family were arrested prevented them from saving some of his personal property.

"As the ill treatment was not required for the purpose of investigating his case, it constituted a wrong for which he has just claim to an indemnity to the extent that such treatment exceeded the measure of the hardships to which he had unavoidably exposed himself by settling in that part of the island.

"By modern principles of international law, a foreigner voluntarily exposing himself to casualties growing out of war waged to expel foreign invasion or to suppress a rebellion must submit to the hardships they impose; but the extent and

character of these hardships must be limited by the actual necessity of inflicting them in order to carry on military operations.

"In the case of Story, the hardships he suffered, so far as they were to secure an investigation of his case, give him no claim; but those that were wantonly and unnecessarily inflicted give him a clear right to indemnity under the agreement between Spain and the United States of February 12, 1871.

"In consideration of the preceding facts and arguments the umpire is of opinion—

"1st. That the claimant has no sufficient title to an award for the destruction of the houses and their contents, as he has not proved himself to be the legal owner of them; and

"2d. That the claimant having been ill treated by the Spanish troops to an extent not required to secure his arrest and the investigation of his case, and having been afterward declared innocent by the competent Spanish authority, is entitled to an indemnity, in which may be comprised an allowance for the loss of some personal property which he might have saved from destruction if the proceeding toward him and his family had not been of a too great severity.

"It seems to the umpire that $1,200 is sufficient to cover the wrong for which said Story is entitled to an indemnity under the agreement of February 12, 1871, and the umpire awards that amount accordingly."

Baron Lederer, umpire, January 16, 1874, *Henry Story* v. *Spain*, No. 1, Spanish Claims Commission, agreement between the United States and Spain of February 11-12, 1871.

Case of Lowe and Others

"In the case of *Gideon Lowe*, *Charles Curry*, *and John Barthum* v. *Spain*, No. 14, it is my opinion—

"1. That the master of the schooner *Arietes* does not explain satisfactorily how, having sailed from Key West, bound to Sisal (Yucatan), the said ship was found inside the Colorado reefs, within the maritime jurisdiction of Spain, a long distance from the direct course; that there was sufficient reason to suspect that the *Arietes* was a wrecker engaged in illegal business, and consequently that the commander of the Spanish schooner of war *Omega* was justified in taking her to port, but that the Spanish authorities neglected to comply with treaty stipulations in not referring immediately the examination of the case to a competent court; that therefore the claimants

have a right to recover damages to the amount of $75, with interest at 6 per cent from the 10th of January 1869 to this day.

"That in towing the Spanish schooner of war *Omega*, the *Arietes* did to the Spanish ship a service, for which the claimants have a right to receive remuneration to the amount of $100, with interest at 6 per cent a year from the 10th of January 1869 to this day."

M. Bartholdi, umpire, December 12, 1874, Spanish Claims Commission, agreement of February 11-12, 1871.

Jemot's Case.

Charles Jemot, a citizen of the United States, was part owner of a hacienda situated near Trinidad de Cuba, and between two camps of insurgents. In May 1869 he was arrested there on a charge of conveying information to the insurgents. On this charge he was tried by a court-martial and sentenced to ten years' imprisonment. Through the intervention of the United States consul he was released on condition of leaving the island without permission to return. The arbitrators allowed him $5,000 with interest from December 4, 1869. The grounds of this award are not stated. It was on or about December 4, 1869, that he left Cuba under the conditions of his release.

Charles Jemot v. *Spain*, No. 108, April 8, 1876, Spanish Claims Commission, agreement between the United States and Spain of February 11-12, 1871.

Fritot's Case.

The claimant, a native of Cuba, was naturalized in the United States in 1860. On February 11, 1869, he was arrested in Cuba as a suspected and dangerous person. He was imprisoned until March 12, when he and other citizens of the United States were released at the request of the consul-general of the United States at Havana and Admiral Hoff. A few hours after his release he was rearrested by a Spanish officer on the supposition that he had escaped, and was confined until the following day, when, having been again released, he went on board a United States man-of-war, by which he was brought to the United States.

It was contended by the advocate for Spain that the claimant when arrested was not known to be an American citizen, and that it did not appear that he had ever made known his nationality until an application was made for his release on that ground. Moreover, there was at the time of his imprisonment an insurrection in Cuba, in which the power of arrest had to be freely exercised in a manner coextensive with the

necessity. Martial law prevailed, and the claimant, it was contended, was subject to it. (*United States* v. *Diekelman*, 92 U. S. 520, 526.) The treaty of 1795, said the advocate for Spain, allowed the claimant to employ counsel and to have his case conducted according to the regular course of proceedings usual in such cases, and there was no allegation or proof that any such privilege was denied him. He left the island, as it was maintained, voluntarily.

The claimant demanded $250,000. There was evidence to show that at the time of his release he was earning $3,000 a year. The arbitrators allowed him $500.

Henry Fritot v. *Spain*, No. 35, March 16, 1873, Spanish Claims Commission; agreement between the United States and Spain of February 11–12, 1871.

Montgomery's Case.

The claimant, a native of Ireland and a naturalized citizen of the United States, was employed in 1870 as an engineer on a sugar plantation in Cuba. June 26 he was arrested by the military authorities for insolence or want of respect to Colonel Verges, governor of Guantanamo, "the chief of operations in the field," who visited the plantation during the day, and whom the claimant on that occasion inadvertently (as he alleged) omitted to salute. The claimant was confined for three or four days, when he was reprimanded and released without trial. In consequence of his arrest and imprisonment, he lost his position as engineer. He claimed damages to the amount of $22,090. The arbitrator for the United States awarded him a year's salary as engineer at $1,000, with interest at 8 per cent from the day of arrest till final payment of the award. The arbitrator for Spain thought it clear, from the claimant's own statements, that he "was guilty of some want of respect, whether intentional or not, to an officer in the field in a time of insurrection and public danger;" that the only facts proved, on which Spain could be held liable, were "that he was arrested under circumstances of perhaps unnecessary hardship, and that he was detained three or four days instead of twenty-four hours, which, under the circumstances, would have been a reasonable time;" and that the sum of $500 would be "an ample indemnity." The umpire allowed $1,000 without interest.

Case of William Montgomery, No. 8, Span. Com. (1871), July 12, 1880.

Machado's Case.

The claimant, a naturalized citizen of the United States, was arrested in Havana in July 1869 for bringing prohibited papers into Cuba. Havana was at the time under martial law, and any correspondence with insurgents was specially prohibited by military orders. The claimant had in his possession certain bonds or certificates which were given to him by an escaped Cuban insurgent in New York, to be delivered to a house in Cuba. He was also the bearer of several letters from the family of the insurgent in question, and of a letter from a young man in New York to his father in Cuba, expressing devotion to the cause of Cuba, and a hope to serve her in the diplomatic line. After a detention of three days the claimant was released, but was informed that the proceedings against him would not be dismissed. He then desired permission to leave the country, which was granted on condition that he would not return while the existing condition of things in Cuba continued. Subsequently he asked if he could remain to finish his business, and was told he could stay a reasonable time. He left Cuba about the middle of October 1869, without having received from the government any order of expulsion. He made the following claims: For value of goods in his store in Havana, $40,000; for goods left in the custom house, $20,000; for debts which he lost through his expulsion, $10,000; for loss of power to do business, $50,000; for personal sufferings, $50,000; and as he claimed interest on all these sums at 8 per cent, his claim at the time of its hearing amounted to upward of $300,000. The umpire rendered the following decision:

"The claimant in this case * * * complains that he was illegally arrested when he went to Havana from New York in July 1869, in order to settle some old affairs before going to Para, Brazil, where he was to establish himself in business. He intended to return to New York in August. He was arrested in Havana on July 28, and was imprisoned from about 4 o'clock on Wednesday afternoon till about 1 o'clock the next Saturday, when he was released from confinement. A suspicion that he was the bearer of certain papers and correspondence which the law in force in Cuba at the time did not permit him to bear, and which papers and correspondence were liable to seizure, was the cause of his arrest and imprisonment. Such correspondence was found in his possession, and in consequence there was sufficient ground for his temporary imprisonment.

"The correspondence found was not of a political character, but it was prohibited by military orders to carry even private

letters from insurgents, and as a violation of the law had been committed, the Spanish authorities had a right to proceed against him, but with due regard to the reservations provided in the treaty of 1795 in favor of American citizens. The Spanish authorities declared after his release that the proceedings would be continued, and that the charge was the bringing of political correspondence from members of the Cuban Junta in New York, in which it was said that the claimant had the writer's confidence, and that he could be spoken freely with, but after some conferences with the American consul-general they gave the claimant the choice either to depart within a certain time, which he found prudent to do, or to remain in Cuba and take his trial on the above charge.

"The principal evidence produced by Spain as proof of this charge is a letter from a young gentleman to his father in Cuba, expressing great enthusiasm for the cause of Cuba, and his hope to serve her in the diplomatic line. He gives incidentally an account of some plans of the New York Junta to establish diplomatic relations with foreign powers. He says he has some hope to be employed as secretary of one of the missions, and asks his father to send him in a covert way his opinion whether he ought to accept. This letter is, in the opinion of the umpire, no sufficient justification of the charge, by which the claimant was frightened away, and he is entitled to some indemnity.

"There is no evidence that any property belonging to the claimant was ever seized by administrative embargo. Some goods in a store were seized in August 1869, and it is contended that this seizure was illegal; but the claimant's own testimony tends to prove the contrary, because he says that the American consul-general, Mr. Plumb, to whom he complained, refused to interfere, and because it is not credible that Mr Plumb would have omitted to interfere and to report the case to the Department of State if this had been a case of administrative embargo. The goods in the store were finally appraised at $4,000, and sold in 1871 for the benefit of creditors. It is probable that they were seized by judicial process already in August 1869.

"The umpire decides that an indemity of $5,000, with interest at 6 per cent a year from the 16th of October 1869 to this day, be paid on account of this claim."

Count Lewenhaupt, umpire, December 28, 1880, *John A. Machado* v. *Spain*, No. 84, Spanish Claims Commission, agreement between the United States and Spain of February 11–12, 1871.

Powers's Case.

On April 3, 1870, John E. Powers, a citizen of the United States, who was in charge of a trainload of troops in Cuba as engine-driver, was arrested on suspicion of having voluntarily thrown the train from the track in order to prevent the troops from

joining another body of soldiers who were engaged in a skirmish with insurgents. He was confined in prison by the military authorities till May 18, a period of forty-five days, and for a week after his trial and acquittal (on May 11) by a military court. His innocence was in fact well established by a preliminary inquiry held on the 8th of April. He claimed $12,000 damages for illegal arrest, ill treatment in prison, and the robbery of a watch and some money while he was in custody.

The arbitrator for the United States, Mr. Stewart, held that the arrest and imprisonment of the claimant by the military authorities was a violation of the guaranties of the treaty of 1795, and for this, as well as for the ill treatment and robbery, and the loss of wages during a period of enforced idleness resulting from the arrest, be awarded the sum of $6,487, with interest at 6 per cent.

Mr. Brunetti, the arbitrator for Spain, thought that the claimant's arrest was legal; that while all persons in districts in a state of siege where the usual civil rights were, as in the present case, suspended, were subject to military authority, the claimant was clearly so subject, being at the time of his arrest engaged in the transportation of troops and under military command; that the alleged ill treatment and robbery were not sufficiently proved, but that the claimant's detention was unnecessarily long and exceeded the requirements of the case; that he should have been promptly tried, say within two weeks; that damages should be allowed him to the amount of $500 for loss of wages during his unnecessary imprisonment, but that nothing should be allowed for the loss of his employment, both because that loss would have occurred if he had been imprisoned for only two weeks, and because he did not profit by an offer made to him during his arrest of release on bail.

The umpire held that under the circumstances there was sufficient ground for the claimant's arrest, and that the charges of ill treatment and robbery, which rested solely on the claimant's statements, were not sufficiently proved; but he also held that the claimant's innocence should have been considered as clearly established by the preliminary inquiry of the 8th of April, and that he should be allowed $4,000, without interest, for being illegally imprisoned for forty days.

Count Lewenhaupt, umpire, February 24, 1881, *John E. Powers* v. *Spain*, No. 106, Spanish Commission, agreement of February 11-12, 1871.

Case of De Luna.

By the protocol signed at Madrid on January 12, 1877, by the minister plenipotentiary of the United States and the minister of state of Spain, for the purpose of terminating amicably "all controversy as to the effect of existing treaties in certain matters of judicial procedure," it was declared by the minister of state that no citizen of the United States residing in the Spanish dominions, charged with sedition, treason, or conspiracy, or any other crime whatsoever, should be "subject to trial by any exceptional tribunal, but exclusively by the ordinary jurisdiction, except in the case of being captured with arms in hand."

On or about March 24, 1880, Antonio Bellido de Luna, a citizen of the United States, was arrested by the military authorities in Cuba for alleged complicity in an insurrectionary plot. He gave notice of his American citizenship when he was arrested, but did not furnish the proofs of it required by Spanish law till April 24, 1880. He was kept in strict military arrest, without the privilege of communicating with anyone, till the 17th of the following June, when he was turned over to the civil authorities on an old charge of forgery. On the 18th of June he was ordered to be released on this charge on giving $1,000 bail, which he was unable to furnish; and he remained in prison till October 12, 1880, when he died. A claim was made by his administrator for damages for his alleged wrongful imprisonment.

The American arbitrator, Mr. Lowndes, held that the imprisonment prior to April 24, 1880, when proper proof of citizenship was produced, and after June 17, when the prisoner was turned over to the civil authorities on the charge of forgery, was lawful, but that his imprisonment by the military authorities between those dates was in violation of the protocol of January 12, 1877. For this Mr. Lowndes allowed the sum of $5,000, and in so doing he referred to the fact that the deceased left no wife or child or other person dependent upon him, his brother being his distributee. The Spanish arbitrator thought that the claimant was entitled to an award of $540.

The umpire, Count Lewenhaupt, awarded $3,000 without interest.

De Luna, administrator, v. *Spain*, No. 138, November 16, 1882, Spanish Claims Commission, agreement of February 11–12, 1871.

Casanova's Case. The claimant, a naturalized citizen of the United States, was arrested near Havana by the Spanish authorities on the night of March 30, 1869. In reply to a request of the vice-consul-general of the United States, to be informed of the reason for the claimant's arrest, the political secretary said that it was done at the instance of the fiscal or prosecuting officer, but assigned no cause. It was subsequently ascertained that his arrest was connected with an affair then under investigation. After an imprisonment of twenty days he was released, and through the intervention of the vice-consul-general of the United States, a passport was given him to leave the island. The arbitrators were of opinion that the claimant's arrest and imprisonment constituted, under the circumstance narrated, an injury for which he was entitled to damages. Moreover, during the month of April his property was embargoed for from twenty to thirty days. This the arbitrators also held to be a wrong, for which the claimant was entitled to damages, though the evidence did not enable them to allow more than nominal damages. They awarded him in all $6,000 in gold.

Ynocencio Casanova v. *Spain*, No. 25, December 26, 1882, Spanish Commission, agreement of February 11–12, 1871. See also S. Ex. Doc. 108, 41 Cong. 2 ses. 187.

Montejo's Case. The claimant, for refusing to pay a certain sum of money that was demanded of him as rent for an embargoed house, was arrested on a charge of disloyalty and was tried for that offense before a court-martial. After his arrest the authorities at first refused to admit him to bail. He was imprisoned, in all, thirty-nine days. He claimed damages for his imprisonment and trial in violation of the treaty of 1795, as well as for the losses resulting from his being prevented from fulfilling certain agreements in relation to the improvement of his sugar estate. He also made a further claim for damages because of the breaking up, as a result of his imprisonment, of a real estate speculation in the city of New York. His claim amounted in all to $542,500.

The umpire decided that, "as indemnity for illegal arrest and imprisonment during thirty-nine days, the sum of $3,900, without interest, be paid on account of this claim."

Count Lewenhaupt, umpire, February 22, 1883, *Manuel Antonio Montejo* v. *Spain*, No. 115, Spanish Claims Commission, agreement between the United States and Spain of February 11–12, 1871.

Cases before the American and British Claims Commission.

"These claims were one hundred in number, and the total amount of damages claimed, in all, was nearly $10,000,000, exclusive of interest; or, adding interest at the rate allowed by the commission, say $16,000,000.

"In thirty-four of the cases awards were made in favor of the claimants against the United States, in all amounting to $167,911. In sixty-four cases these claims were disallowed; one case was dismissed without prejudice for impertinent and scandalous language used in the memorial, and one was withdrawn by Her Majesty's agent by leave of the commission.

Cases of McHugh, Sherman, and Brain.

"The question early arose before the commission whether in case of death prior to the presentation of the claim of the party against whose person the wrongful acts were alleged to have been committed, the claim for such injuries was to be considered as surviving to the personal representatives. This question was raised by demurrer interposed on behalf of the United States, in the cases of Edward McHugh, No. 357; Elizabeth Sherman, No. 359, and Elizabeth Brain, No. 447.

"In the case of Mrs. Sherman, No. 359, all connection between the injuries alleged and the death of the intestate was disclaimed by the memorial.

"In the cases of Mrs. Brain, No. 447, and of McHugh, No. 357, there were allegations that the injuries complained of caused or contributed to cause the death of the intestate; but there was no allegation of any local statute allowing damages in favor of personal representatives for a wrongful injury causing death.

"On the part of the United States it was claimed that, as by the common law both of Great Britain and of the United States, claims for injuries to the person did not survive to the personal representatives, such claims were not to be considered as within the submission by article 12. That the claims which by that article were submitted could not be taken to comprehend claims of a character not recognized by the municipal laws of either of the countries parties to the treaty.

"Her Majesty's counsel contended that the municipal laws of the two countries were not to be taken as controlling the rights of claimants in this regard; that claims for injuries to

the person, whether such injuries caused death or not, were, in the diplomatic intercourse of civilized nations, treated as a proper subject of international reclamation in behalf of the personal representatives of the person injured after his death. He cited the practice of the commissions under the convention between the United States and New Granada, of 10th September 1857 (12 Stats. at L. 985), and under the treaty of Guadalupe Hidalgo of 2d February 1848, between the United States and Mexico (9 Stats. at L. 933, Art. 13).

"In the case of McHugh, No. 357, where the deceased died unmarried and leaving only collateral relatives not dependent on him for support, entitled to inherit, the commission unanimously sustained the demurrer and disallowed the claim.

"In the cases of Mrs. Sherman, No. 359, and Mrs. Brain, No. 447, in both which cases the deceased left a widow and minor children, the commission, Mr. Commissioner Frazer dissenting, overruled the demurrers.[1]

[1] Mr. Frazer read the following opinion:

"This is an international court, and the parties litigant before it are *nations*, not *individuals*.

"But the treaty limits the jurisdiction of this tribunal. Not *all* matters of difference between the two governments have been submitted to the award of this commission, but only certain 'claims on the part of' their respective citizens or subjects, against the other government. The correspondence which led to the treaty clearly shows that this means '*claims of*' the citizens or subjects of either government, against the other government. (Sir Edward Thornton to Secretary Fish, February 1, 1871, and Mr. Fish's reply of February 3, 1871. See Protocol I.)

"There must, then, be an *individual* who has a *claim*, and a British or American nationality, else we can not take jurisdiction.

"When the party whose person or property has suffered injury is dead, how are we to ascertain who, *then*, has such claim? The international law is silent, giving no answer to this question. It is a matter regulated by municipal law, and the law of the *domicil* of the deceased must be referred to to ascertain who takes the rights which he had while in life; that is to say, to ascertain who is the individual 'citizen or subject' in whose behalf a claim exists after the death of the original claimant. If by the municipal law of the *domicil* of the deceased *nobody* is entitled, then by this treaty we can not make an allowance; for we can only do that where there is an *individual*, British or American, who has a claim. We have no authority to create a claimant. The treaty *might* have provided for such cases, but it did not. It might have provided that proper damages should be awarded against our government in favor of the other, for the wrong to the nation, without reference to any question of the right of an individual to such damages, leaving the government in whose favor the award

"It may be added that on final hearing on the merits the claim of Mrs. Sherman was unanimously disallowed; and though an award was made (Mr. Commissioner Frazer dissenting) in favor of Mrs. Brain on account of property taken from her husband, that award included no damages for imprisonment.

Pratt's Case.

"In the case of Ernest W. Pratt, No. 6, it was alleged that the claimant arrived in New York on a British mail steamer from Nassau on the night of the 17th March 1865; that before leaving the vessel he was arrested by order of General Dix, then in command of the United States forces in and around New York, his luggage and papers searched, and he himself committed to prison, where he was detained until the 25th June following, a period of one hundred and seven days, when he was discharged without trial.

"That he had received at Nassau, from the United States consul there, an indorsement upon his discharge from the steamship *City of Richmond*, of which he had been first mate, certifying that he was entitled to pass to the United States as a British subject, which certificate had been given to him by the consul with the assurance that it had all the effect of a regular passport.

"It appeared that in October 1869 he had been about to commence suit against General Dix to recover damages for his false imprisonment, and his counsel having informed the Secretary of State of the United States of his intention to bring such suit, the Secretary, by letter to his counsel in answer, suggested whether it was not expedient to 'await the result of the deliberation of this (the United States) government and that of Great Britain upon a proposition for the establishment or adjudication, among other things, of claims like that of Mr. Pratt;' and the claimant averred that in conformity with this suggestion he omitted to bring his suit against General Dix.

"The *City of Richmond*, of which vessel the claimant had

should be made to determine, as it might see fit, what individual, if any, should be benefited thereby.

"The treaty of the United States with New Granada, and that with Mexico, referred to in the argument, were of this character.

"Where the personal injury was to one domiciled either in the United States or Great Britain and now dead, there can be no citizen or subject entitled to make claim; because, by the laws of both countries, the right to damages is extinguished by the death of the person injured."

been first mate, had been engaged in January 1865 in carrying crew, arms, and ammunition from London to the rebel cruiser *Stonewall*, which received substantially her entire crew and armament of small arms and ammunition by that means. On parting with the *Stonewall*, the *City of Richmond* steamed to Bermuda, and thence to Nassau, where her officers and men were discharged, the claimant immediately proceeding to New York, as above stated.

"The claimant alleged in his memorial, however, that he shipped upon the *City of Richmond* in good faith for an ordinary voyage to the West Indies, and without information or suspicion that 'her voyage was in any way connected with either of the belligerent parties in the United States,' and that, on finding her engaged in supplying the *Stonewall*, he had protested to his captain, who paid no attention to his protest, and required him to obey orders, on pain of arrest for mutiny. The fact of the claimant's having been thus engaged on the *City of Richmond* was reported to General Dix, and this, in connection with his arrival in New York from Nassau, constituted the grounds of his arrest by General Dix.

"On the part of the United States it was claimed that the fact of the claimant's having been actively engaged in aiding the enemies of the United States, and that he immediately thereafter came from Nassau, the principal port in the Atlantic from which intercourse with the States in rebellion was kept up through the blockade, to New York, justified the authorities of the United States in arresting and holding him both as a prisoner of war and as a probable spy.

"On the part of the claimant it was contended that there was no proof of any offense committed by the claimant against the laws of the United States, or the laws or principles of neutrality. That even if he had voluntarily participated in the cruise of the *City of Richmond* to equip the *Stonewall*, this fact would have furnished no justification for his subsequent arrest in New York, though it might have sufficed to determine Her Majesty's government not to interfere for his protection or indemnity. That the informality in his passport was caused, if not contrived, by the United States consul at Nassau, and that the assurance by that officer to the claimant that the passport was a sufficient one was in bad faith, and made with a view to the claimant's arrest when he should arrive in the city of New York, the consul having sent by the same ship a letter

addressed to General Dix, giving him the information upon which he acted; and that the claimant's imprisonment was unnecessarily and unjustly severe and prolonged.

"The commission unanimously awarded to the claimant the sum of $1,200.

Cases of Rahming, Eneas, and Binney.

"The cases of John C. Rahming, No. 7; Joseph Eneas, No. 126; and Joseph W. Binney, No. 352, were of substantially the same character, and were all decided at the same time. These claimants were all domiciled in the city of New York, and there engaged in trade. All were carrying on a considerable trade with the port of Nassau, and were arrested on the charge of carrying on an unlawful traffic with the enemies of the United States under color of their trade with Nassau. Rahming and Eneas were both arrested on the 31st December 1863 and confined under military authority in Fort Lafayette, until July 2, 1864, and then discharged without trial, on giving bonds for their appearance if called on for trial by the United States authorities. Rahming had also been previously arrested, on a charge of having shipped arms to the rebels, in September 1861, and had then been detained as a prisoner in Fort Lafayette for fifteen days. Binney was arrested on the 14th June 1864, imprisoned in Fort Lafayette under military authority for five weeks, and then transferred to a jail in the city of New York, where he was detained seventeen days longer and was then discharged by General Dix without any bonds or security required.

"In each of these cases it was alleged by the claimant, and proofs were taken in support of such allegations, that the claimants were innocent of the offenses charged against them; that their imprisonment was unnecessarily and improperly protracted; and that they received improper and unnecessarily severe treatment during their imprisonment. Proofs were taken on the part of the United States to show the charges against them well founded, and to rebut the charges of improper treatment. In each of the cases allegations were also made of large resulting damages to the claimants by reason of their imprisonment.

"Rahming, by his memorial, claimed damages $580,800, besides interest. He was awarded by the majority of the commission (Mr. Commissioner Frazer dissenting on the question of amount merely) the sum of $38,500.

"Eneas claimed $720,000, besides interest, and was awarded $1,540, all the commissioners joining.

"Binney claimed $100,000, besides interest, and was awarded $5,390, all the commissioners joining.

"In each of the cases I am advised that the decision turned upon questions of fact, all the commissioners agreeing that the proofs, though sufficient to warrant the arrest in each case, did not leave the truth of the charges free from doubt; and that the detention of the prisoners without trial was unnecessarily protracted.[1]

Stovin's Case.

"In the case of John Carville Stovin, No. 23, claimant was arrested at Cumberland, Maryland, in October 1861 on the charge of disloyalty, in attending secession meetings in Cumberland, and being the means of transmitting information to the enemy. He was taken to Fort McHenry, there detained for about five weeks, and discharged without trial. He alleged that his business as a manufacturer at Cumberland was stopped, and in effect destroyed by his arrest, and claimed damages $380,794.27, besides interest; including, however, some firewood, hay, corn, and oats, alleged to have been taken and appropriated by the United States soldiers. He alleged, also, ill treatment while in confinement. Proofs were taken on both sides on the question of his disloyal conduct, and it was contended on the part of the United States that the facts of the case justified his arrest as a disloyal person, openly giving aid and comfort to the rebellion by his language and expressions of sympathy, in a village situated upon the frontiers of the enemy's country, and where such conduct involved danger to the military operations of the United States.

"On the part of the claimant the charges of disloyal conduct and language were denied, and proof was adduced to show him a law-abiding and peaceable inhabitant.

"The commission gave an award to the claimant of $8,300, all the commissioners joining.

Reading's Case.

"In the case of Frank Russell Reading, No. 43, the claimant was arrested in the city of Washington on the 6th July 1864, that city then being threatened by the rebel forces under General

[1] Mr. Frazer read an opinion, discussing the facts. He held that the only ground of claim established by the claimant was that "he was detained too long." (Hale's Report, 241.)

Early; was brought to trial before a military commission in Washington on the charge of uttering disloyal and treasonable language in the District of Columbia when threatened by the enemy, such language being calculated to give aid, comfort, and assistance to the enemy. He was found guilty by the commission, and sentenced to imprisonment for five years, with hard labor, at the Dry Tortugas, or such other military prison as the Secretary of War might select. Under this sentence he was imprisoned at Fort Delaware from the 30th August 1864 till 1st June 1865.

"On the part of the United States it was contended that the military commission was a lawful tribunal, competent for the trial and punishment of military offenses, and having full jurisdiction of the case of the claimant, both as to subject-matter and person; that at the time of his arrest and trial Washington was a city in military occupation, environed by forts of the United States, occupied and defended by their armies, the headquarters of the Commander in Chief of the Army and Navy of the United States, and, as the capital of the country, always a vital point of attack for the rebel forces, and at this specific time the actual objective point of a vigorous and determined attack by the enemy, who actually reached, as their advanced post, on the 12th July, Fort Stevens, within the limits of the District of Columbia and within four or five miles of the Capitol.

"That the offense charged against Reading was a purely military offense, of which the civil tribunals had not cognizance, and so was not within the principle held by the Supreme Court in the case of Milligan (4 Wall. 2).

"That Reading having appeared in person and by counsel before the military tribunal, and having pleaded in chief, without raising any question to the jurisdiction, could not be heard to question the jurisdiction of the tribunal as to his person merely; and that the commission having by law jurisdiction of the subject-matter of the charge, the failure to object to jurisdiction as to the person obviated all question as to their complete jurisdiction. The counsel for the United States cited the case of Vallandigham (1 Wall. 243).

"On the part of the claimant it was contended that the military tribunal had no jurisdiction whatever, and that the imprisonment of the claimant under it was wholly without authority of law.

"The commission gave a unanimous award in favor of the claimant for $15,400.

Shaver's Case.

"In the case of John I. Shaver, No. 51, the memorial alleged that the claimant, being at the time domiciled in Canada, but traveling in the United States on the business of the Grand Trunk Railway Company, a Canadian corporation, of which he was an agent, was arrested at Detroit on the 15th October 1861, by direction of Mr. Seward, the Secretary of State of the United States; that he was taken thence to Fort Lafayette, in New York Harbor, and confined there, and subsequently at Fort Warren, in Boston Harbor, until the 6th January 1862. He alleged that by his arrest he was thrown out of lucrative employment as agent of the railway company named; that by it he lost the confidence of his employers and was unable to regain his position after his release; and that he suffered large pecuniary losses in consequence. He claimed damages $100,000.

"The arrest was made upon information communicated to Mr. Seward that the claimant was engaged in conveying communications between the rebels in Canada and those within the insurrectionary States. The proofs failed to sustain the charge, and it appeared that Mr. Kennedy, chief of police of the city of New York, immediately after the arrest of the claimant, reported to the State Department that he found no proofs to warrant his detention, or to implicate him in any improper communication with the enemy.

"The commission awarded the claimant $30,204, Mr. Commissioner Frazer dissenting on the question of amount only.

Levy's Case.

"In the case of Samuel G. Levy, No. 61, it appeared that the claimant, a resident of Canada, on landing in Boston from a British steamship from Liverpool in May 1864, was taken thence to New York, and there detained for about eight days, on a charge of being engaged in blockade running. At the end of that time he was discharged upon giving bail for his appearance within six months, if required. He alleged large consequential damages by interference with his due attention to his business, and by the enforced breaking of an engagement of marriage in consequence of his arrest, and claimed as damages £20,000.

"The commission unanimously gave him an award of $930.

Stott's Case.

"In the case of James Stott, No. 271, it appeared that the claimant, domiciled in the State of Maine, was arrested at Dexter, Maine, September 2, 1863, on the charge of being a deserter from a cavalry regiment in the United States service; was sent thence to the regiment from which he was alleged to have deserted, at Warrenton, Virginia, where it plainly appeared that the charge was unfounded, it being a case of mistaken identity. He was detained until the 9th of November 1863, and for the purpose of making him some compensation as to loss of time, and of giving him transportation back to his home, was mustered into the United States service and discharged with the pay of a private soldier for the time he had been detained, and with transportation back to his home.

"An award was made for $775 in favor of the claimant, in which all the commissioners joined.

Crawford's Case.

"John I. Crawford, No. 79, was arrested in the city of New York on the 10th of May 1864; sent to Fort Lafayette and there detained until the 27th of July 1864, when he was brought to trial before a military commission in the city of New York, on the charge of violation of the laws of war in passing through the military lines of the enemy, first, from South Carolina, by way of Richmond to New York; second, from New York again, by way of Nassau and Wilmington, through the blockade, to South Carolina; and again from South Carolina, by way of Richmond, to New York; and also by purchasing goods in New York, and sending them thence through the lines to Richmond, Virginia. He was convicted on all the specifications except that relating to the purchasing and sending of goods, and was sentenced to give bonds in such sum and with such sureties as should be satifactory to the general in command of the department that he would not visit, traffic, or correspond with the States in rebellion, nor give aid, comfort, or information to the enemy during the war, in default of giving such bonds to be confined at hard labor during the war. The bond was immediately given and Crawford was discharged. The proofs before the commission fully sustained the findings of the military tribunal.

"On the part of the claimant it was contended that the military tribunal was without jurisdiction, and that the claimant's imprisonment and detention were unlawful.

"The memorial claimed $500,000 as damages, and the commission unanimously disallowed the claim.

Carmody's Case.

"In the case of John Carmody, No. 85, it appeared that the claimant, domiciled in New Orleans, was in March 1865 conscripted into the military service of the United States. The notice of his conscription requiring him to report for military service was addressed to him by the name of John Kemdy, and on receiving it he procured from the British consul at New Orleans a certificate of his British nationality, which he alleged that he presented to the officer in charge of the office at which he was required to report, but two days after was arrested by a squad of United States soldiers and was detained in a military prison for some five or six weeks. The arrest and detention evidently arose from mistake growing out of the confusion of names. The memorial claimed $100,000 damages, besides interest, and the commission unanimously awarded the claimant $500.

Patrick's Case.

"In the case of William Patrick, No. 97, it appeared that the claimant, a British merchant, domiciled in New York, was on the 28th of August 1861 arrested and committed to Fort Lafayette, where he was detained till the 13th September following, when he was discharged. His arrest was based on the charge that the firm in New York of which he was a member, and which had a branch house also at Mobile, Alabama, was a channel for carrying on correspondence between rebels in Europe and those in the insurrectionary States. Representations by highly respectable citizens of New York of Mr. Patrick's loyalty were made to the Secretary of State, and the British minister also intervened in his behalf. Investigation showed that the charge against Mr. Patrick was without foundation, and he was discharged after a confinement of seventeen days. The proofs established Mr. Patrick to have been a gentleman of high social and business standing, and also to have been in conduct marked by loyalty and good faith toward the government during the rebellion, and to have furnished liberal contributions in its aid. His arrest was undoubtedly caused by false or erroneous information.

"On behalf of the claimant punitory damages were claimed. On the part of the United States it was insisted that no such damages could be allowed; that Mr. Patrick, domiciled within the United States, was exposed in the same degree with citizens of those States to arrest on false charges or erroneous information, and that, having been discharged within a reasonable time for inquiry to be made, he was not entitled to

claim damages against the United States; that if any damages were awarded to him, they should be such only as would afford him fair compensation for the injury inflicted.

"The memorial claimed $100,000, besides interest. The commission awarded the claimant $5,160, Mr. Commissioner Gurney dissenting on the question of amount.

Bevitt's Case.

"In the case of Joseph J. Bevitt, No. 104, the claimant, until that time domiciled in South Carolina and Virginia, left Richmond in April 1863 and passed through the rebel lines to the Potomac River, was there taken on board a United States transport steamer on the 30th April 1863, taken to Washington, detained in the Old Capitol prison until the 19th May, and then sent back into the Confederacy.

"On the part of the claimant it was contended that Bevitt, being a British subject, and not having offended against the laws of the United States, or taken part in the domestic strife then in progress, was entitled to such egress without molestation by the public authorities.

"On the part of the United States it was maintained that the attempt of the claimant to enter the loyal portion of the United States from the enemy's country, and through his military lines, after having voluntarily remained within the enemy's country during two years of the war, was one which the United States might lawfully prevent or punish, and that their sending him back into the enemy's country, from which he came, was an act permitted by public law.

"The commission disallowed the claim, Mr. Commissioner Gurney dissenting.

Ashton's Case.

"In the case of William Ashton, No. 325, the claimant, until then domiciled in the State of South Carolina, in February 1863 came north through the Federal lines under a pass from the Confederate General Lee, and while crossing the Potomac River into the State of Maryland was arrested by the naval patrol on the 7th February 1863. He was taken to Washington, there detained until the 11th May 1863, and then sent back through the lines into the enemy's country.

"On the part of the United States it was contended that the case was parallel with that of Bevitt, above reported, and that the arrest, detention, and return of the claimant were lawful acts under the recognized laws of war.

"The commission awarded to him the sum of $6,000, Mr. Commissioner Frazer dissenting.

"The undersigned finds difficulty in reconciling the decision of the commission in this case with that in the case of Bevitt. It may be noted, however, that Bevitt was detained but twenty days before being sent back, while Ashton was detained three months and four days.

Barry's Case.

"In the case of Thomas Barry, No. 127, the claimant, domiciled at New Orleans, alleged that on the 15th March 1864 he was arrested without any cause or provocation, but arbitrarily and maliciously, by a provost-marshal under the orders of General Banks, then in command of the department; was committed to the parish prison, there confined for ten weeks, and then released on giving a bond conditioned that he should report daily to the provost-marshal in the city of New Orleans. That he continued so to report until the 31st December 1864, when the bond was canceled and the claimant fully discharged. He claimed damages $50,000. The proofs showed that he was arrested in the act of clandestinely and in disguise attempting to pass from New Orleans through the lines into the enemy's country, having upon his person letters to residents within the enemy's lines, and carrying Confederate money, the use of which was forbidden by the Federal authorities. That only two months before he had perpetrated the same offense in the same disguise; had visited many places within the enemy's lines, and had returned into the Federal lines in the same clandestine manner. Before his arrest he had applied for permits to go within the Confederate lines for the alleged purpose of looking up and bringing back cotton alleged to have been owned by him; but such permission had been refused.

"The claim was unanimously disallowed.

Glover's Case.

"In the case of Henry Glover, No. 134, the claimant, a resident of the State of Georgia, was in November 1864, in company with a companion, in Jones County, Georgia, within the enemy's territory, overtaken by a detachment of cavalry from the corps of General Kilpatrick, forming a part of the flanking force of General Sherman's army in the march from Atlanta to Savannah. His companion fled and was fired upon; claimant waited, was arrested and detained for twenty-four hours, when he was discharged, it appearing that he was a civilian and a British subject.

"His claim was disallowed, all the commissioners agreeing.

Facer's Case.

"The case of Thomas H. Facer, No. 203, was similar in character to that of Glover, and was disallowed in like manner.

Syme's Case.

"In the case of the administrators of James Syme, No. 139, it appeared that the decedent had been for many years domiciled at New Orleans, and there carrying on a large trade as a wholesale and retail druggist; that on the 28th August 1862 he was arrested and taken before Major-General Butler, then in command of the Department of the Gulf, and there arraigned on charges styled in the memorial 'false, wicked, and malicious,' to the effect that he had aided and abetted the so-called Confederates by the shipment of sulphur, drugs, and medicines into their lines, and that he had violated his neutrality. General Butler, being satisfied of the truth of the charges, condemned him, without the intervention of any court or military tribunal, to be imprisoned at Fort Pickens for three years at hard labor with ball and chain; the ball and chain were, however, within a few days, and before the commencement of execution of the order, remitted. He was detained in confinement at New Orleans for about six weeks; then sent under guard to Fort Pickens, in Pensacola Harbor, Florida, and there confined until about the 1st March 1863, when he was brought back to New Orleans, and there detained during an investigation by a military commission, which reported him not guilty of the charges upon which he was imprisoned. Pending the proceedings of this commission he was discharged from confinement by order of General Banks, who had succeeded General Butler in command, on giving a bond, with surety, in the sum of $20,000, conditioned for his appearance on requirement by the government. Upon the report of the commission the bond was canceled August 28, 1863. At the same time with his arrest his drug store and contents in New Orleans were seized and appropriated to the use of the United States, and remained in their possession until about the 1st May 1864, when the store, with so much of the stock of drugs, etc., as had not been used, was surrendered to his possession by order of the War Department.

"A large amount of testimony was taken on both sides upon the question of his guilt or innocence of the charges on which he was imprisoned.

"On the part of the United States it was also proved that the decedent, in November 1861, and again in March 1862,

had accepted commissions as surgeon—first with the rank of captain, and afterward with the rank of major—in the battalion of the Louisiana State militia designated as the British Fusiliers; that this battalion was a regularly organized portion of the State militia of the rebel State of Louisiana, but was organized under the reservation that its members should be required to serve only within the limits of the city of New Orleans; that on the acceptance of these commissions the decedent was required by law to take, and did take, an oath faithfully to discharge the duties of the office to which he had been appointed, and to support, protect, and defend the constitution of the State of Louisiana and of the Confederate States; that at the time of accepting these commissions, respectively, the decedent was above the age of forty-five years, and was exempt by the laws of the State of Louisiana from militia service by reason of age, even if otherwise liable by reason of nationality or domicil. Evidence was also given on the part of the United States to the effect that Dr. Syme, shortly after the occupation of New Orleans by the Federal forces, refused to sell medical and surgical supplies to medical officers of the United States Army. Dr. Syme died in January 1872, before the filing of the memorial, leaving a widow and one son entitled to inherit his estate, both born within the United States and always domiciled there.

"On the part of the United States it was contended that by the acceptance of these commissions and the taking of the oaths above recited Dr. Syme had deprived himself of the condition of a neutral alien and assumed the character of an enemy of the United States, and was not entitled to a standing as a British subject under the treaty; that the proofs fully sustained the charges upon which he was condemned by General Butler; that if any doubt existed upon the proofs now before the commission as to the truth of those charges, the evidence before General Butler and upon which he acted was certainly sufficient to sustain his finding and to justify the condemnation pronounced by him upon the proofs before him; that as military commander of a captured city within the enemy's country, then strictly and solely under military government, General Butler was vested with full authority to administer military law, either in person or through military courts and tribunals organized under his order; that the offense of which he found Dr. Syme guilty was a crime under

military law of a high grade, and justifying the sentence pronounced upon him.

"The memorial claimed damages for the arrest and imprisonment, $100,000; for the drugs and other property of the decedent taken and appropriated by the United States (less the value of the amount returned), and the rent of the store, $166,925; and damages by the breaking up of the business of the decedent, and the loss of profits which he would have derived from the business, $150,000, besides interest.

"The commission (Mr. Commissioner Frazer dissenting) made an award in favor of the claimants for $116,200. I am advised that this award included nothing for damages for imprisonment, but was made solely in respect of the drugs and other property taken and appropriated by the United States, and the rent of the drug store while occupied by them. Mr. Commissioner Frazer expressed his views upon the case as follows:

"'Being over the military age, and exempt from military duty as a druggist also, Dr. Syme took a commission in the British Fusiliers and an oath of office to support the rebel confederacy, and evinced his hostility further, as I deem the weight of the evidence to show, by refusing to sell goods to the United States after New Orleans fell into Federal possession. This made him an actual enemy, and he could have no standing to prosecute a claim before this commission. The beneficiaries—his wife and child—have none, because they are Americans. His condemnation by General Butler was upon what appeared at the time to be satisfactory evidence, though it was subsequently shown before the military commission organized under the order of General Banks that he was probably innocent of the charges upon which he was arrested. He was restored to liberty as soon as an investigation could conveniently be had, and what remained unconsumed of his confiscated goods was also restored, together with the possession of his building.'

"In so much of this opinion of Mr. Commissioner Frazer as relates to the sufficiency of the evidence upon which General Butler acted to sustain his finding and sentence, and as relates to the probable actual innocence of Dr. Syme as appearing before the commission, I am advised that the majority of the commission concurred.

Booth's Case.

"In the case of William B. Booth, No. 143, a claim was made for $56,000 damages for the alleged wrongful arrest of the claimant in the neighborhood of Fort Jackson, Louisiana, and subsequent imprisonment. He was arrested by United States soldiers on the

8th of August 1862, taken to Fort Jackson, and there confined till the 28th August; then sent to Fort Pickens, Pensacola Harbor, and there confined till the 15th August 1863; then taken back to New Orleans and detained till the 26th August 1863, when he was unconditionally released.

"Previous to his arrest Dr. Booth, who resided in Louisiana, two miles from the forts and outside the lines of military occupation by the United States, had been, on the request of Dr. Gordon, the surgeon of the forts, visiting and prescribing for the prisoners and Federal soldiers at the forts. Gen. Neal Dow, the commander, learning the fact, had notified him that he could not be permitted to visit the forts without taking the oath of allegiance or giving his parole of honor not to communicate information to the enemy. Dr. Booth declined to do either of these things. After his arrest he still continued his refusal to give the required parole, and, persisting in his refusal, General Dow ordered his transfer to Fort Pickens and his detention there. At this time Forts Jackson and Saint Philip, lying on the opposite banks of the Mississippi some one hundred miles or more below the city of New Orleans, were occupied by a United States force of about six hundred soldiers, and about the same number of liberated slaves, under the command of General Dow. The garrisons were weak, and a large number of the troops actually there were prostrated by sickness. General Dow deemed it of the utmost importance that a knowledge of the weakness of his garrison should be kept from the enemy. The refusal of Dr. Booth to give the required parole roused the suspicions of General Dow, and when persisted in led to his sending the claimant to Fort Pickens. During his stay at Fort Pickens, and after his retransfer thence to New Orleans, he still persisted in refusing to give the required parole, and was finally discharged, after a confinement of nearly thirteen months, unconditionally and without parole. Lord Lyons, during his confinement, in a letter to Mr. Coppell, British consul at New Orleans, stated that the required parole was deemed not unreasonable by Her Majesty's government, after consulting the law officers of the crown.

"On the part of the United States it was insisted that the arrest and detention of Dr. Booth were warranted as measures of just military precaution in regard to an enemy by domicil possessed of knowledge, the communication of which to the enemy would be highly dangerous to the United States, and who, by his refusal to give this proper and reasonable pledge,

had, in the language of Lord Lyons, entitled the United States to treat him as a suspected person.

"The memorial of Dr. Booth also included claims to the amount of $83,890, besides interest, for property of the claimant alleged to have been taken and appropriated by the United States.

"The commission (Mr. Commissioner Frazer dissenting) awarded to the claimant the sum of $24,900, which award was, as I am advised, wholly in respect of property taken, and included nothing on account of the arrest and imprisonment.

Cases of McCann and Murta.

"John McCann, No. 173, and John Murta, No. 195, natives of Ireland and domiciled in Luzerne County, Pennsylvania, were arrested there—McCann in September 1863 and Murta in November 1863—by United States troops, under authority of a provost-marshal; were taken to Fort Mifflin and there confined, McCann till March and Murta till April 1864.

"The proofs showed that at the time of their arrest an organized conspiracy existed in Luzerne County and vicinity to resist the Federal draft for troops; that great violence was used against Federal officers; that open defiance of the Federal authority was made in public meetings of the mining population; that loyal citizens sustaining the government had been assassinated, and measures had been adopted to ambuscade and massacre Federal troops, should they be sent there to enforce the draft; that the principal disturbing element in this conspiracy was the Irish Catholic miners; that not only secret associations were formed, but public meetings were openly held for the avowed purpose of stopping the mines and thus stopping the war; that a large number of persons regarded as the ringleaders and most dangerous persons in this movement were arrested, and among them these two claimants. No proof was made of the complicity of either of the claimants with the actual resistance to the draft or violation of law; but Murta was shown to have been a member of the organization known as the 'Knights of the Golden Circle,' created to oppose the draft and aid the rebellion. Neither of the claimants was ever brought to trial.

"In the case of McCann an award was made in favor of the claimant for $3,000, in which all the commissioners joined. In the case of Murta an award was made for $1,200, Mr. Commissioner Frazer dissenting.

Riley's Case.

"In the case of Thomas Riley, No. 192, the claimant, a resident of Luzerne County, Pennsylvania, was drafted into the United States military service in November 1863, was taken to Philadelphia and there held in the United States military barracks for about six weeks, when he was taken sick and sent to the hospital, and there remained confined by disease till the 6th of April 1864, when he was discharged by the War Department, through the intervention of Lord Lyons, as being a subject of Great Britain, having received his pay as a soldier for the time during which he was held.

"On the part of the United States it was contended that he was held simply in consequence of his failure to comply with the regulations of the provost-marshal's department in regard to showing proof of alienage. The case showed, however, that the proofs of his alienage were submitted by Lord Lyons to Mr. Seward in November 1863 within a few days after his arrest, and his discharge was not ordered till about four months after.

"The commission unanimously awarded him the sum of $800.

McCabe's Case.

"Edward McCabe, No. 197, was drafted into the military service of the United States in Queens County, New York, in September 1863. He appeared before the enrolling board and claimed exemption; was informed of the regulation prescribing the method of making the necessary proof; was given time to file it, but failing to do so was arrested by order of the provost-marshal and detained for two days, when, having furnished the necessary proof, he was discharged.

"The commission unanimously disallowed his claim.

O'Mulligan's Case.

"Patrick J. O'Mulligan, No. 476, was drafted in Cayuga County, New York, in October 1863. He appeared before the board of enrollment and claimed exemption as a British subject, but failed to comply with the regulations for the proof of alienage. He was detained for twenty-four hours, and on physical examination by the surgeon was found unfit for military service and was discharged. For these grievances he claimed the sum of $800,000, besides interest.

"His claim was unanimously disallowed.

Hill's Case.

"In the case of Mary Sophia Hill, No. 198, the claimant, a native of Ireland, was domiciled during the rebellion and for many years before in New Orleans. At the time of the capture of New Orleans by the Federal forces in 1862 she was in attendance on the Confederate hospitals in Virginia, but shortly after returned to New Orleans under a proper pass. In 1863 she went to Ireland, and returned to New Orleans, taking the oath of neutrality on landing. She again left New Orleans in the fall of 1863 under a pass and went to Virginia, where she remained for five months 'rendering assistance in the hospitals and to prisoners by means of flags of truce.' In 1864 she returned to New Orleans, and having no pass was arrested and detained in prison for two days, when, having satisfied the provost-marshal that she was a British subject, she was released on bail. After her discharge and while sick she alleged that she was called upon by a woman who gave the name of Ellen Williams, and gave her a note purporting to be from Gen. Tom Taylor, an officer of the Confederate service commanding a post within the Confederate lines in Louisiana. This woman informed claimant that she was going through the lines into the Confederacy if she could get a pass from General Banks, and offered to take letters from the claimant. Claimant gave to her a letter to General Taylor, acknowledging the receipt of his letter, and saying to him, 'Communicate and state what you require, and I will do all in my power; I will be here until the end of July.' She also gave to her a letter addressed to her brother, a soldier in the Confederate service in Virginia, in which she denounced the 'Yankees;' and said, among other things, 'We have accounts of the battles in Richmond, but so hashed up to suit Northern palates you can make neither head nor tail of the affair; but through my spectacles I see General Grant and his well-whipped army with their faces toward Washington and their backs to the hated city of Richmond, except those who take their summer residence at Libby. Tell the boys Banks has made a splendid commissary to Dick Taylor's army, and they were so ungrateful as also to whip him, and very badly.' She also gave this woman another letter of similar character, addressed to Mrs. Graham, a person living in Montgomery, Alabama, within the lines of the Confederacy.

"These letters were delivered on the 20th May 1864, and within a few days after she was arrested by an officer of the

provost-marshal's bureau, committed to prison, and there detained until July, when she was brought before a military commission and tried on the charge of 'holding correspondence with and giving intelligence to the enemy, in violation of the Fifty-seventh Article of War,' the specifications being the written letters above named. She was found guilty of the charge except the words 'and giving intelligence to,' and was sentenced to 'be confined during the war, at such place as the commanding general may direct.' The proceedings and findings of the commission were approved by Major-General Hurlbut, then in command, but the sentence was so modified as to direct the claimant to be sent into the so-called Confederacy as an enemy, and the provost-marshal-general was charged with the execution of the order.

"At the time of her trial New Orleans was still under military government, but the United States district court had been reorganized under Judge Durell and was in operation in that city. No State tribunals were in operation, nor any local tribunals, except under authority and permission of the military commander.

"On the part of the claimant it was contended, first, that the claimant was not amenable to military jurisdiction, but must be tried, if at all, before the civil tribunals; second, that if amenable to military jurisdiction, the commission before which she was tried was not a competent tribunal; that by the Fifty-seventh Article of War (2 Stats. at L. 366) the only military tribunal having cognizance of such an offense was a court-martial, a tribunal distinct and different from a military commission; third, that the finding of the military commission that she was guilty of the charge except the words 'and giving intelligence to,' was in fact an acquittal, correspondence with the enemy without giving him intelligence not being a military offense or a violation of the article above referred to; fourth, that the commanding officer had no authority to change the punishment directed by the sentence of the court, and subsequent banishment into the Confederacy for imprisonment; that this substitution was not with the consent of the claimant, and was not a mitigation of punishment; fifth, that the letters were not in fact sent into the Confederacy, but were delivered by the messenger to the United States military authorities in New Orleans, and that the evidence tended to prove that the pretended messenger to whom they were delivered was in fact a spy and agent of the United States.

"On the part of the United States it was contended that the offense charged against the claimant was a military offense purely, not cognizable by the civil tribunals; that the claimant, domiciled in a city within the enemy's country and recently captured from the enemy, held by military power only, and governed only by military authority, was amenable to military jurisdiction; that the tribunal before which she was tried was a competent military tribunal, organized under sufficient military authority, and having jurisdiction both of the subject-matter and of the person of the claimant; that irrespective of the proceedings, finding, or sentence of the commission, the commanding general had full authority to expel the claimant from the city and send her within the enemy's lines, on satisfactory evidence of her active sympathy with the rebellion, and of her attempt merely to communicate with the enemy, and that the modification and mitigation by the commanding general of the punishment decreed by the military tribunal was one of lawful power, and was not a matter of which the claimant could rightfully complain.

"The commission gave an award in favor of the claimant for $1,560, Mr. Commissioner Frazer dissenting. This claimant was the same person whose original memorial (No. 8) was dismissed by the commission on account of its improper and indecorous language.

Nicolson's Case.

"The case of Colin J. Nicolson, No. 253, may properly be reported in connection with that of Miss Hill. Nicolson, a native of Scotland, had been domiciled in New Orleans since 1852. He was arrested in that city on the 15th of September 1864; was detained in prison till the 22d of November 1864, when he was brought before a general court-martial in that city and tried on the charges, first, of relieving the enemy with money, by investing money in bonds of the Confederate States and transmitting the same to England for sale there; and, second, of holding correspondence with the enemy by letters passing between himself and one Violett, an enemy of the United States, resident at Mobile; and in and by such correspondence devising means for bringing cotton out of the Confederacy, and disposing of it for the joint benefit of himself and Violett, and for negotiating and selling bonds of the Confederate States. He was convicted on both charges, and was sentenced to imprisonment at Fort Jefferson, Florida, or at such other

place as the commanding general should direct, for five years. The sentence was approved by General Canby, commanding, and the claimant was committed to confinement at Fort Jefferson, where he remained for about nine months, when he was pardoned by the President of the United States.

"The questions involved and the doctrines maintained by the respective counsel in the case of Miss Hill were urged upon the commission in this case. The counsel for the claimant further contended that the dealing in bonds of the enemy in New Orleans and transmitting them thence to England for sale was not a 'relieving of the enemy with money,' or in any manner a giving of aid to the enemy, and that the correspondence of the claimant with Violett involved no aid or comfort to the enemy, gave no information to them, and constituted no military offense. He cited the first article of the treaty between the United States and Great Britain of 3d July, 1865 (8 Stats. at L.); also Milligan's case (4 Wall. 2); Eagan's case (5 Blatchford, C. C. R. 320); the Venus (2 Wall. 259); the Circassian (*id.* 158); the Ouachita cotton (6 *id.* 531); Coppell *v.* Hall (7 *id.* 542); Thorington *v.* Smith (8 *id.* 12); the Grapeshot (9 *id.* 129).

"The memorial claimed $500,000 damages. The claim was disallowed by the commission, Mr. Commissioner Gurney dissenting.

McVey's Case.

"In the case of James McVey, No. 208, the claimant alleged that he was twice arrested. It appeared that the first arrest was within the enemy's lines, when he was detained for some four weeks to prevent his communication with the enemy. The second time he was arrested while in the act of carrying goods across the lines from the enemy's country, and was held in confinement several weeks. His claim was unanimously disallowed.

Cases of Milner, Simpson, Carew, White, and Gale.

"Substantially similar to this last case, in regard to the character of the arrest, were the cases of Isaac Milner, No. 207, in which an award was made in favor of the claimant for property, but including nothing for the alleged arrest; of Samuel Simpson, No. 217, which was unanimously disallowed; of John Carew, No. 224, which was disallowed, Mr. Commissioner Gurney dissenting; of Henry F. White, No. 233, which was unanimously disallowed; and of John Gale, No. 247, in which there

was an award for property, but including nothing on account of the arrest or imprisonment.

Scott's Case.

"In the case of Joseph W. Scott, No. 226, the claimant, domiciled at Jacksonville, Florida, was there arrested by order of the commanding officer in November 1864, on the charge of disloyalty, and detained in confinement for some three months. Jacksonville was an inland town, on the Saint John's River, which came into the hands of the United States forces in February 1864, and from that time to the close of the war was occupied by them; but the rebel forces, most of the time, were within its immediate vicinity.

"On the part of the United States it was insisted that the military commander was necessarily invested with absolute power for the control of the city; and that it was his duty to take such measures as should prevent inhabitants disloyally disposed from communicating with the enemy; and that nothing in the case of Mr. Scott showed an abuse of this authority.

"An award was made in favor of the claimant in respect of property taken by the United States troops, but it included nothing for imprisonment.

Munroe's Case.

"In the case of James T. Munroe, No. 235, claimant had embarked at New Orleans in August 1864, on board a steamer for Matamoras, Mexico, with the machinery for erecting a saw mill at that place. The steamer was stopped at Fort Jackson on the charge of having contraband goods on board intended for Texas, brought back to New Orleans, and the claimant was there detained by the military authorities for two days on board the steamer, and for twelve hours in the military prison at that city. It appeared that while he was in confinement his trunk on board the steamer was broken open, either by the provost-guard or in consequence of their negligence, and money, wearing apparel, and other articles stolen from it. On complaint made to Major-General Canby, in command of the city, an order was made by him declaring these transactions, if true, to be exceedingly discreditable to the guards, and directing the provost-marshal to take measures to bring the offenders to justice. An investigation was ordered, but the offenders did not appear to have been discovered, and no reparation was made to the claimant.

"On the part of the United States it was urged that the

arrest and detention were lawful and reasonable for the purpose of inquiry as to the character of the vessel, and that the United States were not liable to reclamation for the theft of the claimant's property.

"An award was made in favor of the claimant for $1,540, in which all the commissioners joined.

Jackson's Case.

"In the case of Susan B. Jackson, No. 255, the claimant, in behalf of herself and her four minor children, claimed damages for the arrest of John Jackson, the husband of the claimant, at Knoxville, Tennessee, and his banishment within the enemy's lines, with his family, in January 1864. It appeared that Dr. Jackson, the husband, had been a resident of Knoxville for some years and until after the breaking out of the war; that he had sent his family to England in August 1861, and himself followed them in June 1862; that he returned to New York in October 1862, and in January 1863, having obtained the proper permission, returned to Knoxville for the alleged purpose of disposing of his property there. Instead of disposing of his property he remained at Knoxville, and there entered into trade. Both before his departure for England and after his return in 1863 he had been an open and active sympathizer with the rebellion, denouncing the United States Government and encouraging and aiding the rebels down to the surrender of Knoxville to the United States forces in September 1863. Evidence was also given on the part of the United States showing conduct evincing a hostile spirit toward the United States Government. On the 29th January 1864, the following notice was addressed to him by General Foster's provost-marshal:

"'Owing to your persistent disloyalty to the Government of the United States, it has been decided to send you and your family south of the Federal lines. You will therefore be prepared to start on receiving further notice.'

"The further notice was served on the 30th January, requiring him to be ready to depart on the 3d February, on which day Jackson and his family were sent through the rebel lines under a flag of truce.

"An award was made in favor of the claimant in respect of property of her own appropriated to the use of the United States, but including nothing by reason of the arrest and banishment complained of.

The Nolan Cases.

"Joseph M. P. Nolan, No. 272, was arrested by the military provost-marshal at Saint Louis, Missouri, in October 1861, on the charge of disloyalty to the United States, and of having written a letter to an alleged enemy of the United States in Canada, giving information as to military movements. He was detained in prison at Saint Louis till June 1862, then transferred to the military prison at Alton, Illinois, and there detained till August 1863, when he was finally discharged. His release was offered him in December 1861, and on one or two other occasions, on his giving his parole to do no act unfriendly to the United States. This parole he refused to give. Great and unnecessary hardships in connection with his confinement were alleged on the part of the claimant, and the proof conclusively showed that the prison in which he was confined at Alton was wholly unfit in its appointments and sanitary condition for the confinement of prisoners, especially for the large number there confined; and that at times the treatment of the prisoners, including the claimant, was harsh and cruel.

"An award was made in favor of the claimant for $8,600, all the commission joining. I am advised that the majority of the commission, at least, held the original arrest of the claimant and his reasonable detention justified; but that his long confinement and improper treatment during it were not justified.

"In the case of Mary Nolan, No. 273, the claimant alleged that she was arrested at Saint Louis by a detective in the employ of the United States authorities in September 1864; taken before the provost-marshal at Saint Louis, and committed by him to the Chestnut street prison, where she was detained for an entire day; and that she was there subjected to improper treatment. She claimed damages $10,000. The evidence in her case showed that she was brought before the provost-marshal, apparently upon a subpœna, to testify in a case before him; that she refused to testify, and defied and insulted the officer, who committed her to the city prison, where she was detained for nine or ten hours. Her allegations of improper treatment were not sustained. The commission unanimously disallowed her claim.

Parr's Case.

"In the case of John F. Parr, No. 285, the claimant, a resident of Nashville, Tennessee, then in possession of the rebel forces, passed through the lines into Indiana, and thence to Buffalo, New

York, in October 1861. He went thence to New York City, where he bought some clothing, shoes, medicines, and other goods, and returned thence to Buffalo, where he was arrested immediately on his arrival, on the 20th of October. He was taken to Fort Lafayette, in New York harbor, there confined for about four months, and was finally discharged in February 1862, without a trial.

"An award was made in his favor for $4,800, in which all the commissioners joined. I am advised that the award proceeded on the ground that though his original arrest and reasonable detention were lawful, his detention for four months without trial was held not justified.

Hall's Case.

"In the case of Richard Hall, No. 318, the claimant was arrested in Maryland, on the 6th of March 1864; was brought before a military commission on the charge of having unlawfully passed from the loyal States through the Federal and Confederate military lines into the State of Virginia, and there held illegal intercourse with the enemies of the United States, and then returned through the lines in the same manner. The military commission found him guilty of the offense charged, and sentenced him to imprisonment in Fort McHenry, Maryland, for the term of four months, and to pay a fine of $6,000, and to be imprisoned until the fine should be paid. He was accordingly imprisoned for the four months and for twenty days thereafter, when he paid the $6,000 and was released.

"On the part of the claimant it was alleged that his visit to Virginia was without unlawful intent and for innocent and social purposes. This allegation was answered on the part of the United States by proof that the claimant took orders from the Confederate military authorities at Richmond for military supplies, which he undertook to purchase for them, and that he returned through the lines with the purpose of executing such orders. The counsel for the claimant claimed that the military commission was without jurisdiction, citing the case of Milligan (4 Wall. 2). The counsel of the United States claimed that the offense was purely a military one and cognizable by the military tribunals under the Articles of War.

"The commission (Mr. Commissioner Frazer dissenting) made an award in favor of the claimant for $2,984. I am advised that this amount was made up of the sum of $5,000, part of the fine of $6,000 imposed, which the commission

deemed excessive, reduced from United States currency, in which it was paid, to gold, and interest added to make up the amount of the award.

Crowther's Case.

"In the case of Llewellyn Crowther, No. 362, the claimant was arrested in Baltimore in July 1863, taken before Colonel Fish, then provost-marshal there, and detained in confinement at the Gilmore House for about eight hours. The arrest grew out of a quarrel between the claimant and two other persons at a hotel in Baltimore, of which complaint was made to Colonel Fish, and the claimant was charged with using seditious and disloyal language. He alleged that Colonel Fish, on the arraignment of the claimant before him, used language abusively and indecently violent toward him and toward his country and Queen. He claimed damages $10,000, and the commission unanimously awarded him the sum of $100.

Vernon's Case.

"In the case of John M. Vernon, No. 364, the claimant alleged that he had always been domiciled in England, the country of his nativity. It appeared, however, that he had resided in the United States most of the time since 1849, and had been there engaged in trade. He was in Europe at the breaking out of the war, but returned to the United States in June 1861, and thence passed into the Confederacy, remaining there, with the exception of a temporary absence in the latter part of 1861, till January 1863.

"He alleged that he had always maintained his neutrality between the United States and the Confederate government; that in January 1863 he sailed from the port of Charleston in the steamer *Huntress*, owned by himself and laden with cotton, principally owned by himself, for Nassau, New Providence; succeeded in passing out through the blockade, but on the day after his departure, and upon the high seas between Charleston and Nassau, the steamer took fire and was destroyed, the claimant with the master and crew escaping in two ship's boats. These boats were picked up by a United States war vessel on the ocean on the 18th January, and the claimant was carried to Hilton Head, South Carolina, there transferred to another vessel, carried to New York, examined before the United States marshal there, and committed to Fort Lafayette, in New York Harbor, in which fort, and afterward in Fort Warren, Boston Harbor, he was kept confined till October 1865, when he was released upon his written pledge that he would 'sail from Bos-

ton, Massachusetts, by the earliest opportunity, and leave the United States of America, not to return without the special permission of the President thereof.'

"He alleged large losses resulting from his imprisonment, by the waste and destruction of his property in the Southern States during his imprisonment, and in consequence of his business being deprived of his personal attention; and claimed damages, in all, to the amount of £338,133.

"The proofs on the part of the United States showed that up to his departure from Charleston, in July 1863, he had been largely and actively engaged in rendering aid to the Confederate government in its war against the United States; that he individually, and as a partner in the firms of Vernon & Co. and Vernon, James & Co., had entered into large contracts with the Confederate government for the supply of arms, ammunition, and military supplies, including twelve large rifled cannon, and large quantities of gun barrels, rifles, pistols, powder, army clothing, shoes, blankets, etc.; that he had been engaged in the manufacture of arms during the war at Wilmington, North Carolina, for the benefit of the Confederate government. At the time of his capture some of his contracts were found upon him; these contracts also granting to his firm, on the part of the Confederate government, certain privileges of purchasing cotton and tobacco, and transporting the same without hindrance, and exporting them to all ports except those of the United States, with convoy if desired. Correspondence ensued between Lord Lyons, Her Majesty's minister at Washington, and Mr. Seward, the Secretary of State of the United States; and upon submission to Her Majesty's legation of the proofs found upon the person of the claimant further intervention in his behalf was declined.

"Mr. Stuart, then Her Majesty's acting minister at Washington, on the 23d September 1863 addressed to Mr. Vernon the following letter:

"'SIR: I beg to inform you, in reply to your letter of the 19th instant, that I lately received a dispatch from Earl Russell, stating that your case had been fully considered by Her Majesty's government in communication with the law advisers of the crown.

"'It appears to Her Majesty's government, judging by the evidence produced, that you are a born British subject, and it does not appear that you have obtained naturalization in the United States, or exercised political privileges as a citizen.

"'But taking other circumstances into consideration, and more particularly that you have identified yourself in the strongest manner with the fortunes of the so-called Confederate States, and that you were, when taken, actually engaged in rendering material assistance to the government of these States, although deriving a commercial profit from so doing, Her Majesty's government are of opinion that the United States Government are justified in treating you as a *de facto* belligerent.

"'The evidence, moreover, shows that although, during a residence of twenty-three years in the Southern States, you paid occasional visits to England, you had no intention of returning to permanent residence in your native country, and that you were practically and *de facto* a willing citizen of the Confederate States, engaged in equipping their army.

"'Her Majesty's government therefore consider, under the circumstances, your release can not be claimed as a matter of right merely because you were born a British subject, but Earl Russell desires that Her Majesty's legation should, nevertheless, endeavor to persuade the United States Government to mitigate or shorten your captivity.

"'I accordingly represented to the Secretary of State, on the 10th instant, that it would be a gratification to Her Majesty's government to learn that your captivity had been mitigated or shortened through the clemency of the United States Government, and your case is consequently again under consideration.'

"From that time forth Her Majesty's government uniformly and consistently declined any international interference for the protection of Mr. Vernon, and disclaimed all pretense of right to intervene in his behalf. Sir Frederick Bruce, then Her Majesty's minister at Washington, as late as 24th October 1865, said in a letter to Mr. Vernon, in response to an application from him: 'My instructions prohibit my interfering in your behalf.'

"A labored argument was filed on behalf of the claimant, by which it was contended that the imprisonment of the claimant without trial was utterly unjustifiable; that it was prolonged in a manner never contemplated by the British authorities; that while under restraint his treatment was indefensible, and that the order of banishment from the United States, and the subsequent refusal to revoke it, were outrages against all law and justice. That the decision of Her Majesty's government, justifying the treatment of the claimant by the United States Government as a *de facto* belligerent, was erroneous; that the condition of the claimant, at the time of his capture, was that of a neutral alien engaged in commercial

transactions only with the Confederate government, and that such transactions were not criminal and did not deprive him of his neutral character. That even if he had previously been an enemy by domicil, he had, when he embarked from Charleston on the *Huntress*, left the country of his former domicil without the intention of returning, and his native domicil, native allegiance, and native *status* had thereupon instantly reverted to him, and that the decision of Her Majesty's government, justifying his detention by the United States and refusing to intervene in his behalf, could not be taken as prejudicing the claimant's individual right to reclamation under the rules of international law. The counsel for the claimant cited, in support of these propositions, the following authorities: 4 Blackstone's Com. 76; Halleck's Law of War, c. 29, § 3, p. 695; 2 Kent's Com. 49; Inglis *v.* The Sailors' Snug Harbor, 3 Pet. 99; Vattel, lib. 1, c. 12, § 218; 2 Brown Civ. & Adm. law, c. 7, p. 327; The *Venus*, 8 Cranch, 278; The cases of Adlam, No. 40; Doyle, No. 46, and Tongue, No. 49, decided by this commission; Calvin's case, 7 Coke; Gardner's Inst. Int. Law, pp. 448, 489; Livingston *v.* Maryland Ins. Co., 1 Cranch, 542; Wheaton's Elements, part 4, c. 1, pp. 561 to 569; Halleck, c. 21, § 18 p. 503; *id.* c. 29, § 3, p. 315; 1 Kent's Com. § 5, p. 73; Story's Conflict of Laws, c. 3, § 27, p. 61; Woolsey's Int. Law, p. 100; 1 Duer on Ins. pp. 515, 520; The *Frances*, 8 Cranch, 280, s. c. 1 Gall. C. C. R. 614; The *Dos Hermanos*, 2 Wheat. 77; The *Friendschaff*, 3 *id.* 14; The United States *v.* Guillem, 11 How. 60; The *Ann Green*, 1 Gall. C. C. R. 275; The *St. Lawrence*, *id.* 267; Catlin *v.* Gladding, 4 Mason, 308; The State *v.* Hallett, 8 Ala. Rep. 159; 3 Phillimore, § 85, p. 129; *id.*, § 4, pp. 404, 604; Twiss, § 43, p. 83; De Bargh, c. 2, p. 36; Westlake, c. 3, § 40, p. 39; 2 Wildman, pp. 15, 43; 1 *id.* p. 57; The *Indian Chief*, 3 Rob. 12; The *Etrusco*, *id.* 31; The *Harmony*, 2 *id.* 322; The *Ocean*, *id.* 91; The *Virginia*, 5 *id.* 98; Boswell's Lessee *v.* Otis, 9 How. 336.

"The commission unanimously disallowed the claim.

Forwood's Case.

"In the case of William B. Forwood, No. 394, the claimant, a British subject, domiciled in England, in October 1861 landed at New York from the steamer *City of Washington* from Queenstown. He was arrested immediately on landing from the steamer, on information that he had, both in Liverpool and on board the steamer upon his passage, expressed himself as a warm friend

of the rebellion, and that he was connected with a firm engaged in running the blockade, and upon the suspicion that his visit to New York was for the purpose of promoting correspondence with the enemy. He was detained at the office of the chief of police in New York for some three or four hours, his person and baggage examined, and he was then discharged. He claimed, as damages for his arrest, £5,000. The commission disallowed his claim, Mr. Commissioner Gurney dissenting.

Cases of Jarman, Bowden, Redgate, and Ellsworth.

"In the cases of Stephen Jarman, No. 418; Robert Bowden, No. 419; Samuel Joseph Redgate, No. 420, and John Henry Ellsworth, No. 421, the claimants were respectively the master and passengers on the British steamship *Peterhoff*, captured as prize of war by the United States steamer *Vanderbilt*, near the Island of St. Thomas, in February 1863. The case of the *Peterhoff* will be more fully reported under a subsequent head. Bowden, Redgate, and Ellsworth were respectively in charge of portions of the cargo of the *Peterhoff* either as owners or consignees, or as agents for owners or consignees. The *Peterhoff* was taken, on her capture, first to Key West and thence to New York, where she was libeled in the United States district court. Jarman, Bowden, and Redgate were taken with the vessel to New York, and detained till their depositions, *in preparatorio*, were taken, when they were discharged. Ellsworth was discharged at Key West, without being taken to New York or examined as a witness. He was detained on board the *Peterhoff* from her capture, 25th February, till the 25th March, eighteen days after her arrival at Key West. Jarman, Bowden, and Redgate were examined as witnesses in New York on the 1st day of April, the fourth day after the arrival of the *Peterhoff* in New York Harbor, and were respectively discharged immediately after their examination.

"On the part of the claimants, respectively, it was contended that the capture of the *Peterhoff* was unlawful, and the detention of these claimants, respectively, was likewise unwarranted by prize law.

"On the part of the United States it was contended that the *Peterhoff* was rightfully captured on justifiable cause, and that the detention of these claimants as witnesses was warranted by the law and practice of the prize courts; and that as to Ellsworth, his release at Key West without examination

as a witness, and without being taken to New York where the vessel was libeled, could not be considered as an aggravation of his imprisonment, nor as giving him any right of reclamation, which he would not have had if taken to New York and examined as a witness, as he lawfully might have been.

"The commission unanimously disallowed all the claims.

Dean's Case.

"The case of Philip George Beaumont Dean, No. 465, was of like character with the four last named. The claimant was captured on board the British brig *Dashing Wave* (whose case will be hereafter reported), off the mouth of the Rio Grande River, in November 1863. He was rated as an able seaman on the brig, though in fact a passenger and a son of one of the owners of the brig. He was taken with the vessel to New Orleans, where the vessel was libeled; was examined as a witness *in preparatorio* 28th November 1863, six days after the arrival of the vessel at New Orleans, and was then released. His memorial alleged that from that time till the 23d July 1864 he was 'detained on parole by the commissioners of the United States Government' at New Orleans, but his evidence showed no such detention or parole, and it appeared that his stay in New Orleans after his examination was a voluntary one, for the purpose of looking after the interests of the owners of the vessel and cargo.

"His claim was unanimously disallowed by the commission.

Cauty's Case.

"In the case of George F. Cauty, No. 443, the claimant was a British subject, for several years domiciled in Central America, but from March to December 1863 temporarily resident in the city of New York, engaged, as he alleged, in commercial enterprises connected with Central America. He was arrested in New York by the United States military authorities on the eve of his departure for Nicaragua by steamer, 24th December 1863; detained in a prison in the city of New York for three days, then transferred to Fort Lafayette, and there confined till the 14th March 1864, when he was discharged without trial and without information of the grounds of his arrest, except the general statement that he had been engaged in aiding the enemies of the United States, or violating the neutrality laws and regulations. It appeared that he was arrested in company with one Dr. Segur, in connection with whom he had been engaged in purchasing arms, as was alleged by them, for the

state of San Salvador, and that the circumstances of the purchase and shipment of these arms were such as to lead to the strong suspicion that they were in fact purchased and shipped for the use of the Confederate government. Shortly after his arrest he was brought before a military commission at New York and interrogated as to his connection with Dr. Segur, and purchase of arms made by him. Most of these questions he refused to answer, on the ground that he had 'been advised not to compromise himself or his friends in any shape or manner.' He was thereupon remanded to prison. The charge that the arms were in any way designed to aid the enemies of the United States was not sustained by the proofs. The claimant alleged large pecuniary losses resulting from his imprisonment.

"The commission made an award in his favor for $15,700, Mr. Commissioner Frazer dissenting on the question of amount.

Tovell's Case.

"John Tovell, No. 446, a Baptist clergyman, was arrested at Nashville, Tennessee, on the 9th of November 1862, on the charge of disloyalty to the United States, and of having in the course of a funeral oration delivered at Nashville used language strongly denunciatory of the military authorities in charge of Nashville, and tending to incite disaffection and rebellion. Nashville was a town within the insurrectionary States, captured by the United States in the spring of 1862, and held by them as a military post and under military government at the time of the claimant's arrest. He was detained in prison till the 8th June 1863, and then banished into the Confederate lines.

"The commission awarded him $830, Mr. Commissioner Frazer dissenting.

H. R. Smith's Case.

"Henry R. Smith, No. 461, a physician, domiciled at Louisville, Kentucky, within a State not in rebellion, was arrested at that place by the military authorities of the United States in July 1864 on a charge of circulating treasonable documents, the documents in question being copies of a handsomely printed placard highly laudatory of the Confederate General Robert E. Lee as a patriot, Christian, and hero of unfaltering devotion to duty, etc. Louisville and the State in which it was situated contained a large proportion of sympathizers with the rebellion, and it was contended on the part of the United States that the circulation of this document by Dr. Smith was made with the direct purpose and intent of giving aid to the

rebel cause; that it was calculated to give such aid, and that his imprisonment and detention were lawful military acts. The claimant was imprisoned for about fourteen weeks, and was then discharged without trial.

"The commission gave an award for $1,540, Mr. Commissioner Frazer dissenting.

McKeown's Case.

"Robert McKeown, No. 463, was in March 1863, while employed as a ship carpenter in the service of the United States Government on board the gunboat *Benton*, on the Mississippi River, near the mouth of the Yazoo, arrested by the commanding officer of the gunboat, confined in the hold for about four days, then transferred to another gunboat, and taken to Cairo, Illinois, where he was discharged on the 5th April, after a confinement, in all, of thirteen days. He alleged improper treatment during his confinement, in consequence of which his health was materially injured. His arrest was upon the charge of disloyal and seditious language against the United States while employed on board the gunboat.

"The commission unanimously made an award in his favor for $1,467."

Am. and Br. Claims Commission, treaty of May 8, 1871, Hale's Report, 61–87. See, also, as to cases of McHugh, No. 357, and Reading, No. 43, Howard's Report, 69, 555, 560, 563, 73, 569, 571.

French and American Commission: Case of the Le Mores.

Prior to the civil war in the United States the firm of Edward Gautherin & Co., consisting of Edward Gautherin and Alfred C. and Jules Le More, all citizens of France, was engaged in business at New Orleans, the two Le Mores being the resident partners. At the time of the capture of the city by the forces of the United States, in April 1862, the firm had a contract with the Confederate authorities for the delivery of a large quantity of gray military cloth, and in June 1862 it delivered to them at Matamoras, through an agent, a quantity of cloth valued at $405,483.08, taking therefor a receipt. This receipt was duly presented at the Bank of New Orleans, and the sum of $405,000, which the Confederate authorities had deposited, first with the French consul and then at the bank, previously to the delivery of the cloth, was obtained upon it.

When this transaction was discovered, General Butler caused the two Le Mores to be arrested and brought before him, and after an examination he sent Alfred Le More to Fort Pickens

and Jules to Fort Jackson. Alfred was confined at Fort Pickens from the 15th to the 26th of November 1862, and was forced to wear a 32-pound cannon ball and 6 feet of iron chain. From November 28 to December 20 he was imprisoned, with others, in the New Orleans custom-house. Jules Le More was simply confined at Fort Jackson, and was then brought to New Orleans and kept at the custom-house.

On behalf of the claimants it was contended (1) that on April 14, 1862, when New Orleans was still under the control of the Confederate authorities, the sum of $405,000 was held in escrow by the French consul; (2) that on the following day the agent of Gautherin & Co. left New Orleans to deliver the goods to Confederate authorities; (3) that after the capture of New Orleans by Admiral Farragut, and the raising of the blockade, the city remained surrounded on the land side by the lines of Federal forces, and that Gautherin & Co. were unable to communicate with their agent, who left New Orleans on or about the 14th of April; (4) that under the laws of the State of Louisiana the transaction was complete on the 14th of April. (See Contract of Sale, chap. 4, art. 2431.) It was contended further on behalf of claimants that the duties of the neutral alien were determined by international law and not by the municipal law of the United States, and that the Le Mores had never violated their duties as neutrals.

Counsel for the United States maintained that by the execution of their contract with the Confederate authorities the Le Mores voluntarily gave aid and comfort to the enemies of the United States during the time specified in the first article of the convention, and contrary to the provisions of that article, and that consequently the commission had no jurisdiction either of the persons or of the cause.

The majority of the commission—Baron de Arinos and M. de Geofroy—held that the Le Mores, by the delivery of the cloth, were not guilty of giving aid and comfort to the enemies of the United States, but the grounds of the opinion were not stated.

In the case of Alfred Le More the majority of the commission said:

"This is a case of unusual and arbitrary conduct on the part of the general commanding at New Orleans.

"He had no right to inflict punishment on the claimant, but only to detain him in custody for trial. The punishment of

solitary imprisonment at hard labor with ball and chain was unnecessary, extreme, and much too severe. In this case we allow the claimant ten thousand dollars without interest."

In the case of Jules Le More an award of $4,000 without interest was made.[1]

Jules Le More v. *United States*, No. 594, and *A. C. Le More* v. *United States*, No. 598, Boutwell's Report, III., commission under the convention between the United States and France of January 16, 1880.

Heidsieck's Case.

Charles Heidsieck, a citizen of France and a manufacturer of wines, whose place of business was at Rheims, France, made, previously to the civil war in the United States, sales to various persons in that country, as the result of which he held claims against them for considerable sums of money. In April 1861 he came to the United States for the purpose, as he alleged, of protecting his interests in the North and in the South. He passed from New York City to Schenectady, N. Y., then to Louisville, Kentucky, and then to New Orleans, where he arrived in June 1861. After the capture of New Orleans in April 1862, General Butler, having learned that there was at Mobile a stock of flour purchased by the city of New Orleans for the subsistence of its citizens, dispatched a steamboat, under safe conduct, to Mobile, to transport the flour to New Orleans. Heidsieck, who had then established himself at Mobile, though he had not obtained authority to leave New Orleans, obtained or assumed the position of bartender on the steamboat, and was enrolled among its employees. In that

[1] The commissioner on the part of the United States, Mr. Aldis, delivered a dessenting opinion in which he said:

"1. The evidence that is not in dispute shows, in my opinion, that the claimants gave aid and comfort to the enemies of the United States.

"2. Notwithstanding the conflicting decisions of the courts, and the more conflicting opinions of the writers upon international law, I think that the gray cloth furnished by the claimants should upon principle be held to be contraband of war. It was furnished voluntarily upon express contract with the Government of the Confederate States for the use of the army. Its destination was for some port of the Confederacy nearest to Richmond, if possible. It was called in the correspondence 'army supplies.' It was a direct and necessary aid for carrying on the war. These are the elements which upon principle constitute contraband goods.

"The doctrine and policy of nations as to what is and what is not contraband advance and recede according to their necessities as belligerents or their interests; but the doctrines of international law must stand upon principle to command the assent and respect of mankind."

capacity he made several trips, each occupying seven days, and conveyed letters between New Orleans and Mobile. When this fact was discovered, General Butler issued an order for his arrest. On this order he was arrested July 29, 1862. He was detained in New Orleans till August 5, when he was transferred to Fort Jackson. He remained there till August 29, when he was removed to Fort Pickens. He was released November 5, 1862, after a detention of 110 days. After he had been imprisoned 45 or 50 days, General Butler offered to release him on condition that he return to Europe by the first vessel; but this offer he rejected. He claimed, for his 110 days' imprisonment, $225,000; and for damages to his reputation in France, and for his bankruptcy, $115,000.

Counsel for the United States contended that Heidsieck was properly arrested as a spy, and that the punishment imposed upon him was a very moderate one.

Counsel for the claimant on the other hand urged that he had no intention to convey information that could affect the interests of the belligerents, and that the letters which he brought were for the most part addressed to the French consul at New Orleans.

The claim was disallowed by the act of a majority of the commission, consisting of Baron de Arinos and Commissioner Aldis. M. Lefaivre dissented.

Upon a rehearing, after motion, the same majority on March 26, 1884, rendered an opinion in these words:

"This case has been fully considered on the rehearing. As our respected colleague, the commissioner on the part of the French Republic, differs from us, and has expressed a dissenting opinion, we deem it proper to briefly state our views, though the question is purely a question of fact resting upon the evidence.

"Mr. Heidsieck in the summer of 1862 was a leading wine merchant of Rheims, France, the head of his house, and doing a large business in the sale of champagne wine both in Europe and America. He was about 40 years old, and had a wife and children. He had an agency for the sale of his wines in New Orleans and in most of the other cities of the United States.

"In June 1862 General Butler made an arrangement with the Confederate authorities at Mobile by which a steamboat under a flag of truce could pass from Mobile to New Orleans and back, carrying flour to New Orleans and returning with salt to Mobile. But as it was all important that there should be no correspondence between the Confederate citizens of New Orleans and those outside, it was made a part of the arrangement that no passengers should be allowed on the boat, and all letters should be carried openly, be submitted to Captain Thornton for

his inspection, and in the care and custody of Mr. Greenwood, both of whom were Federal officers, and subject to the order of General Butler. This caution was necessary to prevent all communications between the disaffected Confederate citizens in New Orleans and the armies on the outside, who were planning the recapture of the city.

"In June 1862 Mr. Heidsieck took the position of barkeeper on this steamboat, and between that date and the 29th July he made four trips from Mobile to New Orleans and back.

"That a gentleman like Mr. Heidsieck should take such a position as that—so humble and so much beneath him—and should continue in it for four consecutive voyages certainly seems surprising.

"He gives them [reasons], first (p. 33): 'To obtain news, if possible, from the French consulate of my affairs and of my family.' It does not seem a wise or a fair course to assume the post of barkeeper to get such information. It would occur to anyone that a frank and open letter to the French consul, to be read by General Butler, would be a better way and be open to no objections. But even if this be an excuse for so going *once*, still it can not be considered as an excuse for going four times, especially as he ascertained the first time that there was nothing for him at the consulate.

"It is further to be considered that he had directed his agents in New York not to send on his letters until they knew where he was; that they did not know, and that he had really no reason to expect letters at New Orleans.

"His second reason was that he agreed with the captain of the boat that he would sell the liquors in the bar for the benefit of the boat (the boat to furnish them), but the wines for his own benefit (he furnishing his own wines), and that as the expense of living was very great, this operation would give him a profit not to be despised.

"As no passengers were allowed on the boat, the idea of a profit from selling his champagne wines to the crew is plainly no good reason; it is a pretense, and casts discredit on his whole story.

"These are all the reasons he gives. The absence of any good reason for his conduct, and at such a time when every artifice was resorted to to carry communications between the Confederates in and out of the city, justly subjected him to grave suspicion.

"At the last voyage he carried a package of letters, as bearer of dispatches, as he called it, to Comte Méjan, the French consul. This package General Butler opened. He then sent for Comte Méjan; had a stormy interview with him; charged Heidsieck with bringing letters fraudulently, and ordered him to be arrested as a spy and sent to Fort Jackson. This occurred on July 29th. He arrived at Fort Jackson August 5th. Eight days after, August 13, General Butler offered the claimant his liberty if he would go to France by the next boat and not return during the war. This he refused. His case was

then sent to Washington for the administration to decide. This made delay. Comte Méjan went to Washington on his behalf, among other things. Traveling from New Orleans to Washington was then slow and difficult, and we may reasonably think that there must have been much delay, especially if there was correspondence between Washington and New Orleans.

"In the mean time the claimant was sent to Fort Pickens, a place thought to be more healthy than Fort Jackson.

"On the 15th November the authorities directed him to be set at liberty upon condition that he would leave the country, the only difference between this offer and the one made by General Butler being that he might go to New York and then to France, instead of going by the first boat.

"If he had accepted General Butler's offer on the 13th August or had asked to have it modified as to going by the first boat, he would have been in custody only fifteen days.

"We think General Butler had good cause for arresting the claimant, and that it was his own fault that his imprisonment was prolonged beyond fifteen days.

"The claim is disallowed."[1]

Charles Heidsieck v. *United States*, No. 691, Boutwell's Report, 119: Commission under the convention between the United States and France of January 15, 1880.

Bebian's Case.

Augusta de Bebian, daughter of Louis de Bebian, a French citizen, who was lost at sea in 1865, presented a memorial in which it was stated that at the outbreak of the civil war in the United States Louis de Bebian was a resident of Wilmington, North

[1] M. Lefaivre, the commissioner on the part of France, filed the following dissenting opinion:

"I can not bring my mind to a concurrence with my colleague in disallowing this claim. In my view of the case the action in the premises of General Butler, the commanding general of the Federal forces at New Orleans, was arbitrary and illegal. The arrest and imprisonment of the claimant in close prisons, situated in unhealthy localities, for the period of *one hundred and ten days, without a trial*, was not only out of proportion to any offense disclosed in the record, but was a violation of the law of nations and of the rights of a French citizen who was at the time under the safeguard of a flag of truce.

"The failure of the defendant government to produce General Butler as a witness, and the nonintroduction of the so-called treasonable correspondence, is, in my opinion, strong proof that there was no sufficient evidence to justify the harsh treatment to which claimant was subjected at the hands of the Federal military commander.

"The principle upon which I rest my dissent in this case has been indicated and sanctioned by the jurisprudence of the commission in the Le More arrest and imprisonment cases.

"Under the circumstances the claimant is entitled to an award of ten thousand dollars."

Carolina, in the employ of the mercantile firm of O. G. Parsley & Co.; that on August 6, 1861, he left Wilmington in the English vessel *Adelso* as the agent of that firm; that the vessel was driven by stress of weather into Newport, Rhode Island, where she was boarded and searched by a revenue officer; that among De Bebian's papers were found a letter of credit and instructions from Parsley & Co. to purchase in Liverpool quantities of army blankets, coffee, clothing, and iron of various sizes, all to be shipped in a French or British vessel to Wilmington; that there was also found among De Bebian's effects a set of signals, to be answered from the shore, for the purpose of enabling the vessel with the contemplated cargo to make the harbor of Wilmington; that upon the disclosure of these facts De Bebian was arrested and sent to Fort Lafayette, where he was detained from August 20 to September 16, 1861, when he was released on parole; that on October 4, 1861, Mr. Seward, then Secretary of State, informed the French minister that he had ordered De Bebian's release on condition that he would not return to the Confederate States; and that all De Bebian's papers except the letter of credit, which had been lost, were returned to him. The memorial claimed damages for (1) the arrest, (2) bad treatment, (3) the loss of the letter of credit and the consequences thereof, (4) the expense incurred in the effort to recover the letter of credit and to obtain justice, (5) the imprisonment and its resulting losses.

Counsel for the claimant urged that the arrest and detention of De Bebian were arbitrary and without good cause; that when arrested he was on his way to Europe for a legitimate commercial purpose; that the goods which he was to purchase were to be disposed of in the regular course of business, and were in no manner to be considered as contraband of war. In support of this position counsel referred to Article XXIV. of the treaty between the United States and France of 1778, and to the treaties between the United States and Holland of 1782, between the United States and Sweden of 1783, and between the United States and Spain of 1795, all of which declared in substance that various articles of merchandise, among which were "all sorts of cloth and all other manufactures woven of wool, flax, silk, cotton, or any other materials whatever," should not be reckoned as contraband or prohibited goods. It was claimed also in behalf of the memorialist that there was no effective blockade of the port of Wilmington on August 6, 1861.

Counsel for the United States contended that De Bebian, being merely an agent, had no interest in the letter of credit, and that the third and fourth items of the claim were therefore excluded from consideration; and that, as to the first, second, and fifth items for damages for illegal treatment sustained by De Bebian in his own person, no recovery could be made by his heir-at-law. As to the case as a whole, it was contended by counsel for the United States that if De Bebian were alive the claim must be rejected. The position of the United States was presented thus: By the proclamation of the President of April 27, 1861, a blockade was declared of all the ports of the States of Virginia and North Carolina. The *Adelso* sailed from Wilmington with a cargo of turpentine and rosin taken on board after the blockade was declared. The circumstance that De Bebian had among his papers a set of signals for the use of the vessel that should take the return cargo was important as establishing beyond controversy his knowledge of the state of blockade, and the fact that the blockade was effective. It also fastened upon him the responsibility of giving aid and comfort to the enemy of the United States during the time specified in the first article of the convention. The escape of the vessel was a violation of the blockade, and De Bebian in his capacity as agent of the house of Parsley & Co., and in his character as purchaser of goods to be used for the support of the army of the Confederate States, was an active party to the violation of the blockade. The rule of law as laid down by Sir William Scott was this: That when there was an actual blockade, and the party charged with violating it had knowledge of its existence, it was unlawful for him to go in or come out with a cargo laden after the commencement of the blockade. (Lawrence's Wheaton's Elements of International Law, p. 577.) It was not anticipated, said counsel for the United States, that an attempt would be made to maintain the position that the blockade declared April 27, 1861, was not effective in the month of August in that year; but any such averment must fail in presence of the fact of De Bebian's possession of the system of signals referred to. The rule of law in regard to blockade was fatal to the claim for compensation for loss of property. A vessel which has run a blockade is liable to seizure and confiscation if arrested at any point between the place of departure and the port of final destination. The same rule applied to the cargo, subject only to the condition that the owners of the articles shipped were at the

time of the shipment apprised of the existence of the blockade. (Phillimore, International Law, vol. 3, par. 406.) Parsley & Co. and De Bebian had knowledge of the blockade, and it followed that whatever interest De Bebian had in the letter of credit, or in any other property for which he might otherwise have claimed compensation, he was barred by the fact of such knowledge. Summed up, the defense against the claim was, first, that whatever rights of property De Bebian had were forfeited by the rules of public law in regard to the violation of a legally established blockade; second, that the claim on account of personal injuries did not survive to his heirs-at-law; and third, that in running the blockade and in transmitting of correspondence in violation of the nonintercourse act, he gave aid and comfort to the enemies of the United States.

The commission, by the concurrence of Baron de Arinos and Commissioner Aldis, disallowed the claim; but the grounds of disallowance were not stated.

Augusta de Bebian v. *United States*, No. 557, Boutwell's Report, 114; commission under the convention between the United States and France, of January 15, 1880.

Dubos's Case.

Henry Dubos, a citizen of France, presented to the commission, under the treaty between the United States and France of January 15, 1880, a claim against the United States (No. 26, French docket) for $25,000 damages for his arrest at New Orleans, September 6, 1862, and his confinment in the custom house and at Ship Island till the 24th of December, by order of General Butler.

Dubos was a writer for a newspaper published at New Orleans called *Le Compilateur*, and was a resident of that city when it was captured by the United States forces. On May 1, 1862, General Butler, as commander in chief, proclaimed martial law there, and in his proclamation among other things said: "No publication, either by newspaper, pamphlet, or handbill, giving accounts of the movements of soldiers of the United States within this department, reflecting in any way upon the United States or its officers, or tending in any way to influence the public mind against the Government of the United States, will be permitted." It was apparent that the articles written by Dubos, and signed by him and published in the *Compilateur* were a violation of this proclamation and although the point was contested by counsel, the majority of the commission in their findings accept the fact as established.

In the proclamation of General Butler there was also this declaration: "All foreigners not naturalized and claiming allegiance to their respective governments, and not having made oath of allegiance to the supposed government of the Confederate States, will be protected in their persons and property as heretofore under the laws of the United States." It was claimed by counsel for the memorialist that this was a guaranty by General Butler that he would not enforce martial law against the class of citizens described, of which Dubos was one.

It appeared that on the morning after the proclamation was issued General Butler appointed Major Bell provost-judge, and Colonel French provost-marshal; that Colonel French then notified the public that he assumed the position for the purpose of carrying out such of the provisions of the proclamation as were not left to the municipal action; and that he called attention particularly to the prohibition against the publication in newspapers of notices and resolutions in commendation of the enemies of the United States. The record showed, however, that General Butler assumed personal jurisdiction of the case of Dubos, and that it was upon his order that Dubos was first confined in the custom-house at New Orleans and afterward sent to Ship Island.

Award. The majority of the commission, Baron de Arinos and M. de Geofroy, gave judgment for the claimant in the sum of $800.

Mr. Aldis, the commissioner for the United States, filed a dissenting opinion, but he also stated that, upon consultation with his colleagues, he found that they concurred with him in these propositions:

"1st. That General Butler had authority to declare martial law in New Orleans, and that his proclamation of martial law was both authorized and justifiable;

"2d. That it applied to aliens in New Orleans, and that they were bound to obey its regulations the same as other inhabitants of the city;

"3d. That Dubos, in publishing the articles complained of, exposed himself to arrest by the military authorities;

"4th. That his arrest was therefore in the first instance justifiable."

But he added that his colleagues held "that Dubos should have been tried by a military commission for the offenses charged against him; that General Butler did not establish [illegible]n arbitrary government, but settled and recognized certain

restrictions to his own authority, and announced the principles and rules of his administration, and that the instructions for the government of the armies of the United States in the field required that 'whenever feasible martial law should be carried out in cases of individual offenders by military courts.'"

It appears by this statement that the award was based not upon the absence of authority in the commanding general to proclaim martial law, nor upon the fact that his requirements were not reasonable, nor upon the fact that Dubos was not guilty of a violation of the rules so established, but upon the ground that the imposition of the penalty by the act of the commanding general was a violation of his own proclamation, and also of the rules and articles of war.

In the opinion of Mr. Aldis it was stated that General Butler communicated to the Department of State of the United States on September 14, 1862, the fact of the arrest of Dubos and copies of the articles written by him; that on October 10 the French legation made an application in Dubos's behalf; that Mr. Seward replied that "the journal in which Dubos published his articles was devoted in nearly all its columns to the instigation of treason and civil war against the United States, and that the articles therein which are signed by Mr. Dubos, if they were as innocent in purpose as he is now understood to allege, are, from their nature and from the character of the organ which has published them, calculated to add to the civil war already prevailing in New Orleans the aggravation of even a servile war, or war of races;" and that the President referred the matter to General Butler, with the suggestion that he "would be gratified with any solution of it which will be agreeable to Viscount Treilhard and Mr. Fauconnet, and at the same time will not endanger the public peace and safety and that public respect for the authority of the United States which can not be allowed to be impaired."

Propositions maintained by Mr. Aldis.

Mr. Aldis in his opinion maintained the following propositions:

"I. Every foreigner owes obedience to the laws of the country in which he resides; and every government has the sovereign right to punish violations of the law on its own soil according to its own laws and the judgment of its own tribunals, and without interference from other nations, so long as the law and the punishment do not conflict with international law. If the law is in conflict with international law, is opposed to the public law of civilized states, then the foreigner who is punished for the violation of such laws may be entitled to redress; otherwise he is not. * * *

"II. *Of Martial Law.*—The Constitution of the United States, like the supreme law of all other governments, authorizes it to make war and to *suppress insurrection*. (Art. 1, sec. 8.) It has the right to raise armies, to carry on military operations in the usual mode and according to the laws and usages of war, and to do all that may be necessary to defeat the operations and machinations of the enemy; and when necessary within the theater of military operations and of the occupancy and movements of its armies, to govern by martial law, and within such sphere to supersede by martial law the civil or municipal law. And this martial law exists, not by any authority derived from the Constitution, but by *the laws of war* as recognized by the laws of nations, and grows out of war and its necessities; and where it lawfully and necessarily exists 'sweeps civil law by the board and takes the place of it.' (See J. Q. Adams's speech in Congress, April 1842.) * * * Where martial law exists searches and seizures may be made without warrant, and persons may be arrested and imprisoned without process.

"Martial law is *law*. It is the will of the commander of the army. Not an arbitrary and lawless will, but a will governed by the laws and usages of war, and which by necessity becomes the supreme legal authority and for the time takes the place of all other law to a greater or less extent, as necessity may require. It is equally binding as the civil law upon all who are within its jurisdiction. * * *

"The commanding officer must of necessity determine in the first instance as to its necessity, extent, and continuance, but he is subject to the control of the Executive, and must receive the express or implied sanction of Congress afterward.

"III. *Martial law as recognized in the United States.*—Martial law, arising from necessity and during war, in camps, garrisons, and the vicinity of military occupancy and operations, is and always has been held as valid law, existing by authority in the United States whenever the occasion for it arises. * * *

"General Jackson, commander of the United States forces at New Orleans, on the 15th of December 1814 proclaimed martial law. He deemed it necessary for the defense of the city. On the 8th of January 1815 the battle of New Orleans was fought, and the American victory secured the city. On the 15th of March 1815 Judge Hall granted a writ of habeas corpus for the relief of one Louallier, who had been arrested by the military. General Jackson, under martial law, thereupon arrested Judge Hall. Four or five months after, when peace came and martial law had ceased to exist, Judge Hall arrested General Jackson for contempt of court in disregarding the habeas corpus. General Jackson appeared and sought to justify his act, but Judge Hall would not listen to the defense, and fined General Jackson $1,000, which he paid. In 1842 a bill was introduced to Congress to reimburse General Jackson for the $1,000 so paid, and interest. The title of the bill was 'to indemnify General Jackson for damage sustained in the discharge of his *official duty*.' It was proposed to change the title of the bill, and call it a bill 'for the relief of General Jackson,' so that, in the language of the committee, 'no inference should be drawn from the passing of it, that a military officer had legal authority to establish martial law.' The minority report opposed the amendment because 'in time of war and imminent public danger it may be the duty of the

military commander to arrest those regarded as traitors, spies, or mutineers within his camp. The act was *justifiable, not merely excusable;* it was demanded by a great and overruling necessity.' Thus this precise issue came before Congress.

"Mr. Buchanan, then in the Senate, afterward President, sustained the bill as it stood, and upon the ground that martial law was justified by necessity. The Senate rejected the amendment and passed the bill as it stood, *Congress thus recognizing that the act of General Jackson was done in the discharge of his official duty.*

"Mr. John Quincy Adams, who was President of the United States, and is justly regarded as high authority on all questions of international law, in a speech before Congress in April 1842 said: 'General Jackson was acting under the laws of war. * * * In actual war, whether servile, *civil*, or foreign, the laws of war take precedence. * * * The *powers incidental to war are derived not from any internal municipal source, but from the laws and usages of nations.* There are, then, two classes of powers, different and often incompatible with each other. The peace power limited by the Constitution. The war power limited only by the laws and usages of nations. The power is tremendous. It is strictly constitutional, but it breaks down every barrier so anxiously erected for the protection of liberty, property, and life.'

"President Lincoln recognized the same principle, and acted upon it in numberless cases throughout the war. The first notable act was in the case of Merryman, arrested by General Cadwallader in May 1861, at the very beginning of the war; and in his case the opinion of C. J. Taney was not sustained. It was disregarded by the government, by the courts, and held unsound by the great jurists. President Lincoln's idea of the right to establish martial law is best shown in the 'Instructions for the Government of Armies of the United States in the Field,' prepared by Dr. Lieber, and approved by the President.

"We quote the first four instructions from General Orders, No. 100:

"'1. A place, district, or country occupied by an enemy stands in consequence of the occupation, under the martial law of the invading or occupying army, whether any proclamation declaring martial law, or any public warning to the inhabitants, has been issued or not. Martial law is the immediate and direct effect and consequence of occupation or conquest. The presence of a hostile army proclaims its martial law.

"'2. Martial law does not cease during the hostile occupation, except by special proclamation, ordered by the commander in chief; or, by special mention in the treaty of peace concluding the war, when the occupation of a place or territory continues beyond the conclusion of peace as one of the conditions of the same.

"'3. Martial law in a hostile country consists in the suspension, by the occupying military authority, of the criminal and civil laws, and of the domestic administration and government in the occupied place or territory, and in the substitution of military rule and force for the same, as well as in the dictation of general laws, as far as military necessity requires this suspension, substitution, or dictation.

"'The commander of the forces may proclaim that the administration of all civil and penal law shall continue, either wholly or in part, as in time of peace, unless otherwise ordered by the military authority.

"'4. Martial law is simple military authority exercised in accordance with the laws and usages of war. Military oppression is not martial law; it is the abuse of the power which that law confers. As martial law is executed by military force, it is incumbent upon those who administer it to be strictly guided by the principles of justice, honor, and humanity—virtues adorning a soldier even more than other men, for the very reason that he possesses the power of his arms against the unarmed.'

"So in his proclamation of September 24, 1862, it is ordered—

"'That during the existing insurrection, and as a means for suppressing the same, all rebels * * * and all persons guilty of any disloyal practice, affording aid and comfort to rebels against the authority of the United States, shall be subject to martial law.

"'And the writ of habeas corpus is suspended in respect to all persons arrested, or now or hereafter imprisoned in any place of confinement by any military authority.'

"This proclamation applied to Dubos, who was then (September 24, 1862) arrested and about to be sent to Ship Island.

"On the 3d of March 1863 Congress by its act of that day ratified the action of the President.

"In the celebrated case of Luther *v.* Borden (7 How. 1), where the question arose as to the illegality of martial law, declared by the legislature of the State in the case of threatening insurrection, Chief Justice TANEY says: * * * 'If the government of Rhode Island deemed the armed opposition so formidable and so ramified throughout the State as to require the use of its military force and the declaration of martial law, we see no ground upon which this court can question its authority. *It was a state of war, and the established government resorted to the rights and usages of war.* In that state of things the *military officers might lawfully arrest anyone who they had reasonable grounds to believe was engaged in the insurrection.*' * * *

"In *Milligan's case* (4 Wall. 2) the subject of martial law declared in States not in insurrection and where the courts were open was fully considered. The counsel for the government attempted to justify, by the law and usages of war, acts under martial law committed in Indiana, a State never in insurrection and where the courts were open and Milligan might have been tried in the ordinary and peaceful course of law. Judge Davis (p. 121), in delivering the opinion of the court, said: 'It is idle to inquire what the laws and usages of war are. They can never be applied to citizens in States which have upheld the authority of government, and where the courts are open and process unobstructed.' But (on p. 127) he recognizes the very right the government counsel here contends for. He says: 'There are occasions where martial law can be properly applied. If in foreign invasion or *civil war* the courts are actually closed, and it is impossible to administer criminal justice according to law, then on the theater of active military operations where war prevails, there is a necessity to furnish a substitute for the civil authority; and as no power is left but the military, it is allowed to govern by martial rule until the laws can have their full course. As necessity creates the rule so it limits its duration.' * * *

"This case was decided by five judges to four. And the four (Chief Justice Chase and Justices Wayne, Swayne, and Miller), through Chief

Justice Chase, said: 'We are unwilling to give our assent by silence to expressions of opinion which seem to us calculated, though not intended, to cripple the constitutional powers of the government and to augment the public dangers in times of invasion and rebellion.' He therefore expressly stated 'that military jurisdiction may be exercised, in time of rebellion and civil war, within States or districts occupied by rebels treated as belligerents, by the military commander under the direction of the President, with the express or implied sanction of Congress, and it supersedes the local law.'

"But, if any uncertainty has ever existed upon the question, the recent decision of the United States Supreme Court in the case of The United States *v.* Diekelman (92 U. S. S. C. Rep. 520; 2 Otto, 520) completely settles the right of the United States to establish martial law, and settles it *as to New Orleans under General Butler in* 1862 and *as to foreigners in New Orleans* as well as to American citizens. Chief Justice Waite, in delivering the opinion, says:

"'I. As to the general law of nations.

"'The merchant vessels of one country visiting the ports of another for the purposes of trade subject themselves to the laws which govern the port they visit so long as they remain, and this as well in war as in peace, unless it is otherwise provided by treaty.

"'The law by which the city (New Orleans) and port were governed was martial law. This ought to have been expected by Diekelman when he dispatched his vessel from Liverpool. The place had been wrested from the possession of the enemy only a few days before the issue of the proclamation, after a long and desperate struggle. *It was, in fact, a garrisoned city, held as an outpost of the Union army, and closely besieged by land.* * * * When he entered the port, therefore, with his vessel under the special license of the proclamation, he became entitled to all the rights and privileges that would have been accorded to a loyal citizen of the United States under the same circumstances, but no more. Such restrictions as were placed upon citizens operated equally upon him. Citizens were governed by martial law. It was his duty to submit to the same authority.

"'Martial law is the law of military necessity in the actual presence of war. It is administered by the general of the army, and is, in fact, his will. Of necessity it is arbitrary, but it must be obeyed. * * *

"'To this law and this government the *Essex* subjected herself when she came into port.

"'General Butler found on board this vessel articles which he had reasonable cause to believe, and did believe, were contraband, because intended to promote the rebellion. It was his duty, therefore, under his express instructions, to see that the vessel was not cleared with these articles on board, and he gave orders accordingly. It matters not now whether the property suspected was in fact contraband or not. *It is sufficient for us that he had reason to believe, and in fact did believe, it to be contraband. No attempt has been made to show that he was not acting in good faith.*'

"A recent work on military law by Lieut. Ives, assistant professor of law at West Point, 1879, contains a very satisfactory summary of the laws of the United States as to martial law. * * *

"I think there can be no doubt but that the right to declare martial law, as exercised by General Butler at New Orleans in 1862, is fully recognized as a legal right by the President, the Supreme Court, and by Congress, and is the law of the United States.

"IV. *Is the law of the United States in conflict with the law of nations?*—Such being the law of the United States, can the action of the Government of the United States, under it and within the territory of the United States, be questioned or interfered with by any foreign state? Clearly not, unless such law is in conflict with international law.

"I am fully satisfied it is not in conflict with, but is in harmony with, the law and practice of all civilized States. It is the law of war as recognized by the law of nations.

"*England.*—Notwithstanding the confusion of martial with military law which has sometimes prevailed among English writers and judges and the erroneous dicta which may be found upon the point, the better opinion has been held by their best writers and judges for more than a century that in case of war or insurrection martial law may be established if necessity requires it, and it will then supersede the civil and criminal law. The only point in doubt is whether on English soil the declaration of martial law is a prerogative of the crown, or must, to be legal, be established or approved by Parliament. * * * But in England very high authorities hold that in war and in case of necessity it may be established in territory subject to English law by the mere order of the military commander. * * * In Tytler's (afterward Lord Woodhouselee's) work on courts-martial I find an illustration so apposite, and the reasons for martial law so admirably expressed and so universal in their application, that I can not forbear to cite them. Speaking of martial law, he says (pp. 366, 367): 'Absolute necessity authorizes the application of extraordinary remedies. It is for the security of the state. The slow and cautious procedure of the ordinary courts of justice *keeps no pace with that daring celerity* which attends the operations of rebellion; nor are their regulated forms and publicity of procedure fitted to bring to light the dark designs of a conspiracy. It is a remedy warranted only by the last necessity, and therefore to be commensurate in the endurance of its operations to the immediate season of danger—an expedient which requires us *to part with our liberty for a while in order that we may preserve it forever.*' The last is the phrase used by Judge Blackstone is his commentaries.

"On the 24th of May 1798 the Earl of Camden, lord lieutenant of Ireland, on account of insurrection and public disorders, proclaimed martial law, which afterward being made known to Parliament, received 'its entire approbation.' Parliament thereupon passed the act of 1798, which was much more stringent than any of the orders of the United States Government during the rebellion. It stated that the exercise of marshal law was the undoubted prerogative of His Majesty, and it authorized it 'whether the ordinary courts of justice are or are not open; and that it should continue from time to time during the continuance of the rebellion.' (See Tytler's Courts-Martial, App. VI. pp. 402, 403.)

"In February 1818, Sir Robert Brownrigg, the governor, proclaimed martial law in India.

"In Ceylon, Viscount Torrington, upon *apprehended insurrection*, on the 29th July 1848 proclaimed martial law, and it was continued till October 10.

Several rebels were executed. The conduct of Viscount Torrington was much animadverted upon, and the question came up in Parliament. His defense (see 115 Hans. Parl. deb. 3d series, p. 843, *et seq.*) throws much light upon the recognized practice of the English Government. * * * In the debate in Parliament the Duke of Wellington 'contended that martial law was neither more nor less than the will of the general who commanded the army. In fact, martial law meant no law at all. Therefore the general who declared martial law, and commanded that it should be carried into execution, was bound to lay down distinctly the rules and regulations and limits, according to which his will was to be carried out.' In this respect General Butler's proclamation of May 1, 1862, and his subsequent orders from time to time, conformed fully to the rule of duty prescribed by the Duke of Wellington: 'Now, he had, in another country, carried on martial law; that was to say, that he had governed a large proportion of the population of a country by his own will. But then what did he do? He declared that the country should be governed according to its own national laws, and he carried into execution that will. He governed the country strictly by the laws of the country, and he governed it with such moderation, he must say, that political servants and judges, who at first had fled or had been expelled, afterward *consented to act under his direction*. The judges sat in the courts of law conducting their judicial business and administering the law *under his direction*.'

"The Earl Grey said: 'I was glad to hear what the noble Duke said with reference to what is the true nature of martial law. It is exactly in accordance with what I myself wrote to my noble friend at the period of those transactions in Ceylon. I am sure that was not wrong in law, for I had the advice of Lord Tottenham and Lord Campbell, and the attorney-general, and I explained to my noble friend that what is called proclaiming martial law is no law at all, *but merely for the sake of public safety, in circumstances of great emergency setting aside all law, and acting under the military power*, a proceeding which requires to be followed by an act of indemnity when the disturbances are at an end.' The opinion expressed by Earl Grey, that an act of indemnity was necessary, does not seem warranted by the practice of the English Parliament. No such indemnity appears to have been required for the Duke of Wellington or any other of the military commanders who have exercised the power. Their justification stands upon the law of nations that gives in time of war to the military commander the right to govern by his own will the hostile territory he conquers or occupies.

"In regard to France and the other great states of the Continent of Europe, I find it stated in the opinion of Attorney-General Cushing (8 Atty. Gen. Op. 371)—

"'That *the state of siege* may have a lawful origin, like the state of war, either in an act of the political sovereignty or *in the necessity of circumstances*. When it exists, all the local authority passes to the military commander, who exercises it in his own person, or delegates it if he pleases to the civil magistrates, to be exercised by them under his orders. The civil law is suspended for the time being, or at least made subordinate, and its place is taken by martial law, under the supreme, if not the direct, administration of the military power.

"'The state of siege may exist in a city or in a district of the country, either by reason of the same being actually besieged or invested by a hostile force, or by *reason of domestic insurrection*. In either case it is the precise fact with which we are now concerned. The state of siege of the continental jurists is the proclamation of martial law of England and the United States, only we are without law on the subject, while in other countries it is regulated by known limitations. (Maurice Block, s. voc. See also Escriche, s. voc., for similar legal provisions in Spain.)'

"A reference to the French code and statutes confirms this statement.

"V. This principle, resting upon the law and usages of war, is admitted by the counsel of the claimant to be correct when applied to foreign war. But they attempt to distinguish between a foreign war and domestic insurrection.

"It will be seen from the authorities already quoted (Judge Woodbury, Judge Davis, Judge Waite, Ives' Military Law, Dr. Lieber, and Attorney-General Cushing, and the practice in England and France) that no such distinction is recognized; that the same rule of war as to the exercise of martial law applies as well to domestic insurrection as to foreign wars. Indeed, in domestic conspiracies and insurrections the secrecy and 'daring celerity' of the rebels and conspirators make martial law more necessary than in the regular and publicly known operations of war between states. In these days when nihilists and communists are conspiring against law, government, and the public peace in Russia and France, neither of those great powers can safely forego the necessary exercise of martial law.

"*Martial law at New Orleans:* Louisiana in May 1862 was as much hostile territory as if it had never belonged to the United States. For fifteen months the United States laws, courts, and judges had been overturned and superseded by the Confederacy. No man could hold an office without an oath of allegiance to the Confederacy. The population of New Orleans, whether native or foreign, was nearly unanimous in violent opposition to the United States. No Union man could express an opinion favorable to the United States, except at the risk of his life. A general invading a foreign country could not have found himself more completely surrounded by a hostile population than was General Butler at New Orleans. The Confederates had left the city, but were closely besieging it with a large army under General Lovell. Correspondence between the rebels in the city and General Lovell and the besieging forces outside was constant, and the utmost vigilance could not prevent it.

"1. Before the capture of the city the *Confederate General Lovell was obliged to adopt martial law.*

"2. When he left, and during the interval before General Butler came, the safety of the city from riot and mob rule was secured only by the employment of the European legion by the mayor for that purpose. The terror and fear that prevailed among the better classes is shown by the letter which Mr. Forstall, the agent of Hope & Co., of Amsterdam, wrote to them on May 13, 1862, in regard to the $800,000 of silver placed in his hand on their account. He says: 'The great apprehension at that time, in the event of the fall of New Orleans, was not the action of the Federal government, which until then on similar events had left private property undisturbed, but the destruction of property and sacking of banks by the rabble out of a mixed population of nearly two hundred thousand, pending the consequent delays of an abrupt and violent change of govern-

ment, and the event proved that such apprehension was not idle, for after the destruction and robbery of an immense amount of property on our wharves and some of our front stores and warehouses, a general plunder of the city would have taken place by the rabble after the retreat of the Confederate troops but for the armed interference, night and day, of the French and foreign brigades for nearly six days, when the Federal troops took charge of the city with a sufficient force to maintain order.' (Parton, p. 373.)

"3. The proclamation of martial law by General Butler was a necessity. It was the only means to save the city. It was approved by President Lincoln, by Congress, and by the country. * * * General Butler at first attempted to govern by leaving the municipal government to the mayor and common council, and the administration of criminal justice to the judges or recorders then in office. But finding, as he believed, that these Confederate officials were sending aid to General Lovell, and could not be trusted, and would not do their duty, on the 20th May he suspended them from the functions of their offices and appointed General Shepley military commandant of the city, and established a provost court, with Major Bell provost judge. (See General Shepley's 'Notice,' Parton, p. 336.) In August 1862 General Butler wrote to the French consul, who complained of his order requiring citizens to give up their arms: 'Whenever the inhabitants of this city will, by a public and united act, show both their loyalty and neutrality, I shall be glad of their aid to keep the peace, *and restore the city to them.* Till that time, however, I must require the arms of all the inhabitants, white and black, to be under my control.'

"VI. But it is claimed that General Butler excepted foreigners from the operation of martial law. His words are: 'All foreigners will be protected in their persons and property, as heretofore, under the laws of the United States.' This did not exempt them from martial law, but assured them of protection of their persons and property, now under martial law, as heretofore under the laws of the United States.

Its meaning was that martial law should protect their persons and property—not that they should be exempt from its operation. In reason, no distinction of the kind could be made. All must be subject to martial law. Foreigners, though they ought to be neutral (and many of them were), in fact were often engaged in aiding the rebellion. General Butler's letter to the French consul of August 14, 1862, shows this. He says: * * * "I trust most of your countrymen are in good faith *neutral;* but it is unfortunately true some of them are not. This causes the good, of necessity, to suffer for the acts of the bad. I take leave to call your attention to the fact that the United States forces gave every immunity to Monsieur Bonnegrass, who claimed to be the French consul at Baton Rouge, allowed him to keep his arms, and relied upon his neutrality; but his son was taken prisoner on the battlefield in arms against us. You will also do me the favor to remember that very few of the French subjects here have taken the oath of neutrality, which was offered to but not required of them, by my order, No. 41, although all the officers of the French legion had, with your knowledge and assent, taken the oath to support the constitution of the Confederate States.' * * * (Parton's General Butler in New Orleans, p. 465. See also General Butler's letter to the consuls, Parton, pp. 456, 457, 458.) * * *

"Such a meaning as is now given to this phrase by the claimants *was not intended by General Butler, nor was it so understood or claimed by foreigners at the time.* In May 1862, in requiring the British members of the European brigade, who had given their arms to Beauregard, to leave the city in twenty-four hours (Parton, p. 357); in his many dealings with foreign consuls, and especially with the French consul, Count Méjan, (see Butler's letter to the Secretary of War, Parton, 378), he always held foreigners, like natives, to be subject to martial law; and the foreigners and foreign consuls did not claim the contrary. See General Butler's letter to the English, French, and Greek consuls of June 12, 1862 (Parton, p. 383), in which he says: 'In order to prevent all misconception, and that for the future you gentlemen may know exactly the position upon which I act in regard to foreigners, resident here, permit me to explaim to you that I think *a foreign resident here has not one right more than an American citizen, but at least one right less; i. e., that of meddling or interfering by discussion, vote, or otherwise with the affairs of the government.*' This was well known in New Orleans three months before Dubos was arrested. In his proclamation of martial law on May 1, he says: 'No publication, either by newspapers, pamphlets, or handbills, giving accounts of the movements of the soldiers of the United States within this department, *reflecting in any way upon the United States or its officers, or tending in any way to influence the public mind against the Government of the United States, will be permitted.*' Can any one suppose that native citizens only were prohibited from doing such acts, but that foreigners would be allowed in doing them?

"VII. The claimant's counsel contends that claimant's arrest and imprisonment were illegal, because he was not tried by a military commission.

"1. General Butler gave to his provost court the jurisdiction of 'high crimes and misdemeanors.' If he thought Dubos's act a minor offense, or for any other sufficient cause saw fit to withhold it from the provost court, he had the right to do so.

"2. As the will of the commander is the basis of martial law, he may or may not resort to a military commission as he thinks best. Ordinarily, he does resort to a commission to ascertain the facts, as he has no time for such trials. The *law* he decides for himself. But where there are no facts in dispute, where the alleged offender admits the facts, there a military commission is not resorted to, because it would be superfluous. That is this case. Dubos admitted then, and admits now, that he wrote and published the articles complained of. * * *

"VIII. *Character of the articles published by Dubos.*—General Butler decided that the article did so violate the law. That decision was clearly right. The President and Mr. Seward went further, and said they were calculated to add to the civil war the aggravation of even a servile war. Mr. Dubos was a neutral; only two years in this country. It was his duty as a neutral and an honorable man to abstain wholly from intermeddling with politics; above all, from exasperating the public mind against the government. Instead of this, he wrote in an ironical way to throw contempt on President Lincoln, on General Butler, on the Union Army, to discredit the Union journals as always telling lies, and to stir up the slave holders to greater violence against the government and to greater severity against the slaves. When arrested he made no excuse or apology. He gave no promise to amend his conduct, but aggravated his offense by the

insincere pretense that the articles were 'jocular,' 'semiburlesque,' and 'not intended to attack the cause of the United States.'

The *time* when they were published added to the evil influence they were calculated to exert. It was August 1862; the month when great disasters in Virginia had smitten the Union army and cause, and a Confederate army was within a few miles of Washington; when the rebels were greatly elated and expected a speedy triumph and to soon retake New Orleans; when the Confederate General Jeff. Thompson wrote to General Butler 'that they would have New Orleans in a few days.' (Parton, p. 474.) That was a bad time to sneer at 'the invincibility of the Union arms, and that they were the terror of the entire world; that France and England would be but a mouthful to them.' Such insulting language published in New Orleans, among an excitable and bitter population of rebels, was well calculated to give 'aid and comfort' to the rebellion, and at that moment to stir the public mind to violence and insurrection. * * *

"If when arrested he had made such expressions of regret and such promises of good conduct in the future as he ought to have made, and could have made with honor, he would doubtless have been relieved from punishment. This is probable, for on the the previous day (September 5) General Butler had permitted the *Estafette du Sud* to resume publication upon the pledge of such assurances.

"IX. It is alleged that Dubos received 'inhuman treatment' while in custody, and for this reason it is sought to increase the damages.

"1. Mr. Dubos does not say he was treated 'inhumanly.' While at the custom-house he 'was in a room with eight or nine other persons.' But he does not pretend that they were convicts or felons. He gives the names of three of them * * * all believed to be respectable persons. 'I lost all my bedding and had nothing to sleep on for five or six days.' He does not say that it was lost by the fault of the government, or that the government could have furnished him with bedding 'for five or six days.' Such hardship could not be called 'inhuman,' even if it were proved to be the act of the government. His next grievance was not a great one, and his allusion to it shows that he really had no great grievance to complain of. 'The mosquitos were very bad, and I had no mosquito bar to protect me.' He then says his eyesight was affected by the glare of the sun on the white sand, and he suffered much pain from that cause. Dr. Batchelor, a Confederate prisoner with him, and who treated him at the time for the affection of his eyes, says: 'Having liberty to go around the house and in shady places on the outside of the house, there was no necessity of his exposing himself to the glare of the sun so as to have it operate injuriously on his eyes. He had the option of exposing himself or not, *and if he did so it was his own fault.*' 'In sitting in the shade with a bank of sand opposite it would be uncomfortable for the eye, but it would be very easy for him to turn his eyes from it.' The room in which Dubos and others were confined was 'from 30 to 40 feet long,' and 'about 16 or 18 wide.' 'It was dry; had two windows.' Mr. Gillis says: 'Our room was well ventilated. We were treated with kindness and courtesy by the officers. Dubos received the same treatment we did. Mr. Dubos could have remained inside the building during the day or have seated himself outside in the shade.' Mr. Walker, a prisoner there, says: 'The treatment was very

good; we were well fed; were allowed to bathe under guard; the rations abundant.' 'It was pleasant, so far as climate was concerned; the bathing was fine; better than at the lakeside places; the food abundant and good; the sleeping apartments good, and the expense little, only for extras and luxuries.' The injury to his eyes was but temporary. 'I now work a great deal during the night by gaslight.' (Dubos, pp. 20 and 21.)

"It is not pretended that either General Butler or President Lincoln were moved by evil intention to oppress Mr. Dubos or to gratify a spirit of malice or revenge. On the contrary, it is plain that they acted from a sense of duty, and treated him with all the mildness that was possible under the circumstances, and with all the forbearance his perversity and foolhardiness would allow. Nor was there any harsh or inhuman treatment. Nothing whatever should be allowed him for damages.

"X. Mr. Dubos 'gave aid and comfort to the rebels.' Such publications as his, by influencing the minds of the French population to resistance against the government, were a more serious injury to the cause of the United States than if he had made a speech at a public meeting—more practically injurious than if he had taken arms and joined the rebel army; and both in intent and effect gave 'aid and comfort to the enemy.' For this reason alone he is, in my judgment, barred from any compensation.

CHAPTER LX.

EXPULSION.

Case of Santangelo.

Orazio de Attellis, marquis of Santangelo, was expelled from Mexico in 1826. In 1833, being assured that his return would be agreeable to the authorities, he went back for the purpose of establishing an educational institution. At the same time he began the publication of a periodical devoted chiefly to the discussion of literary and scientific topics. On June 24, 1835, the President of the republic issued an order for his expulsion, on the ground that he had "occupied himself again in the publication of a periodical in which some productions appear which tend to ridicule the nation and to plunge it into anarchy." What the productions were and what was their offensive feature was not disclosed. The order of expulsion was issued under a decree of the Mexican Congress of February 22, 1832, conferring extraordinary powers on the President. The American commissioners contended that the expulsion was causeless and inspired by the same kind of personal enmities that occasioned the expulsion in 1826; that it was violative of rights secured to inhabitants of the republic by the constitution, and that it infringed the treaty between the United States and Mexico of April 5, 1831, which guaranteed to the citizens of each country while within the jurisdiction of the other "special protection" to their "persons and property," "leaving open and free the tribunals of justice."

The claimant under the order of expulsion was allowed only three days to reach Vera Cruz, whither he was to be taken under a military escort and shipped out of the country. At that time the yellow fever was raging at Vera Cruz, and some of the claimant's family were stricken down. He was injured in health and reputation and ruined in fortune by his sudden and harsh expulsion.

The American commissioners awarded $24,592.50 for the first expulsion, but the umpire disallowed the claim on the ground that Santangelo was not at that time a citizen of the United States, though he had made a declaration of intention to become one. He was, however, naturalized in 1829, and for the second expulsion, for which the American commissioners awarded $54,588, the umpire allowed $50,000.

Case of Santangelo, commission under the convention between the United States and Mexico, of April 11, 1839.

Commission under the Act of March 3, 1849.

"Several memorials have been presented to the board by citizens of the United States who were residing in Mexico at the commencement of the late war with that country, setting forth, severally, claims to indemnity for losses sustained by the memorialists in consequence of having been expelled at short notice, by order of the public authorities of Mexico, from the places of their residence and business in violation, as is alleged, of the twenty-sixth article of the treaty of April 5, 1831.

"By the law of nations, whenever a war breaks out between two countries, the persons and property of one of them found within the dominions of the other are liable to detention and capture.

"'When hostilities have commenced, the first objects that naturally present themselves for detention and capture are the persons and property of the enemy found within the territory on the breaking out of the war. According to strict authority a state has a right to deal as an enemy with persons and property so found within its power, and to confiscate the property and detain the persons as prisoners of war.' (Kent's Com. vol. 1, pp. 55–56, citing Grotius, B. 3, C. 9, S. 4.)

"This absolute right, however, has not been very rigorously insisted upon, especially in modern times, although the United States, during the late war with Great Britain, by the decision of the Supreme Court maintained the sterner and ancient rule of national law upon this subject to its full extent. (8 Cranch, 110, *Brown* vs. *U. States*, 1 Kent, 59.) But, however absolute the right may be, all writers on public law agree that it may be modified and regulated by treaty; and it is said that most of the treaties of the present day make provision for such contingencies. (1 Kent, 55–56.) And although, as a general principle, the breaking out of war puts an end to all treaties be-

tween the belligerents, yet it is not universally so. Kent, vol. 1, p. 175, says:

"'As a general rule the obligations of treaties are dissipated by hostility, and they are extinguished and gone forever unless revived by a subsequent treaty. But if a treaty contains any stipulations which contemplate a state of future war, and make provision for such an exigency, they preserve their force and obligation when a rupture takes place. All those duties of which the exercise is not suspended necessarily by the war subsist in their full force. The obligation of keeping faith is so far from ceasing in time of war that its efficacy becomes increased from the increased necessity for it.' 'Where treaties contemplate a permanent arrangement of national rights, or which by their terms are meant to provide for an intervening war, it would be against every principle of just interpretation to hold them extinguished by the event of war.' (Ib. p. 177.)

"The twenty-sixth article of the treaty of April 5, 1831, between the United States and Mexico is in these words:

"'ART. 26. For the greater security of the intercourse between the citizens of the United States of America and the United Mexican States, it is agreed, now for then, that if there should be at any time hereafter an interruption of the friendly relations which now exist, or a war unhappily break out between the two contracting parties, there shall be allowed the term of six months to merchants residing on the coast and one year to those residing in the interior of the States and Territories of each other respectively to arrange their business, dispose of their effects, or transport them wheresoever they may please, giving them a safe conduct to protect them to the port they may designate. Those citizens who may be established in the States and Territories aforesaid, exercising any other occupation or trade, shall be permitted to remain in the uninterrupted enjoyment of their liberty and property so long as they conduct themselves peaceably and do not commit any offense against the laws; and their goods and effects, of whatever class and condition they may be, shall not be subject to any embargo or sequestration whatever, nor to any charge nor tax other than may be established upon similar goods and effects belonging to citizens of the State in which they reside respectively; nor shall the debts between individuals, nor moneys in the public funds, or in public or private banks, nor shares in companies, be confiscated, embargoed, or detained."

"This article of the treaty secured to citizens of the United States doing business as merchants and residing on the coast the right to remain six months, and to those in the interior

one year, at their places of business for the purpose of arranging their affairs and disposing of their effects, or of transporting them from the country. It did not give the right for any other purpose; nor did it give the right of removal of the person or his property to other places in the territory for the purpose of extending trading operations or commencing new branches of business. The purpose is explicitly stated. In some of the memorials before the board it is alleged that by reason of the expulsion of the claimant from the place of his residence on the coast, Vera Cruz, Tampico, or Matamoras, he was prevented from sending his merchandise into the interior before those places were taken possession of by the American arms, as other foreign merchants did, and that upon the opening of those ports to importations of goods from the United States, without payment of duties, prices considerably declined, whereby the claimants sustained heavy losses upon their stocks of goods Although the language of the article of the treaty above quoted is not entirely explicit, the obvious construction of it, in the opinion of the board, only guaranteed to the merchant the right to remain at his place of business and to dispose of his effects there in the same manner he had been accustomed to do. The decline of prices consequent upon the occupation of the ports by the American forces is not attributable to any cause for which Mexico is responsible. In the opinion of the board the expulsion of citizens of the United States from their places of residence and business in Mexico, during the existence of the late war, before the expiration of the period limited in the treaty, by the public authorities of Mexico, was in violation of their rights secured by treaty, and constitutes a valid claim on the part of any persons so expelled against that republic for all losses and damages which shall be proved to result from such expulsion.

Cases of Breeze, Chase, Fox, Gisner, Miller, Schatzell, Strother, and the Zezeneaus.

"By an order of the supreme government of Mexico, dated 12th of May 1846, and promulgated at Tampico in the early part of the following month, all citizens of the United States residing in any port which should be visited by a vessel of war of the United States were, within the period of eight days, to be sent into the interior, twenty leagues from the coast, unless they should prefer to embark within that period, and all consuls and vice-consuls of the United

States were immediately to cease their functions. The port of Tampico having been entered by the United States vessel of war *St. Mary's* in the month of June, this decree was enforced against the citizens of the United States residing there.

"The claim of Franklin Chase, then consul of that port, has already been decided to be valid, he having been compelled to embark in consequence of the order above recited. Sidney Udall, a citizen of the United States, a carpenter and builder by trade, then residing in Tampico, was also required to leave within the prescribed time, and was sent into the interior and did not return to the city until after it was taken possession of by the American troops. He has presented a memorial to the board claiming indemnity for the damages sustained by him consequent upon such expulsion.

"The board is of opinion that this claim is valid and allows the same accordingly, the amount to be awarded subject to the future action of the board.

" In the month of April 1846, in consequence of the occupation of the left bank of the Rio Grande by the American troops under General Taylor, an order was issued by General Ampudia, then commanding the Mexican troops on the opposite bank, requiring all citizens of the United States residing in Matamoras, and by another order those residing in Reynosa, to remove, or to be sent, into the interior within the period of twenty-four hours from the promulgation of such orders, and in consequence thereof Mr. John P. Schatzell, then consul of the United States at Matamoras, and several other citizens of the United States, merchants and mechanics, were compelled to leave their business and retire into the interior. General Ampudia's order required them to go to Victoria. They left Matamoras on the 12th of April, but went only about fifteen miles from the city, where they remained several days. In the mean time General Arista had superseded General Ampudia in the command of the Mexican army, and an appeal was made to him to revoke the order of expulsion issued by the latter, and a protest was made against it as being in contravention of the treaty of 1831. General Arista declined to revoke the order, but so far modified it as to permit the parties to go to Tampico and embark there, if they chose to do so, instead of going to Victoria. Mr. Schatzell and three or four others availed themselves of the permission and went to Tampico. Henry Breeze,

one of the claimants, was permitted, upon his application, to return to Matamoras after an absence of about twenty days. It does not appear that he had been to a greater distance from the city of Matamoras than Moquito, a place fifteen miles off. But his memorial nevertheless sets forth that in consequence of such expulsion he was compelled to abandon his affairs, and 'travel through a hostile country infested with robbers and disease at the great risk of life and fortune.' Henry Gisner, an American citizen residing at Matamoras, a combmaker by trade, also sets forth in his memorial that he was expelled by virtue of said order, 'and had to abandon his affairs and had to travel through a hostile country infested with robbers and disease, at the great risk of life and fortune;' and indeed all the memorials contain the same allegation. Among the papers furnished to the board by the State Department is a statement made by Gisner upon oath, that owing to his inability he did not leave the city under the order of General Ampudia, and was in consequence arrested by the Mexican authorities and imprisoned several days, when he was removed to a rancho about one league distant, where he was kept at labor for some days longer, having been detained in the whole, about thirty days. Several others, it also appears from the papers before the board, remained at ranchos, or stock farms, at a short distance from the city, and yet they all recite that they were compelled to travel through a country infested with robbers and disease. These manifest and palpable exaggerations of the grounds of claims are calculated to impair very seriously the testimony adduced in support of the amount of losses set forth by the memorialist respectively. Soon after the army of the United States had taken possession of Matamoras these memorialists returned to that place and resumed their various pursuits, from which they had been debarred about sixty days, at most, some of them for a shorter period.

"In the opinion of the board, the claims of John P. Schatzell, George S. Miller, Henry Breeze, Joachim Fox, French Strother, Adloph Zuzeneau, Pierre Zuzeneau, administrator of Emilie Zuzeneau, deceased, and Henry Gisner, set forth in their several memorials to this board, are valid claims against the Republic of Mexico and the same are allowed accordingly, the amount to be awarded to the said parties respectively to be subject to the future action of the board.

Cases of East, Messervey, E. D. Smith, Stevenson, and Wethered.

"Under one of the orders of General Ampudia before referred to, Elihu D. Smith, a citizen of the United States, then residing at Reynosa, employed in trade and in ginning cotton, was compelled to leave that place with his family on the 9th of April 1846, and to remove to Victoria, distant about three hundred miles. He was absent four months. The board is of opinion that his claim, set forth in his memorial, is valid, and allows the same accordingly, the amount to be awarded subject to the future action of the board.

"In the month of September 1846 seven American citizens residing in Chihuahua were, by order of the governor of that state, removed under a military guard to a mining town at a distance of about ninety miles, in consequence of information having been received of the occupation of Santa Fé and other places in New Mexico by a portion of the forces of the United States, and their expected advance before Chihuahua. They do not appear to have been treated with severity or undue harshness by the public authorities of Chihuahua or elsewhere. Upon the occupation of that city by the forces of the United States under Colonel Doniphan they were allowed to return, having been absent about six months.

"Among those thus removed were George East and Archibald Stevenson, who have presented memorials claiming indemnity for the losses sustained by such removal. East was a merchant doing business to a large amount. His affairs were left in charge of two persons who had been in his employment as clerks, and by whom most of the merchandise on hand was sold; and some portion of the debts due to East were collected. By the terms of the treaty of 1831 he was permitted to remain one year from the commencement of the war to arrange his affairs and dispose of his effects. It does not appear that the agents of Mr. East might not have had that full term to dispose of the merchandise if they had desired it; nor that they were in any manner directed or controlled in respect to the winding up of the business by Mexican authorities. If the sales were forced, or made at reduced prices, as is alleged, by which a loss from the estimated value of the merchandise was sustained, that was a consequence for which Mexico was not responsible. It was the duty of East to wind up his affairs within the year, and undoubtedly some loss must always be

expected to result from closing so extensive a concern. If it was done with undue haste, that was the fault of the agents to whom the business was entrusted. The board is of opinion that the claim of East is valid, and allows the same accordingly, for such damages as is proved to have been sustained attributable to his compulsory removal, the amount to be awarded subject to the future order of the board.

"Stevenson was the keeper of a large hotel. In consequence of his removal the hotel was closed, although Stevenson was obliged to pay the rent, taxes, etc., for the period of his absence. The furniture was much injured, and the liquors and groceries left by Stevenson were much wasted and injured. The board is of opinion that his claim is a valid one against the Republic of Mexico and allows the same accordingly, the amount to be awarded subject to the future order of the board."

Expulsion cases, opinion of Messrs. Evans, Smith, and Paine, commissioners under the act of Congress of March 3, 1849. Other cases, presenting the same circumstances as those of East and Stevenson, and in which awards were made in favor of the claimaints, were those of William S. Meservey, and George C. Wethered.

Cases of Chase, the Laflers, and Walley.

Franklin Chase, United States consul at Tampico, whose expulsion is referred to in the preceding opinion, was engaged in business at that port and had on hand at the time of the order of expulsion a large stock of goods. He elected to embark on an American man-of-war, instead of going into the interior, and remained on board from June till November 1846, when, the city having surrendered to the American forces, he returned and resumed possession of his property, receiving it from his wife, Ann Chase, who had remained in the city during his absence and retained possession of his goods and other effects. The memorial before the board was presented by the husband and wife jointly, but the board failed to find anything in the facts which would justify a joint award in their favor. The goods appeared, said the commissioners, "to have been the property of the husband, and the business was conducted by him. He alone was expelled. * * * The board therefore decides that the claim of Franklin Chase is a valid claim against the Republic of Mexico."

Another one of the Tampico cases was that of George and Peter Lafler and Samuel Walley, merchants of Tampico, who were also engaged as partners in the manufacture of brick,

and in cutting dyewoods and farming, on the Panuco River, about 18 miles from Tampico. On June 12, 1846, when the *St. Mary's* arrived at Tampico, they obtained a special permission in writing from the military commandant of Tampico, General Parrodi, "to remain at their brickyard, situate at the Caracol, without having permission upon any motive whatever to leave said place during the present state of war between the United States and Mexico." In the following November, when Tampico was occupied by the American forces, they returned to the city, where they remained during the war. They claimed indemnity to the amount of $147,514.91. They filed an itemized statement entitled "Inventory of property and effects belonging jointly to the firm of Walley & Laflers, with a correct estimate of the losses sustained by said firm previously and after the occupation of Tampico by the military forces of the United States." The principal items were for the loss of dyewoods, which, it was alleged, were cut and piled on the bank of the river ready for exportation and were carried off by freshets; for several boats which were sunk in the river and lost for the want of hands to navigate them; for corn destroyed while growing, in consequence of fences being destroyed by Mexicans, and for loss of profits by reason of the interruption of their business for a period of two years. Besides, there were charges for loss of debts, for the increased expense of keeping cows and other stock which were taken to Tampico in consequence of the danger of loss by robbery on the farm, and for the increased personal expenses of the claimants. Referring to these claims, the commissioners said:

"The board has already had occasion to refer to the exaggerated and unfounded claims of American citizens against the Government of Mexico, based upon the twenty-sixth article of the treaty of 5th April 1831. A construction has been given to that article by several of the claimants before the board which would make the Government of Mexico responsible for all the losses which resulted from a state of war. * * * American merchants residing in Mexico at the commencement of the war were entitled under the treaty to remain six or twelve months, according to the place of their residence, only to enable them 'to arrange their business, dispose of their effects, or transport them wheresoever they may please.' * * * They had no right to engage in any other business than merely the disposal of their property which they had when the war commenced.

"American citizens who were not merchants, but who exercised 'any other occupation or trade,' were entitled to 'remain in the uninterrupted enjoyment of their liberty and property

so long as they conduct themselves peaceably.' Those who claimed the protection of the Government of Mexico under this provision of the treaty were bound to observe a strict neutrality in the contest. Any departure from a strict neutrality would forfeit all right to protection and render them liable to be treated as enemies. The claimants in this case, although they were engaged to some extent in agricultural pursuits and in the manufacture of brick, were merchants, and as such were embraced in the first clause of the twenty-sixth article of the treaty, and were liable to be expelled after the expiration of six months from the commencement of the war. Their trade in dyewoods was a part of their commercial business, as it appears from the evidence that they carried on a large export trade in that article from the port of Tampico. * * * The present claim is held valid to the extent of the loss shown to be a consequence of the expulsion from Tampico previous to the expiration of the six months. For the losses subsequent to that period they were entitled to no redress as against Mexico. The fact that they were engaged in other business than their mercantile operations did not exempt them from the liabilities which attached to them as merchants.

"But if the claimants could have claimed the right to remain in Mexico and prosecute their business after the expiration of six months, the evidence before the board shows that at least one of them took such a part in the contest between the United States and Mexico as destroyed his neutral character and forfeited any right which he might otherwise have claimed. A letter from Colonel De Russy, which the claimants have filed as a part of their evidence, states that after he went to Tampico, in February 1847, George Lafler conducted himself in a manner highly honorable to an American. 'Sacrificing every prospect of favor from the people with whom his interests had become engaged to the high principles of his own national honor and the best interests of his country, Mr. Lafler volunteered willingly to accompany the undersigned upon a dangerous expedition to the heart of the country here, upon which occasion resulted the battle of Calaboose River, where and when he conducted himself in a manner highly honorable to his individual gallantry, and by other important services rendered,' etc. The board does not quote this letter with a view of imputing any censure to Mr. Lafler for the course he saw proper to pursue. On the contrary, every American must feel gratified by the exhibition of that high sense of the demands of patriotism which prompted him to uphold the flag of his country in a foreign land at the sacrifice of his personal interests. They can not, however, consider that Mexico was under obligations to extend protection to his person or property after he had thus assumed a position of active hostility.

"For the losses which the claimants sustained after the expiration of six months from the commencement of the war, no responsibility can be charged to the Mexican Republic."

Cases of Remer, Kidder, Stevens, and Stillman.

Claims for expulsion from Matamoras were allowed by the commissioners in favor of Simeon Remer, Danforth Kidder, Charles Stillman, and Henry Stevens. In the case of Stevens, the commissioners said:

"The only doubt which has existed in relation to the present claim is, whether the claimant is a citizen of the United States. In his memorial he avers that he was born in Denmark, but that he is a naturalized citizen of the United States. He does not produce the letters of naturalization, but shows that he was always regarded and treated as a citizen of the United States while at Matamoras, and as such received the letters of security granted by the Mexican Government upon application of the consul of the United States at that port for several preceding years. He was regarded by the Mexican authorities also as a citizen of the United States, and as such was expelled. Under the circumstances of this case, although the proof of citizenship is not that which is required by the rules of the board, it is inclined to consider this evidence satisfactory, and allows the claim accordingly."

Murphy's Case.

Among the Americans expelled from Vera Cruz in May 1846 was William Murphy. In regard to his claim the commissioners said:

"At first we entertained some doubt whether the claimant had not forfeited his right under this provision of the treaty by taking part with the United States against Mexico in the war which was raging. It appears that Murphy had been for some time prior to the commencement of hostilities a contractor to supply the United States home squadron, when visiting Vera Cruz, with water and fresh provisions—a legitimate and proper business in time of peace but illegal in time of war. It further appears by certificates from naval officers that during the war he was the constant friend of the United States and rendered great service at much peril in obtaining provisions and supplies for the fleet from the shore. But upon careful scrutiny it does not appear that any service was rendered under the contract after the commencement of the war, or that any supplies were furnished or attempted to be furnished to the United States vessels until after his expulsion from Vera Cruz, from which time he was released from all obligation to observe a neutral position. He was not ordered away for any such cause, but was comprehended in a general order requiring all citizens of the United States to depart within the period of eight days. If he had been guilty or suspected to be guilty of aiding the enemies of Mexico '*flagrante bello*,' it is probable a much severer punishment would have awaited him. * * * In the opinion of the board, the claim set forth

in the memorial of William Murphy is valid against the Republic of Mexico, and the same is accordingly allowed."

A claim for expulsion from Vera Cruz was also allowed by the commissioners in the case of Louis L. Hargous.

Wright's Case.

"The memorialist was a merchant residing in the interior and entitled to remain there during the term specified in the treaty—one year. The act of Congress recognizing the war between the two countries was approved and became a law on the 13th of May 1846. After the expiration of one year from that date the obligation imposed upon Mexico by the treaty in reference to American merchants residing within her territories was at an end, and her rights under the laws of nations were then without restriction. The order presented by the memorialist as the foundation of his claim was issued after the expiration of a year from the commencement of the war, and was the exercise of a right which the laws of nations clearly recognized. In the opinion of the board the memorial does not set forth a valid claim against Mexico under the treaty of 2nd February 1848, and it is therefore rejected."

Case of Atkins S. Wright: Opinion of Messrs. Evans, Smith, and Paine, commissioners, under the act of Congress of March 3, 1849.

Burn's Case.

"On the 1st of June 1847 an order was published by the Mexican Government requiring all citizens of the United States in the City of Mexico to leave the city and retire to the State of Jalisco or the State of Morelia. Under this order the claimant was compelled to leave the city, and did not return until after the American army had entered it. The claimant, not being a merchant, by the terms of the twenty-sixth article of the treaty of 1831 was entitled to remain in the uninterrupted enjoyment of his liberty and property so long as he conducted himself peaceably and committed no offence against the laws. It is not shown by the evidence that anything was done by him which could justly forfeit the protection to which he was entitled under the treaty. The board is therefore of opinion that he is entitled to some indemnity for the losses sustained by reason of his expulsion."

Case of Benjamin Burn: Opinion of Messrs. Evans, Smith, and Paine, commissioners under the act of Congress of March 3, 1849.

Togno's Case.

"The memorial of this claimant was rejected by the board 3d February 1851 on the ground that he was embraced in the term 'Merchants' used in the twenty-sixth article of the treaty of 1831, and therefore not entitled to remain in the country and prosecute his business after the expiration of one year after the commencement of the war. Some depositions have been since filed which, taken in connection with the testimony filed with the memorial, prove that he was 'a tailor by trade, engaged in cutting and making clothes for customers, that he kept an assortment of cloths to make up for his customers and called himself a merchant tailor.' From this discription of his business the board is of opinion that he was not a merchant within the meaning of the treaty, and was therefore entitled to remain in the City of Mexico in the prosecution of his business so long as he committed no act which would operate as a forfeiture of the right secured to him by the treaty. The order of the board rejecting his memorial is therefore rescinded, and the same is received. And upon an examination of the proofs, together with the memorial, the board is of opinion and decides that the claim is valid and the same is allowed accordingly."

Case of John M. Togno: Opinion of Messrs. Evans, Smith, and Paine, commissioners under the act of Congress of March 3, 1849.

Ducoing's Case.

"It is alleged in the memorial under consideration that Theodore Ducoing, a native citizen of the United States, and two others, citizens of France, were copartners and doing a large and profitable business in the City of Mexico when the war broke out between the United States and Mexico, and that on the 1st of June 1847 an order or decree was made by the supreme government of Mexico that all citizens of the United States should, within twenty-four hours, leave the capital for the interior. It is set forth that the memorialist, by virtue of this order, was compelled on the 2d day of June 1847 to relinquish his extensive and profitable business in the City of Mexico, and that he set out for Morlia, but in consequence of sickness stopped at Tolucca and was there permitted to remain. It is further alleged that the memorialist was not allowed to return to the City of Mexico until the month of September following, and that in consequence of his absence his business suffered greatly, etc. * * * The memorial sets forth

that the order of the 1st of June 1847 was in contravention of the fourteenth article of the treaty of 1831, between the United States and Mexico. This is clearly erroneous, for the treaty only protected the party for twelve months after the occurrence of war between the two nations, and more than a year had elapsed from the commencement of the war to the issuing of the order of the 1st June 1847. The argument, however, puts the claimant's right under the law of nations. In this it is alleged that on the 5th of January 1847 the Mexican Government granted to the claimant a 'carta de seguridad,' or letter of security, and that in the month of February following the Mexican Congress, by a very decided vote, negatived a motion to expel all citizens of the United States from the country. In consequence of these acts of the government it is contended that Ducoing was lulled into security by Mexico and the latter had not, therefore, any right to compel him to remove from his place of residence until sufficient notice was given to enable him to leave without detriment to his business. * * * The vote of the Mexican Congress to which reference is made in the argument was only in conformity with the obligations binding on Mexico under the treaty of 1831; and this board can not believe that it was intended as a lure to deceive citizens of the United States. So also with the letter of security issued to the claimant on the 5th of January 1847, four months before his rights under the treaty would expire. This board can not believe that Mexico intended by granting such letters of security to do anything more than fulfil her treaty obligations; that is, to allow Ducoing to remain in the City of Mexico until the expiration of one year from the commencement of war. This is the more obvious from the fact that even in times of peace the laws of Mexico required every foreigner to take out a letter of security and to renew it annually. * * * He could not enjoy his right of residence under the treaty without providing himself with a letter of security. * * * The army of the United States was approaching the capital of Mexico. More than twelve months had elapsed after the war broke out, and the memorialist does not set forth that he could not at the expiration of twelve months have embarked from the country voluntarily. Having remained beyond the period allowed him, he can not complain that Mexico at such a period of imminent peril to her capital would not allow him to remain in a situation where

he would be able to communicate with her enemy. It is also to be observed that the letter of security, upon which the right of the memorialist is founded, is a mere right to reside and travel in Mexico, and does not contemplate any continuation of business. * * * The board is therefore of opinion that the memorial considered in connection with the argument does not set forth a valid claim against Mexico, and the same is accordingly rejected."

Opinion of Messrs. Evans, Smith, and Paine, commissioners, February 28, 1851, under the act of Congress of March 3, 1849.

Lee's Case.

William H. Lee, a citizen of the United States residing in Matamoras, Mexico, where he carried on the business of a retail grocer, was, in consequence of the Mexican decree of September 23, 1843, prohibiting foreigners to carry on the retail trade, compelled to close his business and sell his stock at a sacrifice. A claim for the loss thus occasioned was presented to Messrs. Evans, Smith, and Paine, commissioners under the act of Congress of March 3, 1849, who said:

"The strong ground of resistance to this decree taken by the United States minister at Mexico, under instructions from the Department of State, precludes this board from an examination of the justice of this decree. It was holden by the Government of the United States to be '*plainly and palpably*' in violation of the treaty of 1831 between the United States and Mexico, and its repeal demanded so far as it might affect the rights of citizens of the United States. (See instructions from Mr. Calhoun to Mr. Shannon, of June 20, 1844. S. Doc. 2d sess. 28 Cong.) The board therefore considers itself in this case restricted to the inquiry into the proof adduced in support of the claim, only as it may affect the fact of injury and the extent thereof."

Mexican Commission: Case of Lacoste.

"Lacoste further claims damages for his arrest, imprisonment, harsh and cruel treatment, and expulsion from the country. The charge of imprisonment and cruel treatment and of having been condemned to death is not supported by any proof whatever. With regard to the expulsion of the claimant from the country, it must be remembered that, owing to the French invasion, the President of Mexico was invested with great and extraordinary powers; and although such powers ought not generally to be exercised for the expulsion of foreigners without good cause shown, the case is different

where the foreigner is a countryman by birth of the invaders and conceals, as the claimant appears to have done, the fact that he had adopted the United States as his country. The expulsion does not, however, appear to have been accompanied by harsh treatment, and at his request the claimant was allowed an extension of the term fixed for his leaving the country."

Thornton, umpire, *J. B. Lacoste* v. *Mexico*, Nos. 222 and 717, convention of July 4, 1868, MS. Op. VII. 402. The claim was dismissed. So, also, were the claims against Mexico of *Charles P. Stone*, No. 48; *R. E. K. Whiting*, No. 455, and *Ella J. Whiting*, No. 483, for expulsion from Sonora, the umpire holding that the United States had condoned it. (MS. Op. VII. 345, 483.) In the case of *J. N. Zerman* v. *Mexico*, No. 613 (MS. Op. V. 319, VI. 369) Sir Edward Thornton awarded the claimant $1,000 on account of his expulsion from Mexico, saying: "The umpire is of opinion that, strictly speaking, the President of the Republic of Mexico had the right to expel a foreigner from its territory who might be considered dangerous, and that during war or disturbances it may be necessary to exercise this right even upon bare suspicion; but in the present instance there was no war, and reasons of safety could not be put forward as a ground for the expulsion of the claimant without charges preferred against him or trial; but if the Mexican Government had grounds for such expulsion it was at least under the obligation of proving charges before this commission. Its mere assertion, however, or that of the United States consul in a dispatch to his government, that the claimant was employed by the imperialist authorities does not appear to the umpire to be sufficient proof that he was so employed or sufficient ground for his expulsion."

Mexican Commission: De Rijon's Case.

"It is claimed that in April 1864 Don Manuel Garcia de Rijon, the husband of the claimant, was turned out of Brownsville, which was then held by the United States forces under General Herron, and was forcibly conveyed to Matamoras, where, on the following day, he was shot by order of General Cortina. The claimant demands compensation from the United States Government on account of the action taken by General Herron which was followed by the execution of Señor Rijon. On the part of the defense it is stated that Rijon, during his residence at Monterey, had persecuted United States citizens who favored the cause of the Union, and that he sympathized with the Confederates. Whether this was true or not, the right which General Herron claimed of turning anyone out of his lines when he thought proper to do so was the undoubted right of any officer in the position held by General Herron. It must be remembered that his position was a difficult one; that at the time the United States forces occupied but a very small

portion of Texas, and it was very natural that he should not be disposed to keep within his lines persons whom he might have considered disaffected or dangerous. An officer in command in such a position is not always bound in time of war to give his precise reasons for such steps. It was considered necessary that Señor Rijon should be removed from within General Herron's lines. He could be sent only either into Mexican territory or within the Confederate line. The latter it is not likely that General Herron would have consented to, even if he had been asked. It was indeed much more natural to transport a Mexican to the nearest point of Mexican territory, which was Matamoras and was close by. General Herron had apparently no reason to suppose that in sending Señor Rijon to Matamoras he was exposing him to the risk of losing his life. There is no evidence that Señor Rijon or his friends made any representations to General Herron, or to the officers who accompanied Rijon across the river, to the effect that there would be danger to his life by his going to Matamoras. That he was accompanied by three officers was natural in order that his leaving the lines might be insured, and possibly also for the purpose of protecting him from insults in Brownsville, where his supposed sympathy with the Confederates did not make him popular. If there be truth in the statement found in the so-called memorial, that 'the hostile attitude observed by Don Santiago Vidaurri, then governor of the State of Leon, against President Juarez, on his approach to Monterey, was displeasing to the Licenciado Rijon,' and that in order not to be implicated in these matters he 'resigned his office and retired from Monterey,' then it could not have been supposed by General Herron or by anyone that Rijon would have been exposed to any danger by going to Matamoras. However deplorable the result was, there is no evidence to prove that it could have been foreseen by General Herron, nor can he or the Government of the United States be held responsible for it."

Thornton, umpire, July 13, 1876, *Dona Mercedes Pinon de Rijon* v. *Mexico*, No. 567, convention of July 4, 1868, MS. Op. VI. 343.

Cases of the Fosters, and Gibbs.

"The cases of *James D. Foster* v. *Mexico*, No. 789; *E. K. Gibbs* v. *Mexico*, No. 791, and *William S. Foster* v. *Mexico*, No. 816, are so precisely alike that they may be properly treated together. The commissioner of the United States has likened them

to the cases of *James A. Costa* v. *Mexico*, No. 560, and *Alfred F. Marshall* v. *Mexico*, No. 650, but the umpire is of opinion that there is a material difference between them. There was no proof in the two latter cases that the claimants belonged to what was considered a military colony under the protection of the imperial government of Maximilian, and the umpire therefore awarded compensation for the arrest, bad treatment, and final expulsion of those two claimants. The three claimants whose cases are now under consideration certainly were members of a colony of that nature, which was established in the estate of Omealca and other neighboring estates by the imperial government with a view to the protection of that part of the country and to preventing the forces of the Mexican Government from advancing in that direction. That General Figuera was justified in breaking up that colony the umpire can not doubt. The Americans who composed it were certainly under the protection of the imperial government, who had bestowed upon them lands which, as it appears, belonged to Mexican citizens from whom they had been confiscated. The umpire believes that their removal from that point was fully justifiable; and by the strict rules of war their property found in the enemy's country, even when belonging to neutrals, which the claimants do not seem entirely to have been, was liable to seizure."

Thornton, umpire, April 7, 1876, convention of July 4, 1868, MS. Op. VI. 410.

Spanish Commission: Phillip's Case.

On January 3, 1870, the claimant, who was then discharging the functions of acting consul of the United States at Santiago de Cuba, pending the assumption by the duly appointed consul of the duties of the office, wrote a dispatch to the Secretary of State of the United States, in which he made grave charges against the Cuban volunteers and their officers. Among other things he said:

"The assassination at Bayamo of the citizens sent from this city by order of Count Valmaseda, which fact I have already communicated to the department, was nothing more than what is daily perpetrated. It is well known that Valasmeda aspires to the position of captain-general of the island, and in order to increase his popularity among the blood-craving Catalans, who are operating in his behalf, both in this island and in Spain, gives imperative orders to make this a war of extermination, and we daily learn of peaceful citizens residing in the

country assassinated by the mobilized Spanish troops. These orders are probably carried to an extreme, from the fact that those commanding such troops are constantly supplying some Catalan produce dealers of this city, and whose object is to sack the country and forward to their agents such portions of the crop as may fall into their hands."

The dispatch was communicated by the President to the House of Representatives, together with other papers accompanying his message of February 21, 1870.[1] It was published in the New York *Herald* of February 23, and on the 8th of the following month it appeared in Spanish in a journal at Santiago de Cuba. There were upward of 2,000 volunteers in that city, and a hundred or more of them, excited by the publication of the claimant's dispatch, assembled about his house, threatening to kill him and waving their swords. To pacify them the claimant signed a retraction of his charges, which was presented by two officers of the volunteers, who, it seems, were deputed at a meeting of officers on the same day to go to the claimant's house and ask for explanations. Owing to the excitement prevailing, some of the claimant's friends advised him to leave the island by a steamer then in port. The claimant appealed to the governor of the city for protection. The governor said that while he could guarantee official protection, as a friend he advised the claimant to leave the country immediately. The claimant asked for a passport and an escort to attend him to the steamer. The governor refused the escort, saying that the claimant did not need it, though he subsequently sent his secretary to accompany him to the steamer. He declined to give the claimant a passport till he had turned the consulate over to the duly appointed consul, who had for several days been in the city, but who, on account of illness, had not assumed the discharge of his official functions. The consul, in order, as he said, to save the claimant's life, took charge of the consulate, and the claimant left the country on the afternoon of the same day.

The advocate for the United States contended that it was the duty of the authorities to extend ample protection to the claimant, especially as he was acting in a consular capacity, and referred to the action of the United States in 1852, in indemnifying the Spanish consul and other subjects of Spain residing at New Orleans for losses occasioned by a mob in 1851. (10 Stats. at L. 89.)

[1] H. Ex. Doc. 160, 41st Cong. 2 sess. p. 187.

The advocate for Spain maintained that the claimant's treatment was the result of his denunciation of the volunteers, and that the Spanish Government was not responsible for his departure from the island under the circumstances disclosed. He also laid stress on the fact that the United States had not demanded any reparation from Spain for any injury to the claimant as a consular officer of the United States.

The arbitrators differing in opinion on the case, it was submitted to the umpire, who on December 26, 1881, advised the advocates for the United States and Spain that he had determined that the claimant would not have been entitled to indemnity if he had been a private citizen; and he requested their opinion on the question whether he had jurisdiction to decide whether a United States consul had forfeited the protection of his official position. The advocate for Spain answered in the affirmative. The advocate for the United States answered as follows:

"I am of opinion that the umpire has no jurisdiction to decide whether a consul of the United States has forfeited the protection of his official position. The United States make no claim here for indemnity for national injury in the person of Mr. Phillips. They demand compensation for injuries inflicted upon him personally, and in an individual capacity."

The umpire rendered the following decision:

"It appears that Dr. Phillips was not expelled by the Spanish Government, but that he was obliged to depart because he had, by bitter denunciations against the volunteers, excited their hatred to such a degree that an attempt to kill him was apprehended.

"The advocate for the United States says:

"'Dr. Phillips was an American citizen, who from a high sense of duty to his own countrymen felt constrained to perform temporarily the duties of a consular office and to give his own government a true and faithful account of what was transpiring around him. He was not actuated by any personal, or mercenary, or unworthy motive of any kind in making his reports, nor did he suppose that he was guilty of any offense or imprudence in sending his report to his own government. He was in no way chargeable with or responsible for the publication of his reports.'

"The umpire is of opinion that he has no jurisdiction to enter into any question concerning the rights of the claimant as a United States consular officer. The question to be decided is, whether the claimant received the protection due to him as a private American citizen, and with regard to this question the

umpire is of opinion that, under the circumstances in this case, Spain would not have incurred any liability even if he had been expelled.

"Therefore the umpire hereby decides that this claim be dismissed."

Count Lewenhaupt, umpire, case of *Augustus C. Phillips*, No. 67, Span. Com. (1871), February 27, 1882.

Casanova's Case.

"On the night of the 24th February 1871 the claimant, who had just landed in Cuba, was arrested and directed to go on board the steamer plying between Cuba and New York, which he did the same night. The evidence tends to show that the Spanish authorities subsequently changed their purpose of excluding the claimant from the Island of Cuba, and that his actual departure was more due to his fears than their commands. A late writer has said, 'A nation has the right to forbid entrance into its territory of particular foreigners for political motives or motives having reference to the laws. The sufficiency of these motives is a question for the state, which alone can exercise its sovereignty in its own territory.' (Bluntschli, 382.)

"In our opinion, Spain had, under the circumstances, the right to forbid the entrance of Mr. Casanova into the Island of Cuba, and his arrest was only such as was necessary to that end."

Opinion of the Marquis de Potestad, arbitrator for Spain, concurred in by Mr. Lowndes, arbitrator for the United States, case of Ynocencio Casanova, No. 25, Span. Com. (1871), December 26, 1882.

Lynn's Case.

A claimant, a citizen of the United States, married in Cuba a Spanish subject. This lady was arrested on a charge of complicity with an insurrection, and on April 8, 1870, she was tried and acquitted, and was permitted to return to her husband. His house, however, was placed under surveillance, and it was alleged that threats were made against him by Spanish volunteers, and that warnings were given him by his friends. On the 3d of May 1870 he suddenly and secretly left the island. When his departure became known, his creditors instituted proceedings against him, in the course of which he was declared insolvent and his property was sold. In these proceedings he was represented by a duly authorized attorney. It was contended, on behalf of the claimant, that "the Spanish

authorities, having by their conduct created suspicions and an unfavorable impression in the minds of the community in regard to him, neglected to interpose in his behalf and afford him the protection to which he was entitled, but, on the contrary, compelled him to abandon his property and to seek safety in flight."

The umpire, Count Lewenhaupt, held that "the claimant had not sufficient reason to consider himself obliged to leave Cuba on account of any act of omission or commission of the Spanish authorities," and that he was not entitled to any indemnity on account of his claim.

Case of *William S. Lynn*, No. 104, Span. Com. (1871), April 18, 1881.

San Pedro's Case.

A claim was made for damages alleged to have been suffered in consequence of an unlawful expulsion from the Island of Cuba. It appears that the claimant was arrested on a charge of being implicated in an insurrection, and the expulsion complained of consisted in an option given him to stand his trial on that charge or to leave the island. He accepted the latter alternative, but some days before his departure the order for his expulsion was revoked. Of this fact he was duly informed. Subsequently, however, in the month following that in which the order of expulsion was revoked, he sold his property and returned to the United States.

On these facts it was held that the alleged enforced sale of his property could not be considered as having been necessitated by the order of expulsion, or by any act of omission or commission of the Spanish authorities, and that if he left on account of bad feeling toward him on the part of the inhabitants of the place in which he lived, this circumstance was not sufficient to entitle him to indemnity.

Count Lewenhaupt, umpire, case of *Juan San Pedro*, No. 117, Span. Com. (1871), April 18, 1881.

Case of Gowen and Copeland.

Early in 1854 John E. Gowen and Franklin Copeland, citizens of the United States, discovered a deposit of guano on the group of rocks known as Los Monges (the Monks), in the Caribbean Sea, near the mouth of the Gulf of Maracaibo. When the discovery of the guano was made the rocks were "uninhabited and uninhabitable, there being no vegetation and no water, nor were there any visible signs to indicate that they had ever been occupied by any human beings." Specimens of

the guano sent to the United States having proved, on analysis, to be exceptionally rich, Messrs. Gowen and Copeland made extensive preparations for removing it, and sent men, machinery, and materials, instructing their agents to take possession of the rocks, in the name of the United States, for the use and benefit of themselves. This was done in December 1854, and from that time on Gowen & Copeland worked the deposit till they were stopped in the manner now to be related.

In June 1855 the Venezuelan authorities notified the occupants of the islands that they must vacate them. They refused, or omitted to do so, but were not then disturbed. In the following September, however, some persons from Philadelphia, in the United States, who afterward formed an association called the Philadelphia Guano Company, having heard of the existence of the guano deposit, obtained a lease of the islands from the Venezuelan Government. It seems that Gowen & Copeland entered into negotiations with this company for a sublease, but failed to reach an agreement as to terms. In this posture of affairs a Venezuelan man-of-war, about the 1st of December 1855, appeared at the islands, put a file of soldiers on shore, seized the machinery, buildings, and materials of Gowen & Copeland, and expelled their manager and his men under threats of imprisonment. January 10, 1856, Gowen & Copeland entered into a contract with the Philadelphia Guano Company by which it was agreed that they should be permitted on certain terms to continue to work the deposit for a period of fifteen months. Gowen & Copeland claimed damages from Venezuela. This claim appears to have been based on the temporary seizure of their property and the expulsion of their men. It was not shown that the Venezuelan Government either appropriated any of their property or made any use of it between the date of its seizure and the renewal of work under the sublease.

Opinion of Mr. Findlay.

Mr. Findlay, commissioner, speaking for the commission, said that the question arose "at the very beginning of the case" as to the right of Venezuela to make the seizure; and that the commission, "without going minutely into the question of boundaries, the law of headlands, and of derelict property," was disposed to place its decision "upon the simple proposition that the claimants, in taking possession of a barren rock, or group of rocks, in the high seas, unoccupied and uninhabited, and as far as the proof shows never occupied, for

the temporary purpose of removing a valuable deposit, which they were the first to discover, can not be treated as trespassers, subject to be removed by the strong hand, and to be despoiled of their possessions without redress." Whether "New Grenada or Venezuela had the better claim to sovereignty," or "to which territorial garment the fringe composed of these island rocks" might be said to adhere, was a question "much too serious and far-reaching in its consequences" for the commission with its limited resources to determine. Besides, it was understood that the question of title was involved in an arbitration pending between Colombia and Venezuela. Continuing, Mr. Findlay said:

"The only question in the present case which we will dispose of is whether a wrong was done in dispossessing and despoiling the claimants in the peculiar circumstances under which they made their discovery. It is not claimed that they discovered the islands, the names of which disclose a Spanish origin, and which, in fact, had been marked down on maps centuries before, but their claim is that they for the first time set a human foot on their rocky sides with a view to reducing into possession a substance the existence of which was a secret to the rest of the world and the value of which had only been recently demonstrated. These islands were nineteen or twenty miles out at sea from the nearest coast, a gap which might almost suggest that the fringe did not belong to any government, but was waste territory of its own, not subject to any jurisdiction. The argument was made that they were in the track of commerce, and from a military point of view, either offensively or defensively, might be made strongholds for friend or foe; but admitting this, the force of which, however, was very much weakened on a closer examination of the precise location of the islands, the question that we are dealing with is not one of sovereignty or of ultimate ownership, but of temporary occupancy for a special, limited purpose, peaceable in its origin and purely commercial in its character. It is true that an attempt was made to take possession in the name of the United States, but this was a nugatory act and without significance or consequence. The United States never claimed jurisdiction and made no protest when its flag was hauled down under the orders of the captain of the Venezuelan man-of-war. The islands were occupied for the purpose of obtaining guano, and would have been abandoned as soon as this object had been accomplished.

"There was no flag flying to indicate that they were claimed by any other power. If the islands had been in the middle of the Pacific Ocean, without trees, grass, or water, and nothing but a group of barren rocks, with only a name and a place on the navigation charts, there could be but little question that

their occupation would not constitute a trespass. If this is true of islands a thousand or two thousand miles from shore, the only reason that it is not true of similar formations twenty miles out must arise from the opportunities which spring from such proximity to the mainland. We are speaking now of an occupation merely, as distinguished from an actual appropriation with a view to sovereignty, and in the absence of exceptional circumstances we can see no reason for distinguishing between the occupation of the Monks Islands and a similar unoccupied group in the mid-Pacific. It follows from this that the claimants are entitled to be reimbursed for what they lost by the act of Venezuela in dispossessing them. What was this loss? Clearly not the guano deposit on the islands The islands were not theirs, and the guano was a part of the freehold, as much so as gold or coal, or any other valuable deposit.

"The claimants were of the opinion that the islands belonged to New Granada, and had succeeded partially in obtaining a lease from that government when further negotiations were broken off by the unfortunate occurrences at Panama. This shows conclusively that, notwithstanding the hoisting of the United States flag and the claim of territory, the claimants did not consider that they had established title to the islands. The Philadelphia parties, on the other hand, were disposed to render homage to Venezuela as the titular lord of these possessions, and, as the result proved, were wiser than the Boston parties. But neither supposed that the mere fact of taking possession would vest an absolute title, good against the world. The guano will have to follow the ownership of the islands, and as to this, the claimants not only show no title in themselves, but admit and recognize a title in another party. The fact is they recognized the title of Venezuela, because they subleased the deposits from her lessees. It is said they were compelled to do so or lose the profit of their investment. That may be true, but their position now as parties to an international reclamation would have been much stronger if, instead of recognizing the validity of the lease to the Philadelphia company and selling out to them in effect, they had stubbornly stood on their rights and demanded indemnity for the wrong done them.

"They were to pay an export duty of five dollars and an additional sum of like amount as a royalty for the privilege of taking the guano for fifteen months, and at the end of this period, in consideration of this franchise, were to transfer the plant and 'all materials used,' as the contract reads, to the Philadelphia company. They were not compelled to make this bargain, and yet it is difficult to see what other arrangement could have been made without a total sacrifice of the plant as long as Venezuela held it for the purpose of aiding the lessees in consummating the agreement made with her. The testimony as to the value of this plant is very loose and unsatisfactory. We do not know of what it consisted and have n

precise statement as to items and original cost. It was used a year before it was seized, and we can not tell, therefore, how much it deteriorated or what the value of the renewals, if any, was, or anything about it, except in the opinion of several of the witnesses it was worth $20,000. It was worked under the protection of the Philadelphia contract for a year or more at least. That is the inference we draw from the provisions of the contract before cited.

"It is true that there is a conflict of testimony as to the actual date when the islands were taken possession of by the Venezuelan authorities. According to some of the witnesses this took place in July 1855, but Mr. Gowen himself says that it was on the 1st of December following. If this is to be accepted as the date, it would seem that the plant, machinery, etc., were in the possession of these authorities at the time the Philadelphia contract was consummated, and it is reasonable to infer were surrendered shortly afterward to the owners to be worked in accordance with the provisions of that contract. The papers in the case are silent upon this point, and we are left altogether to inference. The seizure, in our opinion, was unjustifiable, and the subsequent detention, for whatever length of time, contributed to the injury. Under these circumstances, and in view of the fact that the transfer of the plant to the Philadelphia company was in the nature of a forced sale, which under the circumstances was a substantial appropriation of the property, we are not inclined to hold the claimants to the strictest proof of its value.

"We will allow on this account the sum of $20,000.

"The claim for false freights can not be allowed. According to Mr. Gowen's own deposition, the vessels on whose account this claim was made were chartered long after he received notice from the consul of Venezuela at Philadelphia that the Monks Islands belonged to Venezuela and that she would prevent anyone trespassing upon her possessions. This notice had such an effect upon him that he ordered the schooner *Adrian*, then at the port of Baltimore, and about to discharge a valuable cargo, to sail for Liverpool and discharge her cargo there, although the Liverpool market was not a good one for this commodity, and in point of fact the sale at that port resulted in a loss of several thousands of dollars to the claimants. This, it seems, happened not only in the case of the *Adrian*, but of several other vessels chartered by the claimants, all of which, for fear of condemnation on proceedings to be taken in this country, were ordered to some foreign port. If, notwithstanding this notice, the claimants undertook to charter vessels which were forced to return empty, we can not see that they have just cause for complaint.

"If Venezuela had, in the first instance, warned them against landing upon the islands under a claim of jurisdiction, and they had, notwithstanding the warning, proceeded to land and to erect their plant and take out guano, we hardly think that

this element of their claim which we have already allowed would have been entitled to favorable consideration. The act of the United States of the 18th of August 1856, providing for the acquisition of islands of this kind by its citizens, makes the fact of the nonexercise of jurisdiction by any other power one of the conditions of acquisition. Notice, then, by Venezuela that she claimed jurisdiction, followed up by the requisite proceedings to enforce the claim, would have put the claimants in the wrong had they attempted to take possession of the islands, notwithstanding this claim. It is just, because there was no claim made by anyone to vacant sterile rocks, lying far out to sea, and by their very situation and appearance suggesting that they were no man's land, that we think the claimants have an equity to be reimbursed for their outlay in taking possession of what was apparently derelict and abandoned property. But the same line of reasoning must necessarily exclude the claim for false freights.

"On the whole, we think justice will be done by allowing $20,000, gold coin of the United States of America. We make no allowance for interest, owing to the imperfection and obscurity of the proof with reference to the value of the plant."

John E. Gowen and Franklin Copeland v. *Venezuela*, No. 16, United States and Venezuela Claims Commission, convention of December 5, 1885.

CHAPTER LXI.

REVENUE CASES.

Importation of Cottons: Question under Law and Treaty.

The second article of the treaty of commerce of July 3, 1815, between the United States and Great Britain, provides that "no higher or other duties shall be imposed on the importation into the United States of any articles the growth, produce, or manufacture of His Britannick Majesty's territories in Europe, * * * than are or shall be payable on the like articles being the growth, produce, or manufacture of any other foreign country." By the tariff act of August 30, 1842, the duties on cotton goods imported into the United States were nearly doubled; but it was provided that the act should not apply to goods shipped in vessels, bound to any port of the United States, which actually left their last port of lading "eastward of the Cape of Good Hope, or beyond Cape Horn, prior to the 1st of September 1842."

Between August 1842, and May 13, 1843, Messrs. Godfrey, Pattison & Co., merchants of Glasgow, imported at New York and Boston a quantity of cotton goods, on which duties were paid under the act of August 30, 1842. These duties were, however, paid under protest on the ground that as shipments made from Liverpool and other British ports were, by the treaty of 1815, entitled to be imported into the United States on the payment of "no higher or other duties" than were exacted on articles the growth, produce, or manufacture of any other foreign country, the cottons in question were entitled to be imported under the old law until May 13, 1842, up to which time it was alleged that vessels with cottons continued to arrive from ports eastward of the Cape of Good Hope.

Claims against the United States for the refund of the alleged excess of duties, together with interest, were submitted to the commission under the convention between the United

States and Great Britain of February 8, 1853. It was argued before the commission that an "importation" of goods should be considered as covering the whole period of transit, commencing with the time of leaving the foreign country. This argument the commission refused to admit, holding that goods could not be said to be imported until the transit was complete and the goods had actually arrived at their destination. On the other hand, the commissioners said:

"We are of opinion that as long as goods were received from the East Indies at the reduced rate of duty prescribed in the prior statute, they were entitled to be received from Great Britain charged at the same rate of duty. This is the only interpretation which it seems to us conforms to the just intent of the treaty.

"A construction, at least as favorable as that adopted by us, was given to this clause of the treaty by the British Government on a claim in behalf of American citizens for repayment of the duty charged on rough rice. That claim was for a long time under consideration, and was settled by directing the excess of duties exacted to be repaid, as long as African rough rice had been allowed by law to be imported into England at a lower duty than was charged on American rice.

"The commissioners are of opinion that the precedent established in that case was based on sound principle, and they direct that the excess of duties exacted on cotton goods imported by the claimants prior to May 13, 1843, shall be refunded.

"A question of payment of interest has also been raised. It appears that at the time the duties were demanded the claimants formally protested to the collectors of New York and Boston against the rate of duty assessed, as contrary to treaty stipulations. They also claimed protection from Mr. Fox, Her Majesty's minister at Washington. The United States Government was, therefore, from the first, informed that the payment of the duty would be resisted.

"The act itself, also, of the 30th of August 1842 should have placed them on their guard, as it expressly provides 'that nothing contained in it shall be construed or permitted to operate so as to interfere with subsisting treaties with foreign countries.'

"Under these circumstances, we are of opinion interest should be allowed on the claim from the time of payment."

Upham, commissioner, delivering the opinion of the commission, convention between the United States and Great Britain of February 8, 1853. (S. Ex. Doc. 103, 34 Cong. 1 sess. 304.)

The same provision of the treaty of 1815 as was involved in the preceding case was invoked by claimants in another class of cases. By the act of Congress of May 22, 1824, in relation

to duties on imports, an increase of 5 cents a square yard on cottons was made to take effect from June 30, 1824, with the proviso "that it should not apply to or be enforced against importations of goods from ports or places eastward of the Cape of Good Hope or beyond Cape Horn, before the 1st of January next ensuing."

The commissioners said:

"The violation of the provisions of the convention of 1815 by that act is much more explicit and direct than that of the act of 1842 with regard to which we have already expressed our opinion. The act then provided merely that all goods which were shipped from ports beyond the Cape of Good Hope *prior to the act taking effect* should not be subject to the operation of the statute. In this case it is provided that the act itself should not take effect on goods coming from beyond the cape for the term of six months after it had been in operation as to goods imported from other countries.

"The commissioners regard this as a clear and palpable discrimination in favor of those countries in violation of the treaty of 1815, and allow claims for the return of any excess of duties beyond those paid by those countries during the period within which the exception operated.

"On the question of interest which has been presented to our consideration, it appears that the duties were originally paid without complaint, and that the claim has been permitted to slumber, until very recently, without being brought to the notice of the United States; and we are of opinion that no interest should be allowed."

Upham, commissioner, cases as to duties on cotton goods, commission under convention between the United States and Great Britain of February 8, 1853. (S. Ex. Doc. 103, 34 Cong. 1 sess. 312.)

Exportation of Woolens: Question under Law and Treaty.

The two preceding decisions relate to the importation of goods, as affected by the second article of the treaty of 1815. By the same article it is also provided that no "higher or other duties" shall be imposed on the "exportation of any articles" from the one country to the territory of the other "than such as are payable on the exportation of the like articles to any other foreign country." The first case that attracted attention, as an alleged violation of this stipulation, was the assessment by Great Britain from the date of the treaty down to May 6, 1830, of an *ad valorem* duty of 10 per cent on manufactured woolens when they were exported to the United States and certain other countries, while during a large part of the time they were exported free of duty to China, Java,

Manila, Lima, Valparaiso, California, etc. On December 27, 1825, some American ships, which had been taking in cargo for some of the latter places, finding that woolens, of which their cargoes principally consisted, were allowed to be shipped free of duty, applied to the board of customs for permission to ship woolens to the United States with the same exemption. This application the board refused. On the 20th of January 1826, however, it was ordered that woolens might be shipped to the United States on deposit of the duties, pending the decision of the British Government.

About this time exception was taken by British merchants to the inequality of the export duties on goods exported to Rio de la Plata and Colombia, with which Great Britain had treaties containing clauses similar to that now in question. The exception of the British merchants was based on these clauses, and it was allowed, the Treasury in April and May 1826 ordering the excess of duties to be refunded. No decision, however, was made on the American claim, and the attention of the privy council of trade was again called to the subject. On the 20th of August 1826 the committee of the council issued an order on the American memorials, declaring "that, as the duty in question was not payable upon woolens exported to foreign places within the limits of the East India Company's charter, the parties were entitled, under the terms of the treaty with the United States, to a like exemption," and requesting the commissioners of His Majesty's customs "to discontinue levying that duty on woolens exported to the United States and to other countries with which treaties containing a similar right of exemption had been concluded;" and it was directed that "on due application from the parties by whom such export duties had been paid, the same should be returned to them."

Notwithstanding this order, the board of customs refused to refund the duties, and procured an act of limitation, which was passed after the memorials of the American claimants were filed, to the effect that duties thus assessed should not be refunded for a period extending back more than three years. No step was taken, however, to pay any of the claims until December 3, 1845, when, after representations on the subject by the United States, an order was issued under which the duties were refunded back to January 26, 1823, at which time the practice began of paying the duties under pro-

test, or conditionally. The claims for the refund of duties collected from January 3, 1815, to January 26, 1823, remained unadjusted, and were referred to the commission under the convention between the United States and Great Britain of February 8, 1853.

The commissioners said that the treaty of 1815 seemed to have been violated in some instances through inadvertence, by careless and hasty legislation, and in others seemingly through ignorance of its provisions. But it was conceded that, as a matter of fact, the inequality of duties complained of in the present case violated the provisions of the treaty; and it was decided that the duties should be refunded. The commissioners, however, did not render any awards in these cases in favor of particular claimants. Owing to the practice of the British shippers in entering in their own names and in gross, for payment of duty, the goods shipped by a particular vessel, evidence of the precise amounts of duty paid by the American importers could not be obtained from the custom-house records; and owing to the lapse of time and the changes in firms by death or otherwise, it was difficult to obtain satisfactory evidence of any kind in many cases. To obviate this difficulty, the agent of the claimants entered into an arrangement with the British Government by which the shippers' accounts, the claimants agreeing to waive interest on them, were accepted as a basis of settlement, and time was allowed for making the requisite apportionment among the several importers. This arrangement having been effected, the commission allowed the claims to be withdrawn.

Commission under the convention between the United States and Great Britain of February 8, 1853. (S. Ex. Doc. 103, 34 Cong. 1 sess. 305–310.)

Drawback of Duties on Coal.

By the United States customs act of March 2, 1799, a drawback of duties was allowed on articles entered for exportation, the owner giving bond not to reland them within the limits of the United States. By the same act the ordinary evidence of exportation was the duly verified certificate of the consignee of the landing of the articles in a foreign country; but in case of loss at sea, or other unavoidable accident, or where from "the nature of the trade" such proof could not be produced, the exporter was allowed to furnish such other proofs as he might possess and as the nature of the case would admit of.

The Great Western Steamship Company, a British organization for the purpose of supplying its steamers with fuel on their outward voyages from the United States, shipped a quantity of coal to New York, paid the duties on it, and stored it in warehouses, giving bond for its exportation as under the act of 1799; and it subsequently claimed a drawback on such part of this coal as was consumed by its steamers, on the ground that it was exported in the sense of the act. The customs authorities denied that such consumption was an exportation, and Congress refused to take any action in the matter until, by the civil and diplomatic appropriation act of March 3, 1853, the Secretary of the Treasury was authorized "to cancel any outstanding debenture bonds given prior to July 1, 1850, upon the importation of foreign coals, provided the said coals have been exported to a foreign port, or consumed upon the outward voyage, and shall not have been consumed in the United States." The Secretary of the Treasury, however, held that this act merely provided for the cancellation of the bonds, without authorizing the refunding of the duties. The company took the opposite view, and the question came before the commission under the convention between the United States and Great Britain of February 8, 1853.

Upham, American commissioner, delivered the opinion of the commission, which was as follows:

"In this case no evidence has been or can be given of the landing of the coal in any other port or place without the limits of the United States, and there is no loss at sea or other unavoidable accident complained of. There is nothing, therefore, to exempt the claimants from the ordinary evidence of exportation, unless the case can be brought within the exception, that 'the nature of the trade' is such that the usual proof required can not be obtained.

"This renders it necessary to inquire to what class of trade this expression refers. It undoubtedly refers to the trade or commerce then carried on with various uncivilized sections of the globe—such as the northwest coast of Africa, the East India islands, and other places where the evidence of consuls and merchants could not be obtained. It is a forced construction to contend that by the act of 1799 consumption of coal on an outward voyage is included in the term 'exportation' within the meaning of the act.

"The coal was imported *for use* by the Great Western Steamship Company on board their vessels on their outward voyage, and should be subject to a charge for such use as much as if consumed on shore. A drawback on goods exported is granted on the ground that they are in transit for *a market*, but where

they have once found a market so as to be appropriated to use, and are not further placed *in transitu, as an article of commerce*, the ordinary duty claimed on the article rightfully attaches, whether it be consumed at sea or on land.

"I do not regard the claimants, therefore, as entitled to a drawback by the act of 1799.

"It becomes, then, necessary to inquire into the effect of the recent act of March 3, 1853, to determine whether a drawback is allowed by that act. In the opinion of Secretary Guthrie, it authorizes merely the canceling of the bonds given, and does not provide for a restoration of the duties in the form of debenture or otherwise.

"There are reasons, however, that might hold him to a rigid construction of the act that do not necessarily operate upon us. The act of April 1853 does not expressly provide that a drawback shall be paid. An administrative officer might insist on some specific authority in the act, or some judicial construction of it to this effect, before assuming the responsibility of the payment of money.

"The act, however, admits of the construction contended for by the claimants, and its passage was undoubtedly obtained through their agency, with a view to effect the purpose now claimed for it. The repeated attempts at prior legislation for this end might well affix on Congress the knowledge of such an intent by the clause presented, and imply their acquiescence in it.

"The different constructions also put at different periods on the prior act relative to drawbacks is a reason why the officers of the government and claimants should both wish some final legislation. I am inclined, therefore, to give it the interpretation placed on it by the claimants. The act, by any other construction, would be almost nominal in its character, and can hardly be supposed to have been made the object of special legislation, under the circumstances, for such a purpose.

"I therefore allow the sum of eleven thousand four hundred and thirty-seven dollars and twenty-five cents for the drawback on duties claimed by the company prior to 1846. There is, in my mind, no legal right to drawback until the act of 1853 was passed, and a claim to interest ought not to go behind that date.

"My colleague places the ground of allowance of the claim on a different construction of the acts in question, and computes interest from the payment of the duty. The question of interest was submitted to the umpire, and was allowed from July 1, 1850."

Case of the Great Western Steamship Company, mixed commission under the convention between the United States and Great Britain of February 8, 1853. (S. Ex. Doc. 103, 34 Cong. 1 sess. 328–333.)

The umpire allowed interest at the rate of 5 per cent from June 15, 1850, to January 15, 1855, amounting to $2,500, making the total award $13,500, on January 15, 1855. (MSS. Dept. of State.)

Judicial Cognizance of Customs Cases.

In 1839 the collector of customs at New York seized a large quantity of goods on complaint that for some years previously the importers, who were resident merchants having partners or houses connected with them in Yorkshire, England, had defrauded the revenue of large sums of money. Many of the goods so seized were sold at public auction. Some of the importers were arrested, and one or more of them fled the country. Some of the cases were prosecuted to judgment or were settled by the parties, and some were not sustained on the trial or were dismissed, owing, as it was alleged, to the difficulty in obtaining evidence from abroad. Complaints having been made of the manner in which the suits were conducted, the subject was investigated by a committee of the United States Senate, and a report was submitted by the chairman of the committee, in which some of the proceedings were severely criticised, but no definite action on the report was taken. In some of the cases, involving in all between $200,000 and $300,000, the importers made claims against the United States, which came before the commission under the convention between the United States and Great Britain of February 8, 1853. In all the cases so submitted the suits were either prosecuted to judgment or else were adjusted between the parties. Attempts were made to show that these adjustments were obtained by the government by duress, but the charge was not sustained. The commission held that the claimants had no standing before it, saying:

"In some of these cases large sums were paid to obtain an adjustment, and it seems to have been overlooked that, unless such adjustment is explained, it tends at least as much to show an acknowledgment of fraud or mistake on the part of the importer as it is evidence of duress on the part of the officers of the government.

"The suits should have been prosecuted to final judgment if a valid defense existed. The parties were resident in the United States, and were availing themselves of the protection of the government in the transaction of their business, and they should not have adjusted claims then pending against them in courts of competent jurisdiction, and come here after a lapse of some fourteen years expecting their reconsideration.

"It was not designed that this commission should take cognizance of such cases. The respective governments had already provided by treaty for the settlement of all transactions arising out of the ordinary business of commerce by persons domiciled in the government of the other.

"The convention of July 3, 1815, to regulate commerce between the territories of the United States and of Great Britain provides in article first 'that the inhabitants of the two countries, respectively, shall have liberty to remain and reside in any part of the territories of the other where other foreigners are permitted to come; also to hire and occupy houses and warehouses for the purposes of their commerce, and, generally, that the merchants of each nation, respectively, shall enjoy the most complete protection and security for their commerce, but *subject always to the laws and statutes of the two countries, respectively.*' (U. S. Stats. at L. vol. 8, p. 228.)

"It was manifestly contemplated in this provision that citizens or subjects of either government resident in the country of the other engaged in commerce should be subject to the laws of the country where they reside in all ordinary matters pertaining to such commerce. The adjudication of suits arising out of the collection of the revenue is certainly a matter of local jurisdiction by the courts of the country, and there can be no appeal from them to this tribunal.

"We have been able to see no ground in any of this class of cases which have been presented to us that entitles them to recovery under this commission."

Upham, commissioner, delivering the opinion of the commission, convention between the United States and Great Britain of February 8, 1853. (S. Ex. Doc. 103, 34 Cong. 1 sess. pp. 334–338.)

Case of the "Fair American:" Unlawful Confiscation.

The schooner *Fair American*, of which Thomas Wilson, a citizen of the United States, was sole owner, and Peter Parker, master, on December 3, 1825, cleared from Baltimore, Maryland, and on January 4, 1826, arrived at Refugio, Mexico, where she was entered and permitted to land her cargo, which was consigned to a firm at that port. On the 11th of January, while the consignees were engaged in removing the cargo to the nearest custom-house for inspection and assessment of duties, the goods were seized for confiscation on the ground that the vessel had no certificate or note from the Mexican vice-consul at Baltimore evincive of the honesty and fairness of her intentions in relation to the revenues of Mexico. It seems that the Mexican vice-consul at Baltimore had been consulted as to what papers were necessary, but had not specified such a paper as that which was required. Mr. Wilson, however, on hearing of the seizure of the cargo, procured a certificate from the vice-consul and sent it off, with a statement as to his previous action, in a vessel specially employed for the purpose, to Refugio, an expense of $1,300. But in spite of the evidence furnis[illegible] the goods were condemned and sold and the proceeds div[illegible]

between the Government of Mexico and the officers of the revenue. Mr. Wilson made a claim for damages.

The Mexican commissioners stated that there existed in Mexico at the time of the seizure and confiscation of the cargo a law subjecting to confiscation the cargoes of all vessels clearing from any port in the United States at which there was a Mexican vice-consul without having obtained from such vice-consul a verification of the manifest of the cargo, and in addition thereto a consular certificate or note corresponding with the manifest in the specification of the cargo. The American commissioners replied that no authenticated copy of the law had been produced; that if it had been there was no evidence that it was made public at Baltimore on or before the day on which the *Fair American* cleared, and that if Mexico could enact a law of the import alleged it could not be obligatory upon the citizens of another state until it had been published in that state such a length of time that all upon whom it was to operate would be presumed to have had notice of it. The Mexican commissioners referred to the record, which purported to contain provisional regulations for the government of Mexican vice-consuls, a copy of which was promulgated at Refugio on January 11, 1825.

On March 10, 1841, the umpire delivered the following "preparatory judgment:"

"The claim of Thomas Wilson can not yet receive the definitive judgment of the undersigned. The decree of the 25th March 1826, ordering the confiscation of the cargo of the schooner *Fair American*, is founded on article 14 of the sovereign decree of September 4, 1823, on articles 9 and 12 of chapter 1 of the tariff of maritime duties, as well as on article 3 of the provisional regulations of the Mexican consuls. To better comprehend the decree of confiscation, it will be desirable to learn the contents of the decree of September 4, 1823, as well as the cited chapter of the tariff. The American commissioners can not acknowledge the authenticity of the provisional regulations of the Mexican consuls, unless it shall be established by the production of a copy of said regulation exemplified under the great seal of the Republic of Mexico. It is necessary, then, that the regulation should be proved in the manner indicated by the American commissioners, as more than the copies submitted are necessary.

"The American commissioners have objected that article 3 of the provisional regulations, ordering, under the penalty of confiscation, the production of consular certificates, includes not only the government of consuls, but also a penal provision which should emanate from the legislative power. To refute

that objection the Mexican commissioners contend, in an extract annexed to their report submitted to the umpire, that the Mexican constitution authorizes the executive power to make such rules, decrees, and ordinances for the better execution of the constitution, of constitutional acts, and the general laws, and that consequently the provision of article 3 of said regulations has the force of law. It is necessary that the American commissioners should understand what the Mexican commissioners have to say on that point, and it is also necessary to produce the Mexican constitution as well as the general laws for the better execution of which the said provisional regulation was made."

The American commissioners, reviewing the various measures mentioned in the "preparatory judgment" of the umpire, said that the fourteenth article of the sovereign decree of September 4, 1823, was to the effect that all officers against whom an omission should be proved facilitating smuggling, or obstructing the seizure of smuggled goods, should be tried in conformity with the provisions of the second chapter of the law of March 24, 1823, which laid down the mode of enforcing the responsibility of public officers; that the ninth article of the maritime tariff provided that whenever, in the export of goods, silver, and other articles subject to duty, an excess should be made to appear, such excess should be subject to seizure; and that the purport of the twelfth article was that when a captain of revenue guards, by himself or his subordinates, should, in visiting a vessel, find gold, silver, or other articles subject to duty, shipped without leave from the custom-house, he should unship them and deposit them in the warehouses, in order that a suit for such penalty as might be proper should be instituted. The American commissioners could see nothing in these articles to sustain or even to palliate the seizure and confiscation of the cargo of the *Fair American;* and they contended that the provisional regulations for the control of consular officers were beyond the power of the executive of Mexico under the constitution of that country, and were therefore invalid.

April 23, 1841, the umpire made the following decision:

"The umpire recognizes the justice of the demand for an indemnity for the confiscation of the cargo of the schooner *Fair American*, but he is not yet ready to pronounce on the question of the amount of the indemnity, that question not having as yet been discussed by the mixed commission."

The American commissioners then submitted an argument on the subject of the amount of the indemnity to be awarded.

They allowed (1) for the confiscation of the cargo the sum of $46,895.71, with interest at 6 per cent from March 7, 1826; (2) for notarial and cognate expenses, $117.80, and (3) for various other expenses, including those involved in the prosecution of the claim, certain other sums.

The umpire, June 2, 1841, awarded (1) for the confiscation of the cargo the sum of $25,240.05, with interest at 5 per cent from March 7, 1826, to the time of payment, and (2) for notarial and cognate expenses, the sum allowed by the American commissioners. As to the third item allowed by the American commissioners, he reserved his decision, and further arguments on the subject were submitted by the commissioners. On July 10, 1841, the umpire rendered the following decision:

"The mixed commission having submitted anew to the umpire the decision relative to certain expenses reserved in his decision of the 2d of June, the American commissioners have allowed for expenses incurred in the prosecution of the claim, as well as for the transportation of the merchandise to the custom-house, and for the detention of the ship by the Mexican authorities, the following sums: $1,517, with interest at 5 per cent from February 27, 1827; $1,684.50, with interest at 6 per cent from the same date; $128, with interest at 6 per cent from the same date; and $25.18, without interest. Notwithstanding that the Mexican commissioners have rejected these demands, the umpire decides that the Mexican Government is bound to pay the claimant for the said expenses the sum of $2,185.68, without interest, except as to the sum of $348, on which sum the umpire allows interest at 5 per cent from March 7, 1826, to the day of payment. The umpire rejects the demand so far as it exceeds the above."

Thomas Wilson v. *Mexico:* Commission under the convention between the United States and Mexico of April 11, 1839.

Case of the "Express."

In January 1825 the American brig *Express* arrived at Alvarado, Mexico, from Marseilles, France, with a cargo of brandy, which, while being unloaded, was seized and libeled by the subcommissioner of the custom-house on the charge that it was Spanish. Certificates of origin were exhibited, but they failed to satisfy the authorities; and the purchaser of the brandy threw up the contract on the ground of the nondelivery of the article. The district judge decided in favor of the owners and directed the delivery of the brandy, but the authorities took an appeal to the circuit court at Jalapa. In February 1826 this court directed the examination of the brandy by samples, at Mexico,

Oaxaca, and other places, at all of which it was pronounced to be French, and the decree of the district court was affirmed in March 1826; but an appeal was taken by the subcommissioner of customs at Alvarado to the supreme court of Mexico. Finally he withdrew his appeal, and the proceeds of the brandy, which had been sold by order of court, were ordered to be paid over, less the duties on the brandy, to the original owner. Part of the proceeds, however, was not found in the public treasury, and the full amount of the remainder was not returned.

Indemnity for the losses suffered by the owner of the brandy in consequence of the transaction was awarded.

Reuben M. Whitney and Charles Callaghan, Assignees of John Colter, v. *Mexico:* Commission under the convention between the United States and Mexico of April 11, 1839.

Marie's Case.

The American commissioners awarded the sum of $1,093.12½, with interest at 6 per cent from August 30, 1824, as indemnity for the confiscation pronounced by a court of justice of Alvarado, Mexico, on a charge of violation of revenue laws, of fifty barrels of beef and thirty sacks of coffee. The umpire, February 25, 1842, rejected the claim.

Leontine Marie v. *Mexico:* Commission under the convention between the United States and Mexico of April 11, 1839.

Case of the "Robert Wilson."

The Union Insurance Company of New York demanded of the Mexican Government the sum paid by the company to the proprietors of the brig *Robert Wilson*, in consequence of its seizure and confiscation by the Mexican authorities. The American commissioners contended (1) that the Mexican authorities had, by their refusal to communicate to the official named by the superior court of New York, a copy of certain proofs in the process against the brig, deprived the company of the means of showing that the confiscation had been pronounced because the commerce in which she was engaged was prohibited, and had thus brought about the condemnation of the company to pay the insurance; and (2) that the confiscation of the vessel was not justified. The Mexican commissioners, on the other hand, contended (1) that the Mexican tribunals were not bound to communicate evidence except to parties to the pleadings before them; and (2) that the confiscation was pronounced according to Mexican law.

The umpire rejected the claim. The violation of the law of Mexico was proved, though the master of the vessel disclaimed knowledge of it. It appeared that certain boxes which were entered on the manifest of the brig as containing tin plate, in fact contained counterfeits of Mexican copper coin.

Commission under the convention between the United States and Mexico of April 11, 1839.

Massicott's Case. William Massicott, master of the American brig *Aspasia*, sailed from Baltimore to Gibraltar, and from the latter port to Vera Cruz, having on board some specie for the payment of the crew and other expenses. On arriving at Vera Cruz he paid duty on a part of the specie ($1,500), and obtaining a permit for its exportation, placed it in a chest with the other part, which amounted to $1,528. After sailing from Vera Cruz he decided to call for further cargo at Sisal. At the latter place the authorities found the $1,528, and ordered its seizure. The $1,500, as to which the master had a certificate of the custom-house at Vera Cruz, the authorities released. The $1,528, as to which he had no certificate, they confiscated. The umpire, December 3, 1841, rejected the claim.

Commission under the convention between the United States and Mexico of April 11, 1839.

Case of Joseph Smith. An indemnity was claimed on account of the seizure by the Mexican authorities at Saltillo of a quantity of merchandise imported by claimant in 1832. When the goods were seized they were not properly protected, and were left exposed to depredations. The judicial proceedings resulted in the dissipation of the charge on which the seizure was made, and the goods were ordered to be restored. But a considerable portion of them had been made away with, and it was for the value of this portion, with a reasonable mercantile profit thereon, that an award was made. The umpire, February 23, 1842, awarded $18,762.63.

Joseph Smith v. *Mexico:* Commission under the convention between the United States and Mexico of April 11, 1839.

Case of the "Mary." In 1837 the claimant, a merchant of Philadelphia, sent the brig *Mary* from Havana to Tampico, laden with merchandise. A part of the cargo was seized and condemned as prohibited, but as to this no claim was made.

On March 29, 1837, the brig left Tampico for Tabasco without any cargo, except a few hides and a small amount of specie, together with thirteen passengers. On her way to Tabasco she touched at Vera Cruz for provisions, and all her passengers but one went ashore. She passed on to Tabasco and arrived at that port on the 10th of April. The collector of the port refused to permit her to enter and ordered her forthwith to proceed to sea, on the ground that the voyage from Tampico to Tabasco was a coastwise trading voyage, and as such prohibited by the revenue laws of Mexico. The brig then sailed from Tampico to Campeachy, and after some difficulty was admitted at the latter port. After her arrival, judicial proceedings were instituted for the purpose of determining whether the voyage from Tampico to another port in Mexico was in violation of the laws of that country. The decision of the court was pronounced in favor of the legality of the voyage and of the right of the vessel to enter at Tabasco, where her object was to take on a load of logwood. It was alleged that the refusal to permit her at once to enter that port defeated the object of the voyage and resulted in a loss of $4,822, which was the first item of the claim in the case.

The brig was freighted with part of a cargo of logwood at Campeachy, and then returned to Havana. On July 15, 1837, under the command of the same master, she sailed again from Havana to Tampico, where she arrived on the 24th of the same month. The manifest and other documents were presented to and received by the authorities, but when on the 21st of August the brig was ready to depart, the authorities refused to clear her on the ground that the manifest of the inward voyage had not been certified by the collector of customs at the port of Havana in conformity with a Mexican customs regulation of October 4, 1836. On this ground the vessel was libeled for the recovery of a fine of $500, though it was alleged that she had incurred the penalty of forfeiture. The penalty of forfeiture, however, was not insisted upon, but a second fine of $500 was exacted for the absence of a proper certification of the manifest on the first voyage from Havana to Tampico. For the payment of these two fines of $500 each the brig was sold. A claim of damages was made by the owners for the loss of the brig and for the loss of freight which she might have earned if she had not been seized.

The American commissioners argued (1) that the refusal of the captain of the port of Tabasco to permit the *Mary* to enter

was an illegal act, for which the claimant was entitled to the resulting damages; (2) that the regulation under which the proceedings against the vessel were taken did not emanate from the lawmaking power of Mexico, and that, being a mere executive order, it was, so far as it assumed to impose penalties, void; (3) that, as the Mexican Government had neglected to place at Havana a consular officer to give the required certificates, the fault, if any, of not complying with the regulation (assuming it to be legal) was attributable to that government; (4) that the regulation of the 4th of October 1836 was void or inoperative as to citizens of the United States, since it was not consonant with the treaty stipulations then existing between the two governments; (5) that, even assuming that the master was liable to the penalties exacted of him, the Mexican authorities had no right to detain the vessel, and (6) that the neglect to enforce the law on the first voyage or then to give the captain notice of the law or of his having violated it in effect released him from the penalty, if any, incurred on that voyage, and constituted a defense against exacting the penalty on the second voyage.

On the other hand, the Mexican commissioners argued against any allowance on the ground (1) that when the brig on March 12, 1837, first arrived at Tampico from Havana she had on board certain contraband or prohibited articles, including two boxes which were invoiced as cologne water, but which were found to contain 20,000 cigars and a barrel of brandy; (2) that when her cargo was landed the master asked to be cleared for Havana, and on March 29 sailed in ballast for that port with thirteen passengers; (3) that when the brig had been at sea five days she put into Vera Cruz without having a passport for that place on the pretext of taking in water; that the passengers were made to land there, though bound to another place, and that a bill of health was obtained for Havana; (4) that instead of sailing for Havana the brig proceeded to Tabasco, but being forbidden to enter there went to Campeachy, where the master, the captain of the port opposing her entry, obtained from the judge of the district, though the law forbade it, permission to enter and load with logwood, notwithstanding that three dozen hides, the product of the country, were found on board without a permit; (5) that the brig did not, either on her first or her second entry at Tampico, comply with the provisions of the regulations of October 4, 1836, and

that a fine of $500 was properly exacted of the master for each omission; (6) that the master refused to pay the fines, abandoned his vessel, and departed the country, leaving a written protest before the consul of his nation, in which he estimated the value of what he had abandoned at $15,000, without availing himself of the provisions of law in regard to the appraisal of vessels.

The commissioners differing in opinion as to the allowance of the claim, the umpire on October 27, 1841, dismissed it.

William Richardson v. *Mexico:* Commission under the convention between the United States and Mexico of April 11, 1839.

In an analysis of the awards of the commission made by Mr. Brackenridge, one of the American commissioners, there is, with reference to the foregoing case, the following note:

"Brig *Mary*. Seizure and sale of vessel for the payment of pretended fines, amounting to $1,000, in the year 1836. Proceeds of the sale of the vessel above the amount retained by Mexican authorities. This, together with some other items for damages, etc., constitutes the claim. The award of the umpire was affirmed by the board, but it was afterward suggested that the balance of the claim, not having been expressly referred to him, remained undecided; in consequence, it was moved by the American commissioners to take the subject into consideration, but overruled by their colleagues. It is therefore still a question whether this case has been finally decided. The claimant contends that all the proceedings in the case are void on account of irregularity, and that the whole claim stands open the same as if there had been no action upon it by the board or the umpire."

The claim for damages for the loss of the vessel and for loss of unearned freight was laid before the commissioners, Messrs. Evans, Smith, and Paine, under the act of March 3, 1849. The commissioners dismissed it, on the ground that it had been disallowed by the umpire under the convention of 1839, whose decision was, by Article X. of that convention, final and conclusive.

Another claim, growing out of the sale of the vessel to pay the fines, was, however, allowed by the commissioners under the act of 1849. This claim they described as follows:

"In the progress of the cause before the mixed commission the Mexican commissioners, though totally denying the justice of the claim then under consideration, admitted that the claimant was entitled to the amount for which the brig was sold, less the fines to pay which the court rendered the decree of

sale, and that this sum without interest was all that the claimant could properly demand. * * * The board is of opinion and decides (1) that the present claim was not embraced in the claim decided by the mixed commission * * *, and (2) that it is a good and valid claim against the Government of Mexico."

In accordance with this opinion the commissioners awarded the sum of $2,804.

O'Flaherty's Case.

James O'Flaherty, a citizen of the United States, master and owner of the schooner *William A. Turner*, presented a claim tothe mixed commission under the convention between the United States and Mexico of 1839, growing out of certain proceedings against the vessel at Sisal in 1834 and at Matamoras in 1836, and for his own imprisonment and ill treatment in the latter year. The commissioners differing in opinion, the claim was referred to the umpire, who failed to decide the case, and it was afterward laid before Messrs. Evans, Smith, and Paine, commissioners under the act of Congress of March 3, 1849.

Taking up, as first in order, the seizure of 1834, the commissioners said that it was not easy from the proofs in the case to arrive at a satisfactory result as to some of the facts necessary to be established before the claim could be admitted; that the validity of the claim depended in great degree, if not altogether, upon whether the schooner was at the time of the seizure within the territorial jurisdiction of Mexico and amenable to Mexican laws. She had on board at the time a small quantity of rice and soap, both being prohibited articles, the importation of which into Mexico, as the law then stood, subjected the vessel importing them, as well as the articles themselves, to confiscation. If, said the commissioners, the vessel with these articles on board had actually entered the port of Sisal, not being driven in by distress, she was undoubtedly amenable to the laws of the country; but if, as alleged by claimant, she was taken possession of on the high seas, outside the jurisdiction of Mexico, and brought within it, she could not be held answerable for any violation of the revenue laws of that country. The commissioners said it was understood that by an ordinance of Spain the territorial limits of Mexico, when a colony of Spain, extended only to the distance of ten miles from the shore, and this was believed to be considered as its present extent. In this relation they referred to an opinion of the supreme court of Louisiana filed in the claim of J. H. Cucullu et

al. The commissioners said that it was undoubtedly competent for Mexico, as well as for any other nation, to seize vessels found hovering on its coasts with the evident design to embrace an opportunity to enter its ports in violation of its laws, but that the present seizure was not made in the exercise of such right.

It was proved that the vessel sailed from New Orleans in March 1834 with a general cargo of provisions, including some rice and soap, for the bay of Honduras; that she went to several ports in that bay, sold part of her cargo and landed the residue, and made one voyage on freight from Truxillo to Belize; that she then reshipped the portion of her cargo which had been landed, including a small quantity of rice and soap, and, taking two cases of cotton cloth, received in payment for articles sold, set sail on her return voyage, intending to stop at certain Mexican ports, if it should be ascertained that those ports had, owing to the prevalence of the cholera there, been entirely opened for all descriptions of merchandise, as had been reported at Truxillo. If he should learn otherwise, it was the intention of the master, as he declared, to proceed to New Orleans. When about twelve days out, off Sisal, and at a distance of more than four miles from land, Captain O'Flaherty sent his boat ashore to obtain wood and water, and not having hands enough to manage the vessel, came to anchor with some of his sails flying. Before the return of his boat he was boarded by a party of armed men from the shore under the command of an officer called the commandant of the revenue guard, who demanded his manifests, papers, and other documents belonging to the vessel. In addition to the general manifest the laws of Mexico required vessels entering their ports to have three special manifests of cargo, certified by the Mexican consul nearest the port whence the vessel last sailed. Captain O'Flaherty was not provided with these documents; but, declaring that he was ignorant of the laws of the country, and that he did not know that the Mexican authorities could demand his papers at that distance from the port, he undertook to comply with their requirements. Certain manifests were made out and delivered to the revenue officer. These manifests contained the rice and soap, the prohibited articles, but did not contain the two cases of cotton cloth taken on board at Truxillo, which were not prohibited, nor did they accurately state the quantity of flour on board. Upon the discovery of these circumstances, the vessel was

seized and towed into port. The whole cargo was landed by order of the collector, and the case was brought before the district court for the condemnation of the vessel, of the prohibited articles, and of the excess of flour not set down in the manifests. On the trial certain Mexican witnesses testified that the vessel had come to anchor in the usual place, within one mile from the mole, while the crew and the supercargo testified that she was more than four miles from the mole, and that the boat was sent ashore solely for wood and water. The district court appointed the collector of the port of Campeachy to be promotor fiscal, or legal adviser and prosecutor, to whom all proofs were submitted; and on June 10, 1834, he made a full report to the judge, coming to the conclusion that the vessel and cargo were not liable to confiscation for violation of the revenue laws, and recommending that they be declared free and be delivered up to the claimant. Thereupon the collector of Sisal interposed an appeal to the circuit court. While these proceedings were pending, Captain O'Flaherty gave bond for $1,200, the appraised value of the schooner, and obtaining her discharge, sailed away. On January 5, 1835, a decree was pronounced by the circuit court reversing the decision of the district judge, declaring the schooner confiscated, and imposing a penalty upon the captain the nature and extent of which did not clearly appear, but which was confirmed in March 1836 by the supreme court of Mexico. The bond of $1,200 was paid immediately after the condemnation.

The commissioners said that, taking into consideration that the voyage of the schooner was not originally projected to any Mexican port, and consequently that the captain had no occasion for triplicate manifests; that the larger part of the prohibited articles was actually disposed of in Honduras, and that the master, when a demand was made upon him, actually entered those articles on the manifests, they saw no sufficient evidence of design on his part to violate any of the revenue laws of Mexico, and as, notwithstanding very strong Mexican testimony to the contrary, they were constrained to believe that the vessel was not within Mexican jurisdiction nor amenable to Mexican laws at the time she was taken possession of in the manner stated, they were of opinion that the claim for the amount paid by claimant to release the vessel from the illegal restraint imposed upon her was valid.

The commissioners also found that the claim of Captain

O'Flaherty for his imprisonment and the detention of his vessel in 1836 was valid. It appeared that in July 1836 he cleared from New Orleans for Matamoras, and on the 17th of the same month arrived at the port of Brazos, where, obtaining the necessary permit, he discharged his cargo on the 21st and 22d of July. On the 23d of July, however, the authorities of the port sent an armed band on board, and arrested the schooner and imprisoned the master. The master was liberated on the 13th of August, and on the 22d of August the schooner was released on a bond of $1,200. Between the latter day and the 29th of the same month the vessel was freighted and cleared at the custom-house, and was prepared for sea. On the morning of the 30th of August orders were given to stop the schooner, and her master was again imprisoned. On the 21st of October the vessel was again released, but the master was detained for some time longer. It appeared that his first arrest was made on information sent by the authorities (1) that he had abstracted and run away with his vessel in 1834, before the termination of the judicial proceedings; (2) that he had incurred a fine pronounced by the supreme court of Mexico; (3) that he had by a decree of the same court been banished from the country, and could not lawfully enter it again. Besides these grounds, derived from the authorities at Sisal, it was alleged (4) that Captain O'Flaherty had been guilty of gross misconduct at Brazos. The commissioners said that the first ground of complaint was wholly unsupported, since it was entirely proper for Captain O'Flaherty to take his vessel, after he had given a bond for her appraised value, which was ultimately paid. As to the second ground, it was shown that he had paid the fine demanded; besides, most of the indignities were subsequent to the payment. As to the allegation that he had been interdicted from entering the country, the commissioners said it did not appear that by the laws of Mexico the court had power to pronounce such a penalty, and there was no evidence that it had done so. The whole proceeding against him appeared to be illegal, and he was finally released without having been brought to trial or charged before any tribunal with any offense—which was strong evidence that he had not committed any infraction of the laws. But as to his alleged misconduct at Brazos, the commissioners considered it wholly probable; the Mexican authorities complained to the American consul that he had committed faults of great magnitude in that port

namely, that not being discharged on the day he wished he had loaded two cannon which he had on board with grapeshot, bringing one to bear on the barracks and the other on a Mexican schooner; that he ordered these cannon to be fired, but that it was not done because the crew were opposed to it. The commissioners said that so far as these proceedings on Captain O'Flaherty's part may have aggravated the personal injuries of which he complained, he must be content to bear the consequences, but that for the acts of the Mexican authorities in the seizure and detention of the vessel and the original imprisonment of Captain O'Flaherty, being for the most part illegal, and being authorized and directed by persons for whose proceedings the Government of Mexico was responsible, an indemnity should be allowed. They therefore awarded on the whole claim, including the detention of the vessel in 1834 and 1836 and the imprisonment of Captain O'Flaherty, the sum of $8,221.25.[1]

Case of the "Henry Thompson."

The ship *Henry Thompson*, an American vessel, sailed from Gibraltar December 8, 1833, with a cargo a part of which was destined for Vera Cruz, Mexico, and a part for New Orleans, in the United States. The goods destined for those ports, respectively, were entered upon the manifest and the place of destination of each article was properly specified. On the arrival of the vessel at Vera Cruz the master delivered to the collector of the port a copy of his manifest, and received permission to unload that portion of his cargo which was consigned to that port. Shortly after that portion was landed a party of men, under the authority of the collector, went on board the ship and forcibly took possession of the residue of the cargo, carried it on shore, and deposited it in the public stores, and proceedings were

[1] When the schooner was seized at Matamoras, on August 30, 1836, there were among the articles of merchandise on board 182 bales of wool, the property of Horace Southmayd. While the vessel was in custody the authorities stored this wool in a warehouse, where it was burned. A claim for its loss was presented to the mixed commission under the convention of 1839. The American commissioners awarded for the wool $3,795.60, the sum which it would have brought at the time of its probable arrival at New York, the port of destination, less freight and charges, together with $375 expenses incurred in protecting the wool at Matamoras after its seizure. On these two sums they allowed interest at 7 per cent from April 1, 1837, till March 1, 1841, the date of the final award, together with $165.19 for costs of translating and preparing papers—making in all $5,479.22. The umpire reduced the rate of interest to 6 per cent and awarded $5,353.79.

instituted by the collector before the district judge with a view to its confiscation. The ground alleged for these proceedings was that a law of Mexico which prohibited foreign vessels from carrying goods to two or more ports had been violated by the shipment of the cargo to Vera Cruz and New Orleans. The district judge decided that the law in question was intended only to prohibit the coasting trade of Mexico to foreign vessels, and that the *Henry Thompson* did not come within its provisions. He refused, however, to order the redelivery of the goods to the master without payment of duties, which he held to be obligatory under instructions from the Vice-President of the republic. The master refused to pay the duties, and after entering his protest before the United States consul, abandoned the goods and sailed for New Orleans. A claim for indemnity was presented to the mixed commission under the convention between the United States and Mexico of April 11, 1839, but, being left undecided, was afterward submitted to the commissioners under the act of Congress of March 3, 1849. The commissioners said:

"The right of the claimant in this case to indemnity must be determined by the decision of the question, Were these goods subject to the payment of duties under the Mexican tariff? The right of the Mexican Government to enact a law requiring foreign vessels voluntarily coming into her ports to unload the whole of their cargoes and pay duties upon them, even though portions of such cargoes were consigned to ports in another country, will not be questioned; and if it were made to appear that such a law existed at the time the cargo of the ship *Henry Thompson* was seized, the board would feel itself constrained to reject the claim. Such a law, however, would be extraordinary in its character and in contravention of those principles of liberality by which the commerce of civilized nations is governed. The board can not in the absence of testimony presume the existence of such a law. The reasons assigned by the Mexican members of the joint commission for their refusal to recognize the validity of the claim are not found among the records or papers belonging to that commission. * * * A letter from the American consul at Vera Cruz, which is on file with the papers, written immediately after the decision [of the Mexican court] was made, refers to a provision in the Mexican tariff law of 1827 which provided that the reembarkation of foreign goods, imported at any time, should not exempt them from the payment of import duties. * * * In the opinion of this board the provision in the law referred to could only be applied to such goods as had been voluntarily imported into Mexico. * * * These goods wer

not imported into Mexico. They were shipped from Gibraltar to New Orleans. The port of their destination was entered upon the manifest. They were never intended to touch upon Mexican soil, or to be entered at a Mexican custom-house. They were only taken within the harbor of Vera Cruz because the vessel in which they were shipped had a portion of her cargo which belonged there. * * *

"Upon a careful examination of the case the board is brought to the conclusion that the exaction of duties was illegal and unauthorized and constitutes a valid claim against the Government of Mexico, and the same is accordingly allowed."

Case of the "Splendid."

"The brig *Splendid*, of New York, was insured by the Atlantic Insurance Company, of Philadelphia, on the 20th of August 1835, for a voyage from Norfolk, Virginia, to Montego Bay, Jamaica, and thence on her return to the United States. By an indorsement on the policy dated November 3, in consideration of an additional premium, permission was given to the vessel to proceed from Montego Bay to Tabasco, in Mexico, without prejudice to the policy. The *Splendid* sailed from New York on the 13th of July 1835 to Norfolk, and having there taken in a cargo of lumber, and three boxes containing soda powders, proceeded to Jamaica. The master, on his arrival, finding that the soda powders were prohibited, deposited them in the custom-house, to be reshipped to the United States. After disposing of the lumber he took on board twenty tons of stone ballast and the three boxes of soda powders, which he had deposited and which were entered on the manifest for the United States. He then sailed for Tabasco for the purpose of procuring a cargo of logwood.

"On the arrival of the brig at Tabasco, on the 28th of September following, her papers were examined by the custom-house officers, who informed the master that they were all right. A few days afterward the vessel was seized by order of the district judge, and without even the formality of a trial was sold at auction for the benefit of the government. The master and crew were at the time imprisoned and kept in close confinement several days. After his release the master entered his protest before the consul of the United States, abandoned the vessel, and returned home. The only reason assigned to justify the seizure of the vessel was the fact of finding on board the three boxes of soda powders, which it is alleged were prohibited by the laws of Mexico. Whether this was a

prohibited article it is not material to inquire in order to determine whether the vessel was properly seized. It is clearly proved that the soda powders were manifested for the United States, and that no attempt was made to introduce them into Mexico. Nothing occurred which could justify a suspicion of any intention to violate the laws of Mexico or to defraud the government. The seizure and sale of the vessel under these circumstances upon the mere order of the judge was wholly unjustifiable, and a gross violation of the laws of nations, for which the Government of Mexico was justly responsible. The insurance company, upon a compromise with the owner of the vessel, paid the sum of $2,375 in discharge of the policy."

An award was subsequently made in favor of the Atlantic Insurance Company for $4,020.12—principal $2,375, interest $1,645.12.

Opinion of the commissioners under the act of Congress of March 3, 1849.

An award was also made in the foregoing case in favor of Daniel Collins, owner of the brig, for damages resulting from the seizure and sale, less the amount received from the insurance company. The award to Collins was $6,434.37—principal $3,625, interest $2,809.37.

Parrott's Case.

"The claimant resided in Mazatlan, in Mexico, in 1845 and held a commission as consul of the United States for that port. He was also extensively engaged in mercantile business, and was the only surviving partner of Parrott & Co. On the 18th of March 1845 Timoteo Canedo, the collector of the port, issued an order against Parrott & Co. for the payment of $4,772.25½, which it was alleged was due from them for consumption duties on two cargoes of goods which they had imported in 1841. Upon the presentation of this order Parrott refused payment of the money alleged to be due, on the ground that no such duties could be legally demanded. The collector then referred the question of the legality of the demand to a lawyer, who, after an examination of the subject, gave an opinion in writing that there was no law in force at the time the goods were imported which would justify the exaction of the duties alleged to be due, and recommended a suspension of proceedings against the claimant. Upon this opinion the proceedings were suspended and the demand withdrawn.

"On the 14th of April, by order of the collector, the demand of payment was renewed, and, on the refusal of Parrott again

to pay the money, an embargo was issued by the collector against his property. The real estate of Parrott, consisting of store houses, warehouse, and dwelling, with the appurtenances, * * * were seized under this order and placed in the possession of a Mexican officer.

"The claimant then appealed to the supreme Mexican Government for relief against the embargo, through Mr. Black, consul of the United States at the City of Mexico, there being then no minister there representing the United States. Mr. Black, in a letter to the State Department, dated 3rd July 1845, stated: 'I have as yet received no reply to my note to this government in relation to the illegal embargo of the house of Parrott & Co. of Mazatlan, referred to in my letter to the Department, No. 335, but I have no doubt that orders have been given to have the embargo raised.' It does not appear, however, that the expectations of the consul were realized. Commodore Sloat, who was in command of the Pacific squadron in 1846, addressed a letter to the State Department 13th November of that year, in which he stated:

"'On my arrival at the port of Mazatlan in November last I found a large amount of property under embargo and detention by order of the Mexican Government belonging to J. Parrott, esq., United States consul at that place. * * * On investigating the case duly, and procuring from other sources all the information I could acquire and enough to satisfy me that the proceedings against Mr. Parrott and his property were palpably unjust, on the 25th of November last I addressed a communication to the minister of relations and government of Mexico demanding a release of the property of Mr. Parrott, and a suitable indemnification for the losses and wrongs he had suffered. Notwithstanding I apprised the Mexican Government that I should await on the coast its answer to my letter, during the whole of my stay at Mazatlan, near seven months, I never received any answer from it on the subject.'

"The claimant alleges that he did not regain the possession of his property until January 1849. Whether he was kept out of the possession until that time by reason of the embargo does not appear from the testimony. From the letter of Commodore Sloat it may be inferred that when he left Mazatlan, which was in June or July 1846, the property was still held under the embargo. A decision was made by the Treasury Department 17th November 1848, that the consumption duty could not be legally demanded in the port of entry in which the goods were entered. This decision establishes the illegality of

the embargo, and it is very probable that it was withdrawn immediately afterward. It may be proper to remark that a similar demand for consumption duties alleged to be in arrears was made by the collector from Messrs. Scarborough & Co., English merchants residing at Mazatlan, at the same time the demand was made of Mr. Parrott. Upon their refusal to pay an embargo was issued upon their property, but upon their threatening to resist its execution by force all attempts to execute it were abandoned, and it was subsequently withdrawn.

"The board is satisfied from the evidence before them that the demand made upon the claimant was illegal, and that the embargo and all subsequent proceedings were unjust and oppressive and constitute a valid claim for indemnity.

"An additional claim is presented by Mr. Parrott, growing out of a seizure of a cargo of goods imported by him in the Hamburg brig *Matador* and entered at the port of Monterey. It is very satisfactorily proved that at the time the goods were entered at Monterey in July 1845, the duties were fully paid, amounting to the sum of $67,873.32½. The greater part of the cargo of the *Matador*, after the entry at Monterey and the payment of the duties, was reshipped on the Mexican vessels *Julia* and *Republiana*, and sent to Mazatlan and San Blas. Before the goods shipped on the *Julia* were landed they were seized by virtue of an order from the treasury department of the Mexican Government, upon the allegation that the duties had not been paid and that a portion of the goods were contraband. Those shipped on the *Republiana* were seized by virtue of the same order after they had been transported to the interior to be sold. These allegations were clearly disproved on investigation, but yet the goods were only released upon the condition that Parrott, the owner, should give bond with security to pay the duties, should it afterward be discovered that they were due. These bonds were given and the goods were released. The claimant alleges that he was compelled to deposit the sum of $100,000 with his securities, as an indemnity to induce them to execute the bonds—that the bonds have never been surrendered or canceled, and that therefore he has been unable to procure a return of this deposit. This allegation is not proved. One of the securities has given a deposition in which he alleges that he executed the bond from motives of friendship for Parrott, having no interest in the matter, but he does not show that he received any indemnity.

"The seizure of the goods was an arbitrary act, without any justifiable cause, and must have resulted in injury to the claimant."

Opinion of Messrs. Evans, Smith, and Paine, commissioners, February 1951, under the act of Congress of March 3, 1849.

Vanstavoren's Case.

"It is sufficiently proved that the claimant in the year 1839 shipped, per brig *Charles Carroll* from New York, 17 boxes of Cavendish tobacco, containing 2,125 pounds, which were consigned to the Messrs. Hargous & Brothers, at Vera Cruz, and that on the arrival of the vessel and delivery of the manifests the tobacco was seized by the custom-house officer, and detained as a prohibited article of importation. It is not altogether clear that the seizure was illegal, because the tariff laws of Mexico at the time are not so distinct upon the subject of the importation of tobacco as to leave the question of the prohibition of this kind of tobacco without doubt. Yet the requirements of the law affecting articles which might be seized as prohibited merchandise were not followed by the authorities. The law required that the legality of the seizure should be adjudicated within a certain time; but the public authorities of Mexico, although repeatedly applied to by the consignee of the tobacco to bring the case before a judicial tribunal, refused or neglected to do so, and the tobacco was kept in the hands of the seizors for several years and until the same was abandoned by the owners. From the evidence the board is satisfied that the case was never adjudicated and that most probably, through this willfulness or neglect on the part of the government authorities of Mexico, the property became a total loss to the claimant. The board is therefore of opinion that the claim * * * is a valid claim against the Government of Mexico."

Memorial of *George W. Vanstavoren:* Opinion of Messrs. Evans, Smith, and Paine, commissioners, January 8, 1851, under the act of Congress of March 3, 1849.

Scott's Case.

"The claimant alleges in his memorial that in September 1830 he was at Chihuahua with two wagonloads of goods from the United States; that he paid at Santa Fé all the duties which were charged upon the goods; that in April 1831, having sold out his goods at Chihauhua, he prepared to return to the United States when a custom-house officer of the Mexican Government with a number of armed soldiers entered the house occupied by him and seized six bags of silver, each containing

one thousand dollars, the officer alleging that he made the seizure for duties due on the goods which he had imported. The officer alleged that other duties than those paid at Santa Fé were due for the payment of which the seizure was made. To support the claim the deposition of John Prewett has been filed. Mr. Prewett states that 'he was in Chihauhua in April 1831, and resided in the same house with Scott, and was present with him in said month, when a Mexican officer, and as this affiant believes, an officer of the custom-house, or a revenue officer of the Government of Mexico, entered the house of said Scott with a file of soldiers in the Mexican service and seized upon and took away from said Scott six bags of money in silver coin, containing, as this affiant believes, one thousand dollars each; the said officer alleging at the time, as well as this affiant now remembers, that said seizure was made for duties due upon the goods of said Scott.'

"This deposition is all the testimony which has been presented to the board. The general statements which it presents are not sufficient to show any responsibility on the part of the Mexican Government for the alleged loss of the claimant's money. Twenty years have elapsed since the loss complained of occurred. During all that time no complaint has been made either to the Government of the United States or to the Mexican Government, and no demand for indemnity has been presented. No claim was presented to the commission organized under the convention of 1839, and it has been presented to this board at a very late period. This long delay in presenting any claim for indemnity, although not conclusive evidence against the validity of the claim, may well excite some suspicion and justify a demand for proof more definite than that which has been presented. * * *

"If the facts occurred as they are stated by the witness, the most rational inference is that it was a mere robbery perpetrated by a lawless band of soldiers, or by ruffians who, for the occasion, assumed their character, and used the name of a custom-house officer to cover the crime. For such a wrong the government can not be held responsible. Upon no principle of national law can a government be held responsible for every act of lawless violence which may be perpetrated within its dominions. If an illegal exaction of duties had been made by an officer of the government charged with the duty of collecting its revenue, it might be charged that the government should be accountable; but in this case that is neither charged

nor proved. The money, it is alleged, was taken by a custom-house officer. A weigher, gauger, or a clerk in the custom-house might be called a custom-house officer, yet the government could not be held accountable for any act of lawless violence he might have committed. A remedy might have been afforded the claimant by the judicial authorities of the place, but it does not seem that any application was made to them. There is not sufficient proof to show that the wrong, if any was perpetrated, was done by an officer for whose acts the government could be held responsible."

Memorial of *William L. Scott:* Opinion of Messrs. Evans, Smith, and Paine, commissioners, March 22, 1851, under the act of Congress of March 22, 1851.

Case of the "Express."

"The memorial sets forth that in the month of May 1832 the schooner *Express* sailed from New Orleans with a cargo on board, belonging in part to the memorialist, bound for Omoa, in the Bay of Honduras, intending to touch at Truxillo for the purpose of landing passengers and a portion of the cargo. Upon arriving at this latter place it was ascertained that the port and castle of Omoa were in a state of rebellion and were then besieged by the troops of Guatemala, and that all commercial intercourse with that port was interdicted. The captain and supercargo of the vessel thereupon 'resolved to seek another market for the cargo and set sail for Sisal, Yucatan, in the Republic of Mexico,' but upon arriving there found that port blockaded, and thence continued the voyage to Campeachy, where they arrived the 18th of June. The manifest of the cargo was exhibited to the custom-house officer by whom the vessel was boarded, who informed the captain that it should have been certified by the Mexican consul at the port of departure. On the following day the captain and supercargo attended at the custom-house and delivered the manifest, upon inspection of which it was found that there were several prohibited articles on board, which by the Mexican laws were liable to confiscation. Proceedings were therefore instituted before the district judge, before whom the master and supercargo appeared, when, in the language of the memorial, 'the whole matter was fully explained and understood.' The judge however decided that the prohibited articles were liable to confiscation and gave judgment accordingly, and also mulcted the vessel with an additional penalty of $202.62. The

memorialist claims indemnity for the articles thus confiscated, and for the penalty imposed.

"No appeal appears to have been taken from this decision. The claim was not presented to the joint commission under the convention of 11th of April 1839, nor does it appear that the interposition of the Government of the United States was ever invoked in the case. These are circumstances indicative of a conviction on the part of the memorialist that the Mexican authorities were justified by the laws of Mexico in the proceedings which took place. The vessel voluntarily entered a Mexican port seeking a market for her cargo, a part of which consisted of merchandise not allowed by the laws of the country to be imported. Those laws imposed a penalty for such importation, and it is not alleged and does not appear that anything more was done than they required. No complaint is made that the trial before the district judge was not fairly conducted, nor that his judgment was unauthorized by the laws of Mexico. In the opinion of the board the memorial does not set forth a valid claim against Mexico, and it is therefore rejected."

Memorial of *James F. Desbois:* Opinion of Messrs. Evans, Smith, and Paine, commissioners, January 17, 1850, under the act of Congress of March 3, 1849.

Case of the "St. Croix."

"The *St. Croix* sailed from New York to Aransas Bay, in Texas, in 1834, with a party of colonists and their effects. After the passengers and cargo had been discharged by the permission of the collector of the port, a demand was made by the captain [of the port] for tonnage duties alleged to be due, amounting to $210. Captain Ward, alleging that he had understood that vessels arriving with colonists were not liable to any charge for tonnage duties, and had not therefore provided himself with funds to meet such a charge, offered to pay $100, which was all the money he had at the time, and offered to draw upon the owners of the vessel for the residue, or to procure the money there, if a short time should be allowed him for the purpose. While he was endeavoring to make arrangements to raise the money he was finally seized by order of the collector and imprisoned twenty-nine days, when he was discharged. In the mean time the vessel had been dismantled, her sails carried off, her stores destroyed or taken away by the order of the collector, and the captain deprived of all control over her. He then protested and abandoned her and returned to the United States. * * *

"The forcible seizure of the vessel under the circumstances, the carrying off her sails, and the waste and destruction of her stores for the nonpayment of tonnage duties alleged to be due, without any judicial proceedings either to ascertain the amount of the duties, or to direct the means of enforcing their payment, appears to the board as an act of illegal violence, justified by no law of Mexico of which they have any knowledge, and constituting a valid claim."

Memorial of *William D. McCarty, assignee of John Woolsey:* Opinion of Messrs. Evans, Smith, and Jones, commissioners, November 28, 1849, under the act of Congress of March 3, 1849.

Case of the "Patrick B. Hayes."

"The schooner *Patrick B. Hayes*, an American vessel registered at Philadelphia, sailed from that port to Vera Cruz on the 20th of September 1827 with a cargo of brandy, sperm candles, and cigars. The vessel and cargo were owned by Patrick Hayes, the claimant, who was a citizen of the United States. Two of the crew being disabled by sickness when the vessel reached the Gulf of Mexico, Commodore Porter, who was in command of a Mexican vessel of war, having met the schooner and finding her crew insufficient to navigate her, took the sick sailors on board of his vessel and sent two of his own crew to fill their place. On the night of the 12th of October, one of the Mexican sailors furnished by Commodore Porter being at the helm, through his carelessness or treachery the vessel was grounded on the coast of Yucatan, opposite Telhuac. The captain, having thrown overboard a part of the cargo with out getting the vessel off, on the morning of the 13th inst. went on shore for assistance. The inspector of the port sent out a boat, which took off a part of the cargo and also picked up a portion of what had been thrown overboard to lighten the vessel. The inspector then took possession of the vessel and detained the captain on shore several days, refusing to allow him to return on board. The captain applied to the judge of the district, Juan José Seal, exhibited to him his papers, and requested the restoration of the vessel and cargo. This the judge refused to do, but after some days' delay ordered the cargo to be reshipped, and sent the vessel to Sisal for the purpose of instituting proceedings to procure their forfeiture. When the schooner arrived at Sisal the cargo was landed and deposited in the custom-house. Seal then instituted proceedings before the circuit court at Merida upon the allegation that the brandy which constituted the larger portion of the cargo

was of Spanish manufacture and therefore prohibited. Captain Hunston made every effort in his power to procure a decision of the court, but without success, and finally, about the latter part of December, abandoned the vessel and cargo and returned to the United States.

"In the mean time the claimant, who happened to be at Havana, hearing that his vessel had been seized, proceeded to Sisal and arrived there in January 1828. The court at length, in February, decided that the brandy was not of Spanish manufacture and was therefore an article of legitimate commerce, and that the vessel was not liable to seizure; but in consequence of the resemblance of the brandy to Spanish brandy, and the suspicions attaching to the vessel from her grounding at Telhuac, the owner was subjected to the payment of all the costs and expenses which had been incurred. An appeal was allowed from this decision to the claimant, upon his giving bond with security conditioned to comply with the final decision. Several securities were offered who were refused, upon grounds strongly indicating an intention to compel the claimant to abandon the appeal. The claimant was finally compelled to consent to a sale of the vessel and cargo for the payment of the costs and charges imposed on him by the court, which amounted to over $1,500, in addition to the duties on the cargo, which were about $1,200. The vessel and cargo were sold at public sale, and out of the entire proceeds the claimant, after paying the duties, costs, and charges, realized but about $1,700.

"The proceedings against the property of the claimant were vexatious and oppressive in the highest degree. The papers produced in evidence satisfactorily prove that the voyage was a legal one, honestly undertaken, and without any intention of fraud. The brandy had been imported from Marseilles by the claimant but a few days before it was shipped for Vera Cruz. The seizure of the vessel was wanton and without excuse. The proceedings were unnecessarily delayed, occasioning great expense and trouble to the owner and captain. And when at length the tardy proceedings of the court were brought to a close, although that tribunal was forced to decide that the charges upon which the proceedings were instituted were false and unfounded, the sentence of acquittal was accompanied by an order for the payment of enormous costs and charges upon the ground that an intention of fraud had been suspected.

"If the existence of [illegible] suspicions should be regarded as a justification of the seizure and detention of vessels engaged in lawful commerce, the shipmasters with civilized nations [illegible] around the commerce of the world would be wholly unable to protect it against the cupidity of [illegible] whose suspicions it [illegible] make the excuse and [illegible] for rapacity and extortion.

"The seizure and detention of the vessel and cargo, and [illegible] to pay the costs and expense incurred [illegible] that the seizure was without cause, in the opinion of the board present a good claim for indemnity against the Government of Mexico, by whose authority the proceedings were had. It is therefore decided by the board that the claim now preferred by Patrick Hayes is a valid claim against the Republic of Mexico."

Opinion of Messrs. [illegible] Pan. Claims, 2d sess. January 21, 1839, being the act of Congress of March 3, 1849.

Case of the Harriet.

"The brig *Harriet* sailed from New Orleans in the month of March 1824 bound for Tampico in Mexico. When near the latter port the brig was driven on shore by a storm and bilged. Some days after this occurrence the vessel and cargo were sold at public auction as she lay, with the consent of the master and the United States consul at Tampico. The claimant became the purchaser for the sum of $2,000. He employed a large number of hands and proceeded to land as much of the cargo as could be got from the wreck. The most of it, consisting of furniture, dry goods, crockery, wax, wine, and quicksilver, was carried on shore. * * * After the goods were landed a portion of them, estimated by some of the witnesses at one-fourth of the whole amount, were pillaged or forcibly carried off by the natives on the coast. The claimant, fearing that all his goods would be lost, appealed to an alcalde and an officer of the customs at the village of Los Pressas, in the neighborhood, to protect them, and by an agreement with them the residue of the goods was deposited in the public buildings at that place. The custom-house officer soon afterward sold a portion of the goods without the consent of the claimant and refused to pay him the proceeds. He also refused to deliver any portion of the cargo still left in his possession.

"The collector of customs at Tampico finally took possession of the goods and, refusing to deliver them to the claimant, or

to afford him any other redress, referred him to the supreme government of Mexico. The witnesses state that the claimant applied to the supreme government through Mr. Wilcox, the United States consul at the City of Mexico, for redress, but without success. The board is satisfied from the evidence that the property was wholly lost to the claimant and that he has never obtained any indemnity. The pretext upon which it was detained by the collector at Tampico is not shown. Whether it was for duties alleged to be due or for any violation of law does not appear. The matter appears to have been brought to the notice of the supreme government, and under all the circumstances disclosed by the testimony it is not an unreasonable presumption that the proceeds went into its treasury.

"The property has been traced into the custody of the collector of customs, and as nothing has been shown which would justify its detention, and as the supreme government when appealed to refused to order a restoration or afford any redress, it should be held responsible for the loss resulting to the claimant."

Memorial of *Joseph Bosque;* Opinion of Messrs. Evans, Smith, and Paine, commissioners, March 27, 1851, under the act of Congress of March 3, 1849.

Case of the "Hylas."

"The schooner *Hylas* sailed from Portsmouth, New Hampshire, for Tampico, in Mexico, in February 1830 with an assorted cargo. She arrived in Tampico in March, and her manifest was sent to the collector immediately after her arrival. The collector in a few hours afterward sent on board an officer and assistants, who took possession of the vessel and closed the hatches upon the ground that the cargo consisted of articles which were prohibited by the laws of Mexico. After some delay the vessel was unloaded, and all the cargo except the prohibited articles was delivered to the consignee, and by him disposed of. The prohibited articles were stored in the custom-house and probably confiscated, although that fact is not clearly proved. The residue of the cargo and the vessel were subjected to no further restraint after the payment of duties.

"The evidence in this case presents no facts upon which the Government of Mexico could justly be held responsible for the injuries which resulted to the owners from the seizure. The vessel arrived at a Mexican port with many articles which the laws of the country expressly prohibited, under the penalty of

confiscation. The collector had an undoubted right to seize those articles. To do this it was necessary to take possession of the vessel. It was his duty to proceed without unreasonable delay in the manner which the laws of the country prescribed to enforce the penalty which had been incurred. If any just claim to indemnity exists in this case it can only be based upon the delay which occurred before the part of the cargo which was liable to confiscation was separated from the residue. A deposition of the supercargo states that the vessel and cargo were in charge of the custom-house officers forty or fifty days; but it is not alleged or proved that under the laws of Mexico any more summary proceedings could have been adopted. It appears from a letter from the collector to the minister of finance, quoted in a letter of the secretary of foreign affairs to the minister of the United States, that during that time he was waiting for instructions from the department. In that letter he stated:

"'In my dispatch of 20th of March last I informed your excellency of these occurrences, sending you at the same time documents in proof of them; and your excellency in consequence was pleased to direct me, by your superior order of the 21st of the same month, to proceed in the affair agreeably to the law of May 2nd. Upon this I caused the vessel to be unladen, the part of the cargo which was admissible to be entered, agreeably to the existing tariff and to the said law of 2nd May, leaving only in the public stores the goods prohibited by the thirty-sixth article of the 3rd chapter of the said tariff, comprehending the soap, tallow, candles, morocco, made clothing, etc.'

"A letter of the consul of the United States dated May 8th, 1830, stated: 'The collector has given me all the cargo with the exception of the prohibited articles, such as soap, candles, etc.'

"The deposition of the supercargo states that when he discovered that a part of the cargo was prohibited he requested permission to return with it to the United States, which was refused. This refusal presents no ground for indemnity. The vessel sailed direct for Tampico, with her cargo all manifested for that port. She anchored in the port and her papers were delivered to the collector. She was then within the jurisdiction of Mexico and subject to the laws of the country. The penalties incurred could not be avoided by a voluntary offer to depart with the unlawful cargo. Nor could ignorance of the laws of Mexico (which is alleged) furnish any exemption from

their penalties. It was the duty of those who traded in her ports to inform themselves of the extent to which the laws permitted their commerce. The owner undoubtedly sustained a loss as a consequence of the seizure of the vessel and cargo, but as the same was clearly warranted by the laws of Mexico, and it is not proved that the laws were perverted or violated to the injury of the claimant, he is without redress. His loss must be regarded as the consequence of an attempt, whether knowingly or ignorantly, to violate the laws of Mexico by the introduction of goods which were prohibited."

Memorial of *Nehemiah Moses:* Opinion of Messrs. Evans, Smith, and Paine, commissioners, March 5, 1851, under the act of Congress of March 3, 1849.

Case of the "Eclipse."

The schooner *Eclipse*, belonging to citizens of the United States, sailed from Mobile in the month of February 1836, having on board a frame and materials for a house, bound to Tabasco. She arrived at the bar of the river on the 26th of that month, where she was boarded by a custom-house officer, to whom the proper manifests were duly delivered. The captain was taken on shore in the custom-house boat and detained until the next day. The vessel proceeded up the river to a place called Frontera, where, on the 28th, she was visited by five officers of the customs, who commenced a rigorous search, and tore open the lockers and staterooms under the pretense that prohibited articles were on board. She was afterward subjected to repeated examinations and spoliations, accompanied with ill treatment of the master and crew. The consul of the United States, then residing at Tabasco, attributed these proceedings to the excited state of popular feeling in Mexico against the United States, growing out of the revolutionary movements then taking place in Texas. The commissioners under the act of Congress of March 3, 1849, to whom a claim growing out of the transaction was presented, said:

"In the opinion of the board these facts constitute a valid claim against the Republic of Mexico. They were the acts of public officers, of officers of the customs, of the military and of the judicial departments. They were not the acts of unauthorized individuals, but were shielded and sanctioned by those exercising authority in the name of Mexico, and undoubtedly had their origin in the causes assigned by the vice-consul of the United States."

Belden's Case.

"The claim for loss on goods alleged to have been detained at Durango is not valid. It rests upon a general declaration of the revenue officer at Zacatecas, that he would seize all goods coming within his jurisdiction that proved to be of the description prohibited by the tariff of 1837. The claimant alleges that in consequence of this declaration (not known in any instance to have been carried out) he was prevented from taking his goods from the warehouse at Durango to carry them into other markets, lest they might be seized. If this claim could be valid there was not an American merchant residing in Mexico that might not say he was injured by that declaration. It is not shown that the threat was made to affect any particular individual or against American goods merely."

Memorial of *John Belden*: Opinion of Messrs. Evans, Smith, and Paine, commissioners, March 31, 1851, under the act of Congress of March 3, 1849.

Lovell's Case.

"The claimant in this case seeks to obtain indemnity for a payment of $2,000, made by his agent in Alamos, in Mexico, in the year 1829, to procure the release of certain goods belonging to him, which had been seized upon a charge of violating the revenue laws.

"By the revenue laws then in force in Mexico, all goods imported into the country were subject, in addition to the import duties which were paid to the general government, to a consumption duty to be paid in the State in which they were sold. Foreign goods, after being entered at a custom-house, and the import duties being paid, if carried to any point in the interior for sale, were required to be accompanied with a manifest and clearance from the custom-house at which they were entered, and the consumption duties were payable upon the goods embraced in the manifest at the place in the interior at which they were offered for sale. The collectors of the interior custom-houses were authorized to confiscate any goods upon which it was shown that the import duties had not been paid. It was also competent for the importer, after carrying his goods to any particular point in the interior, to pay the consumption duties upon such portion of his goods as he might sell at that point and send the residue, with a manifest and clearance from the custom-house, to any other place in the interior where he might wish to offer them for sale. By this regulation the consumption duties were paid on each piece of goods at the place where it was sold.

"In the year 1829 the firm of Lovell, Tylor & Co. (of which claimant was a member) dispatched from Matamoras to the interior a quantity of goods with the usual manifest and clearances. A portion of them being sold at Saltillo, the consumption duties on that portion were paid at that place, and the residue were sent by these several carriers to Alamos, the quantity taken by each carrier being accompanied with a new manifest and clearance from the custom-house at Saltillo. After remaining at Alamos a short time, Lovell took a portion of his goods in the manifest and clearance to a town called Jesus Maria, in the State of Chihuahua, leaving the residue in charge of Reuben M. Potter, an agent. Shortly after Lovell left Alamos a charge was made in legal form by the collector before an alcalde that a portion of the goods which were brought to Alamos were not embraced in the manifests, and a confiscation of all the goods not so embraced was demanded. Two persons were appointed by the alcalde to examine the goods and compare them with the manifests, who, after the examination, reported that the goods did not correspond with the manifests and specified those which were not embraced in them, and were therefore liable to confiscation. Potter then requested that time might be afforded him to show that the report of the examiners was erroneous. This was granted, the alcalde in the mean time closing the store and taking possession of the keys. On the next day Potter solicited the interposition of the vice governor of the State, who was then at Alamos, stating that he 'wishes to have the matter closed without judicial proceedings, and that he would conform to the dispositions he might make as to what should be allowed to the implications and informers.' The vice-governor, in his certificate of the transactions, stated: 'I immediately repaired to Potter's store to advise him of the result and ask him how much it would be well to guarantee to those interested, in place of their legal emoluments, to which he replied that I might dispose as I deemed advisable, observing also that the amount of contraband did not probably exceed three or four thousand dollars.' The compromise was then completed by the payment by Potter of $1,500 to the officers interested in the seizure, and also the import duties on the goods which it was alleged were not embraced in the manifests from Saltillo. The duties paid amounted to the sum of $533.87. The goods were then released.

"This account of the transaction is taken from the *expediente*

which is presented as evidence to sustain the claim. A deposition of Potter accompanies the *expediente* in which he gives a history of the transaction, which so far as regards the proceedings corroborates the *expediente*. He, however, denies that any of the goods were liable to confiscation, but admits that some of the goods specified in the manifest taken out for Jesus Maria were not embraced in the manifests from Saltillo. The proceedings he alleged were based on these discrepancies, a part of which he says 'were merely verbal and the rest had arisen from inadvertence.' He admits that he solicited the interposition of the governor and that the compromise was made through him as stated in his certificate. He does not admit, however, that he stated to the governor that part of the goods were contraband. He says: 'He (vice-governor) expressed a willingness to intercede and inquired of me what amount of contraband goods I had on hand, to which I replied, "None." He then inquired what amount there was, though not contraband, that might be implicated by the proceedings then pending. To which I replied, in substance, that from the unjust and illegal manner in which the authorities were proceeding they might perhaps contrive to implicate a considerable amount, naming a sum which I do not now recollect.'

"The money was paid by the claimant's agent voluntarily upon a compromise of the proceedings instituted against the goods, and it is by no means clear, even from the testimony of the agent, that a portion of the goods was not liable to confiscation. In his deposition he states: 'I supposed that the goods were more compromised on the ground of technical informality than they were.' This must be regarded as an admission that they were compromitted to some extent. If any portion of the goods was liable to confiscation the officers had a right to institute proceedings to ascertain the extent to which the government might proceed to obtain satisfaction for the violation of the laws. If the claimant or his agent voluntarily paid a sum of money to suppress the proceedings and prevent the investigation, the board can perceive no ground upon which the Government of Mexico can be required to refund it. The board therefore decides that the claim preferred by Benjamin D. Lovell against the Republic of Mexico is not valid and it is disallowed."

Opinion of Messrs. Evans, Smith, and Paine, commissioners, February 28, 1851, under the act of Congress of March 3, 1849.

Case of Uhde & Co.

"Messrs. Uhde & Co. were merchants of Matamoras, where they had resided from the year 1842, carrying on trade there, having a house of business and a home in that city. They continued to reside there after the declaration of war by the United States against Mexico in 1846, and until 1851.

According to the interpretation of the law of nations, by the highest courts in Great Britain, it is a point settled, 'beyond controversy, that where a neutral, after the commencement of hostilities, continues to reside in the enemy's country for the purposes of trade he is considered as adhering to the enemy, and as disqualified from claiming as a neutral altogether.' (See Dr. Lushington's judgment in the case of the *Aina*, reported in the *Jurist* of July 1855.) However good the claim of Messrs. Uhde & Co., as conquered Mexicans, against the United States, by the interpretation of the law of nations as given by the decisions of the courts of Great Britain may be, the claim ought to be excluded from this commission. The Government of the United States have, however, entertained the claim in the correspondence between the diplomatic agents of the two countries, and for this reason we hold it should be considered and settled without further delay.

"I shall proceed, therefore, to examine and decide the case on its merits. The case is as follows: On war being declared by the United States against Mexico in 1846, the ports of Mexico were declared in a state of blockade; but several ports (amongst them the port of Matamoras, on the Rio Grande) having fallen into the possession of the United States forces, the government, on the 30th of June of that year, issued a circular, addressed to the collectors and other officers of the customs in the United States in regard to Matamoras, to the following effect, viz:

"'In the case of application of vessels for clearance for the port of Matamoras, you will issue them under the following circumstances:

"'1st. To American vessels only.

"'2d. To such vessels carrying only articles of the growth, produce, or manufacture of the United States, or of *imports from foreign countries to our own, upon which duties have been fully paid.* Upon all such goods, whether of our own or foreign countries, no duties will be chargeable at Matamoras, so long as it is in the possession of the United States forces. *Foreign imports*, which may be reexported in our vessels to Matamoras, will not be entitled to any drawback of duty; for if this were permitted, they would be carried from that port to the United States, and thus avoid payment of all duties.'

"Of this circular, which was published in the newspapers at the time, Messrs. Uhde & Co. must have been aware. They however sent to New Orleans and chartered the American schooner *Star* for a voyage to Havana, to load a cargo of merchandise for Matamoras, if open, and if not open she was to proceed to New Orleans to discharge. The circular indicates that no foreign goods could be shipped from the United States to that port until the duties had been fully paid. Messrs. Uhde & Co. could not, therefore, when chartering the *Star*, have supposed that a cargo of foreign goods, from a foreign port, could enter without paying duty, when foreign goods from the United States were *chargeable with full duty* in the United States in order to their admission free at Matamoras.

"It is stated that it was known at Havana, when the *Star* sailed, that the port of Matamoras was blockaded; but it is very extraordinary that a vessel should proceed to a port known to be blockaded to inquire whether it is so or not. The *Star* arrived at Brazos the 6th of November 1846, which is on the Texan bank of the Rio Grande. The captain went on shore to inquire if he might enter his vessel, and Mr. G. S. Cook, who was or assumed to be deputy collector, informed him that he might, and charged him $7.50 for fees. Captain Merrill, of the *Star*, exhibited his manifest, etc., and received a permit to discharge his cargo in the following words:

"'The master of the schooner *Star*, from Havana, is authorized to discharge her cargo at Barita or at Matamoras.

'G. S. COOK,
'*Deputy Collector, Brazos St. Jago, November 7, 1846.*'

"The schooner was then brought into the river, and the goods were landed in open day by Messrs. Uhde & Co., and placed in their own warehouses, and were, two days afterward, seized by the military commander of the place on the charge of being fraudulently introduced.

"The whole defense of Messrs. Uhde & Co. for their landing the goods rests on the value and force they attach to the permit given to Captain Merrill to discharge his cargo. It was very well known to everyone conversant with foreign trade that it is the duty of every shipmaster, on arrival at a foreign port, to proceed to the custom-house, enter his vessel, and pay light and port dues; until he has done so he is not allowed to commence discharging his cargo. But this is very different from a con-

signee's permit to land the goods which are entered and bonded, or the duties paid by the consignees when a permit is granted to land the same. The seizure was therefore justifiable, as no inquiry was made by Messrs. Uhde & Co. if any duties were payable.

"After the seizure, it is stated that the claimants offered to pay the duties of the American tariff *which was to go into operation on the 1st of December next.* This was refused by Colonel Clark, the commanding military officer, who seemed determined to wait orders from a higher quarter.

"The claimants then made application to the British minister at Washington, who applied to the then Secretary of State, the Hon. James Buchanan. The case was referred to the Secretary of the Treasury, the Hon. R. J. Walker, who examined the master of the *Star*, brought to Washington by the claimants, and other evidence, and a final decision was come to that the seizure was sustained; but an order was made, directed to the collector of the customs at Galveston, that the claimants might have their goods on payment of duty according to the tariff of 1842, and charges and expense of warehouse rent, and interest on the duties from the date of the seizure until paid.

"For some cause the settlement was never carried into effect. The claimants allege that no person ever came to Matamoras, as directed by the Secretary of the Treasury, and that the goods were taken to Galveston, condemned, and sold in a damaged state for about $8,800.

"My belief is, that had the arrangement made by the Secretary of the United States Treasury been carried into effect, the result would have been that the claimants would have realized near the cost value of their goods. I therefore award to Messrs. Charles Uhde & Co., or their legal representatives, in full of said claim, the sum of $25,000, this 15th January 1855."

Bates, umpire, convention between the United States and Great Britain of February 8, 1853. (S. Ex. Doc. 103, 34 Cong. 1 sess. pp. 436–453.)

Case of the "Baron Renfrew."

"The umpire appointed agreeably to the provisions of the convention entered into between Great Britain and the United States on the 8th of February 1853 for the adjustment of claims by a mixed commission, having been duly notified by the commissioners under the said convention that they had been unable

to agree upon the decision to be given with reference to the claim of Mr. Duncan Gibb, of Liverpool, owner of the ship *Baron Renfrew*, against the American Government; and having carefully examined and considered the papers and evidence produced on the hearing of the said claim, and having conferred with the said commissioners thereon, hereby reports that this vessel was seized at San Francisco on a charge of smuggling, and was libeled in the district court of the United States. At the time it was shown that the merchandise smuggled (59 or 99 Bags of Rice) had been entered in the manifest of the ship as stores, and according to the laws of the United States the smuggling of stores does not involve the forfeiture of the ship. She was accordingly cleared and restored to the claimants by decree of the court. The district attorney held a different opinion and appealed to the Supreme Court of the United States. The rice was condemned as forfeited, and the captain of the ship incurred the penalty of three times the value (the rice sold for $2,200), which being unable to pay, he was imprisoned. At Washington the judgment of the district court was confirmed and the ship finally delivered up. The ship had been valued for bonding at $23,000, but for some reason the claimant's agent did not see fit to give bond.

"The vessel was seized August 6th, 1852.

"The libel was dismissed September 21st, 1852.

"In custody of the marshal four months and twenty-seven days, deducting the time from the 6th of August to the 21st September, for which no reasonable claim for detention can be made, there appears to have been a detention of three months and a half for which, and for a portion of legal expenses, I award to Duncan Gibb, esquire, and owners of the ship *Baron Renfrew*, or their legal representatives, the sum of $6,000 on the 15th January 1855."

Bates, umpire, December 23, 1854, convention between the United States and Great Britain of February 8, 1853. (MSS. Dept. of State.)

Case of the "Only Son."

Mr. Bates, umpire of the mixed commission under the convention between the United States and Great Britain of February 8, 1853, awarded $1,000 to the owners of the schooner *Only Son* for the wrongful action of the collector of customs at Halifax, Nova Scotia, in compelling the master of the schooner, whose intention was merely to report for a market and to proceed

elsewhere if circumstances rendered it desirable, to enter his vessel and pay a duty of 5 shillings a barrel on 825 barrels of flour, composing the cargo, which the master, having been compelled to enter and pay duty on it, there disposed of. It was doubtful how much loss was sustained by the sale. But according to the master's protest, made at Halifax, he intended to proceed to a port in the United States, instead of paying duty and selling the cargo at Halifax, and the umpire under the circumstances made the award above stated, which was about the amount of the duties. The claim was the subject of much diplomatic correspondence, beginning in 1829, and the British Government agreed to pay any loss sustained by reason of the act of the collector, but on examining the particulars refused to pay anything, on the ground that no loss was suffered.

Case of the "William Lee."

"On the 12th day of September 1855 the whale ship *William Lee*, of 310 tons, was lying in the port of Tumbez [Peru] and ready to proceed on a whaling cruise. The captain of the ship, Lorenzo Gruninger, having obtained the papers necessary from the custom-house and from the governor, proceeded to the office of the captain of the port for the purpose of procuring his clearance. That officer, Don Cristobal Colona, refused to clear the ship, on the ground that the captain of the same owed a sum of money to two sailors and to a person from Ecuador, whose names were not given. Captain Gruninger proved that he had paid all just demands against him, but offered security in $10,000 that he would satisfy all lawful claims against him.

"Notwithstanding this, the captain of the port persisted in refusing the clearance, nor would he give to Captain Gruninger a passport to go to Lima. It was not until the 22d of December of the same year that the captain of the port gave the proper clearance of the ship.

"The *William Lee* suffered great damage in its hull and masts and rigging during the three months it was forced to remain in Tumbez, and as experts declared that the necessary repairs could not be made at sea, the captain was compelled to take his ship to Paita for repairs, where he expended $4,000 in making the same.

"The whaling season being over, and it also being found impossible to procure a suitable crew in Paita, Captain Gruninger departed with his ship for the United States. The

owners of the *William Lee* made a claim upon the Peruvian Government through the Government of the United States for $67,514.29 as damages in consequence of the detention of the ship.

"Upon examining the claim, the United States Government reduced it to $32,424.54, and on the 22nd March 1858 instructed its minister in Lima, the Hon. J. Randolph Clay, to present to the Peruvian Government a claim for that amount.

"The Peruvian Government replied on the 19th January 1860 stating that the owners of the *William Lee* and its cargo were entitled to damages, but could not agree to the amount claimed by the United States. The case continued in this state till the negotiation and ratification of the convention of 12th January 1863, between the two governments for the settlement of claims, when two commissioners were appointed by each government to adjust the claims between the citizens of the two governments.

"That commission in session in Lima, having given audience to the agents of the two governments for the presentation of arguments in the case, came to the following determination:

"That there is no positive proof furnished in support of any of the items presented with this claim. The principal element of damage is based upon the loss of the whaling season during the detention of the ship, but this item is sustained only by presumptive evidence, namely, the declaration of the ten shipmasters in the whaling service, as to the probable catch of such a ship as the *William Lee* at that season on the 'off shore ground.' This is stated at 800 to 1,200 barrels. But, on the other hand, it is evident from the papers presented in evidence on behalf of the claimant in support of a different point, namely, the illegality of his detention, that during the eighteen months of the cruise actually preceding the detention of the *William Lee*, as well as during the anterior period she had been at sea, her catch was only 730 barrels of oil. The commissioners think this a much more reasonable and equitable as well as a much more tangible measure of damage than the opinion of the shipmasters. There is no proof found in respect to the whole sum of $2,671.11 for notarial, consular, and other fees and expenses alleged to have been incurred in consequence of the detention of the ship. The Government of Peru has already admitted in their correspondence with Mr. Clay, their liability for the sum of $4,000 incurred in repairing the ship at

Paita, according to the report of the board of survey. Including, then, in the determination of damages the loss of the whaling season to the *William Lee*, the $4,000 for repairs, $1,500 for all expenses during detention, and interest on all losses from the release of the ship in December 1855, at the rate of 6 per cent per annum, the commissioners award to the owners of the whale ship *William Lee* twenty-two thousand dollars ($22,000) in the current money of Peru, or its equivalent in the current money of the United States."

Opinion of the commission under the convention between the United States and Peru of January 12, 1863.

CHAPTER LXII.

FORCED LOANS.

Ducoing's Case.

"The board, having duly considered the case of Theodore Ducoing, for a forced loan exacted from him in the months of September and November 1836 by the Mexican Government, find that the amount levied upon him was $1,000. But in the enforcement of it he complains that money and property to the value of $2,000 were taken from him by the Mexican authorities. This complaint he has, we think, satisfactorily verified by proof. The commissioners are therefore of the opinion that the Mexican Government is justly indebted to him in the sum of $2,000; and they do unanimously award, decree, and decide that the Mexican Government shall pay to the said Theodore Ducoing, the claimant, the sum of $2,450, being the $2,000 aforesaid, with the interest included, at the rate of 5 per centum per annum thereon, from the 11th day of November 1836 up to this time."

Commission under the convention between the United States and Mexico of April 11, 1839.

In the case of *John Ehlers*, before the same board, a claim was made for $466.75, exacted by the Mexican authorities as a forced loan. The case was referred to the umpire, Baron Roenne, on the question whether the claim had, as required by the convention, been presented to the Department of State or to the diplomatic agent of the United States at Mexico prior to the signature of the convention; and the umpire decided that it had not been. No allowance was made. The same claim, apparently, was presented to the commissioners under the act of Congress of March 3, 1849, and was dismissed on the ground that Ehlers was not a citizen of the United States at the time when his claim originated.

Homan's Case.

"It is proved in this case that the memorialist [William Homan] and one James H. Farrington were copartners and doing business as cabinetmakers in the City of Mexico in the year 1836, both being citizens of the United States. In the month of October

of that year a forced loan was ordered to be made by the Mexican Government, to which citizens of the United States, as well as other residents of Mexico, were required to subscribe. The amount assessed upon said company was $100. The company protested against this exaction and refused to pay it; and in consequence their property of the value of $220 was seized and sold at auction to raise the required amount. The board is of opinion that this constitutes a valid claim against the Government of Mexico, but it does not appear that the memorialist is entitled to more than a moiety of the amount. The copartner is equally entitled, and may hereafter prefer a claim for his share of the indemnity."

Opinion of Messrs. Evans, Smith, and Paine, commissioners, January 22, 1850, under the act of Congress of March 3, 1849. The commissioners subsequently awarded $187.75—$110 principal, $77.75 interest.

Robinson's Case.

"It is clearly proved by the evidence in support of the claim in this case that the memorialist [John A. Robinson], who is a citizen of the United States, was residing at Guaymas, at the outbreak of the late war with Mexico, and was consul of the United States for that port. He was required to remove to the distance of twenty leagues from the coast about the 1st of October 1846, and accordingly took up his residence at Hennosville, where he remained until May 1848. The supreme government of Mexico, on the 17th of June 1847, issued a decree for a forced loan of $1,000,000 for the purpose of carrying on the war against the United States. The proportion of this loan assessed upon the claimant was $660, which sum he was compelled to pay, but against which he entered his protest. In the opinion of the board the Mexican Government had no right to require the payment of this sum or any sum of the memorialist, and it therefore decides that the claim is valid, and allows it accordingly."

Opinion of Messrs. Evans, Smith, and Paine, commissioners, January 7, 1851, under the act of March 3, 1849.

A. B. Thompson and John C. Jones presented a claim for $2,843.50, the amount of a forced loan made in California in 1836, by order of the government, from funds of the claimants. The claim was subsequently recognized by the Mexican Government, and was allowed by the commissioners. A claim of Sanforth Kidder for a "forced loan" made in January 1836 to the commissary department, as proved by the original certificate given to the claimant by the commissary-general, was also allowed. In the case of Benjamin Lovell, a claim for a forced loan was rejected for want of evidence. In the case of William S. Parrott, which was before the mixed

commission under the convention of 1839, a claim was made for $1,000, the amount of a forced loan exacted by the Mexican Government in 1836. The commissioners under the act of 1849 said: "This item was allowed by the Mexican members of the mixed commission to be valid. The board therefore decide that this item of the claim is valid, and it is allowed accordingly."

Moke's Case.

Moses Moke (No. 342, Am. docket) made a claim before the mixed commission under the convention of July 4, 1868, for $1,000, exacted as a "forced loan" December 21, 1864, $500 as damages for a day's imprisonment to which he was subjected "to force the loan," and $300 exacted at a "forced loan" April 2, 1865. He also claimed interest on each of the "loans." Mr. Wadsworth, on August 16, 1871, delivering the opinion of the commission, said:

"The forced loans were illegal; the imprisonment was only for one day, and resulted in no actual damage to claimant or his property; but we wish to condemn the practice of forcing loans by the military, and think an award of $500 for 24 hours' imprisonment will be sufficient. While the calamitous circumstances surrounding the officers of the government and the people of Mexico at the time are entitled to much consideration on the question of damages, nevertheless we can not too strongly condemn this arbitrary, illegal, and unequal way of supplying the wants of the military. If larger sums in damages, in such cases, were needed to vindicate the right of individuals to be exempt from such abuses, we would undoubtedly feel required to give them. The loans were paid in Mexican coin, but considering the difference in the value of the coins of the two countries, and the exchange on New York from Matamoras, it will be right to award currency. We award the sum of $2,425, and $100 as costs, etc., currency of the United States."

MS. Op. II. 165.

McManus's Case.

After Sir Edward Thornton had succeeded Dr. Lieber as umpire, and Mr. Zamacona had become Mexican commissioner, the case of McManus Brothers (*Francis McManus et al.* v. *Mexico*, No. 348, Am. docket) came on for decision. Mr. Wadsworth, the American commissioner, rendered (MS. Op. III. 359) the following opinion:

"One of the claimants has furnished us with the several decrees under which the special contributions levied on his firm were made. It appears from these decrees, very plainly, that the contributions were either levied upon all the property

of all the inhabitants of the republic, or upon all the cantons of the State of Chihuahua. The levy thus being upon all equally, is certainly lawful; and foreigners having property in the country were equally bound with citizens to pay the contribution, which was in fact only an extraordinary war tax. Claimants are in error in supposing that as the levy was made to resist the French invasion, they were therefore, as aliens, exempt from the imposition. Aliens residing in the United States during the late war were bound to pay the same taxes as the citizens of that country, whether ordinary or extraordinary. Nothing can be more just than that aliens residing in the country, and accumulating property there, by traffic or otherwise, should contribute *equally with all others* to its defense against its armed invader.

"It is my opinion that claimants, then, can only recover here for the forced loans imposed upon them and collected. These are not only unlawful, but the government undertakes in terms to repay the money. They are contrary to the treaty of 1831 and to right, because they are not imposed upon all the inhabitants of the state in same, equal, and uniform manner, and do not profess to be taxes or contributions to the public necessities, but only temporary loans, wrung out of the unhappy wretches at the point of the bayonet. They are deplorably frequent in Mexico and are wicked beyond the power of expression, and cast a reproach upon all engaged in levying or sustaining them. Surely nations that submit to them are entitled to the praise due to patience and forbearance. Claimants should have an award for the forced loans with 12 per cent interest. In my opinion the sums of money obtained by force are the following, viz: July 11, 1865, $2,000; August 4, 1865, $1,000; March 28, 1866, $1,000; July 17, 1866, $1,000; August 1, 1866, $1,000.

The loan of May 15, 1866, is subject to a credit of $539.64, repaid. I understand the sum of $2,400 exacted of Francis McManus to be included in the sum of $6,000, which the 'mint property' was compelled to pay (see affidavit of Francis McManus, paper No. 20) and which is embraced in another claim pending before this commission. I can not doubt my duty to award the foregoing sums with interest."

Mr. Zamacona (MS. Op. III. 361) said:

"Upon a close examination it [the claim] appears to consist of various elements—pecuniary loans made at times to the government of the State and at others to the government of the republic; at times in the nature of taxes, at others as forced loans; some in their own name and some in the name of other people. It is perceivable from this that some of the allegations, as, for example, the payment of general taxes, can not be the subject of a claim.

"But even taking the grounds of the claim altogether, there are other principles which, taken in connection with the circumstances of the case, do not permit the claimants' preten-

sions to be admitted. Foreigners, with regard to their local property, are subject to the laws of the country where they may reside. The acts of the authorities are presumably in accordance with the laws until it is proven that they are otherwise. A diplomatic claim may be made when the claimant has been the victim of a palpable injustice when making use of his ordinary or usual remedies. When he fails to make use of such as are furnished him by the local laws, there is no ground for complaint. Now, with reference to the pecuniary payments such as those alleged to have been made by the claimants, and with regard to such as from their nature demand repayment, recent provisions of the Mexican legislation show no intention on the part of the public authorities to ignore such, but on the contrary a desire to facilitate and methodize the exercise of such a right. The holders of claims contracted during the last war for which the government is responsible have been convoked; an institution has been established for the examination of their vouchers; the time granted for their presentation has been extended several times, with a prospect that payment would follow an adjustment according to its means. Such creditors as have not responded to the call can complain of no injustice. Their ground of complaint would arise when, upon making use of the legal remedy, they should meet with any palpable act of injustice either in their adjustment or payment.

"The difficulties of discussing questions such as the present before our commission and not before the board of audit established in Mexico can be seen in the present case. The commission, as it is easy to observe by Order No. 19, is even embarrassed for the want of legal data, and as to the facts which the board of audit of the "Contaduria Mayor Mexicana" abundantly possesses. * * * If our commission should attempt to disentangle and classify the heterogeneous mass of claims embraced in this *expediente* in addition to admitting a premature claim and assuming powers which belong to a domestic institution, it would expose itself to err for the want of means of investigating which are not within its reach. I should here repeat the considerations upon this same subject stated in my opinion of this date in case, No. 101, of Patrick Francis Ryder. I refer to them and hope that the umpire of the commission will take them into consideration. My opinion, therefore, is that, leaving the claimants' rights intact, to be made use of by them in the ordinary way, the claim in its diplomatic character be dismissed."

Argument of Mr. Ashton.

After these opinions were delivered Mr. Ashton, the agent and counsel of the United States, in a printed argument before the umpire in *Francis Rose* v. *Mexico*, No. 344, maintained:

1. That great weight should be given to the fact that claims on account of forced loans were allowed by the commission

under the convention of April 11, 1839, the Mexican commissioners concurring with the American in the awards, and by the commissioners under the act of Congress of March 3, 1849. The forced loans allowed by those commissions "would appear to have been levied," said Mr. Ashton, "without discrimination, upon Mexicans and Americans alike, in the particular localities."

2. That while there was no "special clause" in the treaty of 1831 "in reference to forced loans *nominatim*," such loans came within the eighth article "upon a proper interpretation of it." If, said Mr. Ashton, money did not come within the literal signification of the word "effects" in that article, that word should be "extended by construction" so as to include it. (Vattel, Book II. Ch. XVII. sec. 290; Grotius, Book II. Ch. XVI. sec. 25; 2 Phillimore, 93; 2 Austin on Jurisprudence, 1025.) While private property might be taken for public use, compensation should be made to the individual owner. (Grotius, Book VIII. Ch. XIV. sec. 7; Pufendorf, Book VIII. Ch. V. sec. 7; Bynkershoek, Quaest. Jur. Pub. Book II. Ch. XV.; 2 Johns. Ch. 165; Const. of Mexico, 1857, lit. I. Art. 27; Blackstone's Comm. 139; *Grant* v. *U. S.*, 1 Ct. of Claims, 50.) But it was unnecessary to resort to extensive interpretation. All kinds of personal property were comprehended by the "natural signification" of the eighth article. The word "effects" had been held in a will to be equivalent to *property* or *worldly substance*. (*Hogan* v. *Jackson*, 1 Cowper, 304; *Hearne* v. *Wiggington*, 2 Maddock's, Ch. 120; *Campbell* v. *Prescott*, 15 Ves. 499.)

3. That if money was within the eighth article, the government, when it appropriated money, became "immediately and absolutely *liable*" to repay it, and the individual might bring an action to recover it without a prior "express demand or application for repayment." (8 Johns. Rep. 374; 5 Cowen, 516; 13 Peters, 136; 12 Geo. IV. c. 78; *Grant* v. *U. S.*, 1 Ct. of Cl. 50; *Johnson* v. *U. S.*, 2 id. 415; *U. S.* v. *Klein*, 13 Wall. 136; Smoot's Case, 15 Wall. 45; *U. S.* v. *O'Keefe*, 11 Wall. 179.)

4. That if forced loans were not within the eighth article, the Mexican Government would be liable for their repayment "under the settled principles of universal law applicable" to "the exercise of the right of eminent domain." (*Sinneckson* v. *Johnson*, 2 Harrison (N.J.), 129; *Gardner* v. *Village of Newburgh*, 2 Johns. ch. 165; *Mitchell* v. *Harmony*, 13 Howard, 134.)

5. That a "forced loan" was "a taking of money for public use in the exercise of the right of eminent domain, and not in the exercise of the power of taxation, (Cooley, Constit. Lim. 527, note; 6 Cranch, 145.) Even if the treaty of 1831 were construed, as it was understood that the umpire had construed it, as guaranteeing against a discrimination in the matter of forced loans as between citizens and foreigners, this fact would not release the state from the obligation to repay where no such discrimination was made. If this view was correct, it was unnecessary to consider whether the words "charges or contributions or taxes" in the ninth article of the treaty of 1831 included "forced loans." The words "charges or contributions" should, however, be construed as describing such as were "levied under the power of taxation, and not under the right of eminent domain." (26 Ill. 357; 12 Ill. 406; 10 Wis. 242; 4 N. Y. 419; 3 Scam. Ill. 130; 29 Ill. 494.)

Award of the Umpire.

The umpire, Sir Edward Thornton, November 26, 1874, delivered (MS. Op. IV. 178) the following opinion:

"The case of *McManus Brothers* v. *Mexico*, No. 348, involves two claims, one for what are called in the memorial 'involuntary' contributions, and the other for forced loans, levied upon the claimants by Mexican authorities. With regard to the first of these the two commissioners appear to be agreed that the claimants are not entitled to compensation, and no observations are therefore needed from the umpire.

"The second question is whether forced loans could properly be exacted from citizens of the United States by the Mexican authorities. The principal argument of the claimant is that treaty stipulations between the United States and Mexico exempt them from the payment of forced loans. The umpire, after examination of the treaties between the two countries, can find no mention of forced loans and no stipulation which accords or implies the exemption of United States citizens from their payment.

"Article VIII. of the treaty of 1831 stipulates that the 'citizens of neither of the contracting parties shall be liable to any embargo.' This can not imply the nonpayment of forced loans; and further, 'nor shall their vessels, cargoes, merchandise, or effects be detained for any military expedition, nor for any public or private purpose whatsoever, without corresponding compensation.' If it were possible to imagine that 'the detention of effects' implied the payment of forced loans, these could not be exacted without corresponding compensation. But the compensation could only be either the immediate return of the money, which would be absurd, or its repayment

at some future date. Now, there is no evidence that the claimants ever made any application to the Mexican Government or were refused repayment. The defensive evidence asserts that those who applied were repaid, and the claimants do not rebut this assertion.

"Article IX. of the same treaty stipulates that 'the citizens of both countries, respectively, shall be exempt from compulsory service in the army or navy; nor shall they be subjected to any other charges, or contributions, or taxes, than such as are paid by the citizens of the States in which they reside.' Forced loans may well be included in 'charges, or contributions, or taxes,' and the clear inference is that if the citizens of the State were subjected to forced loans, hard and impolitic as they might be, citizens of the United States were not exempt from them.

"For it appears by the evidence, and the claimants do not deny, that these forced loans were distributed amongst the whole of the inhabitants, whether native or foreign, of the republic or of the particular State.

"In the treaties, then, between Mexico and the United States, there seems to be no mention of forced loans. But in certain treaties made by the former with some other nations there is a stipulation with regard to them. If, however, this stipulation implies an exemption from their payment, it is a qualified exemption. In the treaty with Great Britain it is stipulated that 'no forced loans shall be levied upon them,' whilst the Spanish version is that 'no forced loans shall be levied specially upon them.' A stipulation precisely similar to the treaty with Great Britain is to be found in the treaties with the Netherlands, Denmark, Chile, Peru, Prussia, the Hanse towns, and Austria. The umpire considers that it implies that forced loans may be levied upon the citizens and subjects of the contracting parties, provided they be not levied especially upon them without at the same time and in the same proportion being levied upon all the other inhabitants of the respective countries, whether natives or foreigners.

"The umpire also observes that the claimants made continuous payment on account of forced loans for several years; yet there is no evidence that during that time they made any representation upon the subject to their government, or, if they did so, that the United States Government addressed any remonstrance to the Mexican Government against the exaction of these forced loans; it possibly felt that the terms of its treaties with Mexico would not justify such a remonstrance.

"The agent of the United States in his argument before the umpire in the case of *Francis Rose* v. *Mexico*, No. 344, has stated that the liability of Mexico for the forced loans must be regarded as settled by the old precedents of decision in this commission, and, as he thinks, by the case of *Geo. Pen Johnson* v. *Mexico*, No. 357. With regard to his own opinion in

that case, the umpire must be allowed to observe that he expressed none as to the right of the Mexican authorities to impose forced loans upon United States citizens. He did not enter into that question, because in that case he found that there was not sufficient proof that the 'forced loans' were actually paid, or if so paid, that they were not refunded afterward.

"In the memorial in the case now before the umpire, it is stated that one of the claimants, George L. McManus, was arrested and imprisoned because he refused to pay a forced loan. The umpire does not consider that this is the proper way of enforcing the payment of any tax, and it might have entitled the claimant to compensation, but of this fact there is no evidence but that of the claimant, which the umpire does not consider sufficient.

"The umpire is therefore of opinion that in the case of *McManus Brothers* v. *Mexico*, No. 348, the claim on account of forced loans and of the arrest and imprisonment of G. W. McManus must be disallowed."

Case of Rose: Opinion of Mr. Wadsworth.

After the foregoing decision was made, the question was reargued by the commissioners in the case of Francis Rose, No. 344, in which Mr. Wadsworth delivered an extended opinion.

Mr. Wadsworth began by saying that "on several occasions the money of claimant [Rose] was forced from him for public use; that on one occasion he was imprisoned and treated badly until he procured his release by paying $500 as a loan to the government;" and that the commission had "never doubted its power or its duty to award the return of the money thus taken by force for the public use, with interest, until the third commissioner nominated by Mexico to the board raised the objection." Mr. Wadsworth here referred to the cases of Moses Moke, No. 342; Robert Wülfing, No. 345; Rudolph Dressel, No. 450; Starr & Merritt, No. 516, and D. D. Brainard & Co., No. 672. These "decisions by the commissioners" were, said Mr. Wadsworth, "approved by the umpire, Dr. Lieber, in *Miller* v. *Mexico*." In making them the commissioners followed the precedents under the convention of 1839 and the act of 1849, and thus the matter stood till the umpire's decision in the case of McManus. Continuing, Mr. Wadsworth said:[1]

[1] The case here referred to by Mr. Wadsworth was that of *Rafael M. Miller* v. *Mexico*, No. 490, Am. docket, MS. Op. I. 599. Dr. Lieber awarded August 2, 1871, $14,649 United States gold and $100 United States currency, stating the case thus:

"Rafael M. Miller, a native citizen of the United States, settled temporarily at Matamoras, Mexico, as a merchant. In 1866 the Mexican troops

"As well as I understand the grounds of that decision, it is based on the consideration that no demand for compensation had been made on the government by claimant before bringing his claim here. * * * This is a matter of grave importance, and I would not willingly misunderstand it. * * * If a demand must be made upon the government for a return of the property or for compensation before this commission can take jurisdiction of such cases, * * * it will practically dismiss a large proportion of the claims on our dockets. I am resting this on the conclusion that no distinction can be drawn between claims here for money taken by force and other property impressed for the public use. * * * Heretofore in granting awards for money taken by force as a loan (a loan to which the consent of the owner is never asked), the commission had been in the habit of awarding the money and interest without regard to the fact of demand or no demand, before presenting the claim to our notice. In none of the cases was any such demand shown. Similarly, in regard to claims made for other kinds of property taken by force for the public use, the commissioners have never required that a previous demand or request for payment should have been made and proved. In no such case has either of our umpires required that such previous request for return or payment should be shown. * * * In point of fact, by the convention the governments have waived any presentation of claims to them, and sent them all here for investigation and decision. Accordingly it will be seen that the Mexican Government (in cases already familiar to the umpire and commission) has referred claimants here who were knocking there for admission. * * *

"But when and where was the victim of a forced loan to apply for his money? He was surely willing to take it. There is in point of fact no system in Mexico pursued in the forcible seizure of money or in returning it. It is a proceeding not regulated by law. It rests in the arbitrary discretion of a military chief, with hungry, unpaid troops under his command.

under the command of Colonel or General Canales, having made himself governor of the State of Tamaulipas, and in a great civil and military confusion, 'a forced loan' (as it is almost ironically called in the terminology of absolutism, whether this be monarchical or democratic or of any other character)—a forced loan was raised, presenting itself in the shape of a pillage, in which Miller lost a certain amount of merchandise, for which he now claims a sum of money equal in value to the property lost."

To this claim, said Dr. Lieber, it was objected (1) that Miller was domiciled in Mexico, (2) that he suffered by the "fortunes of war," and (3) that "the officer who exacted the 'forced loan' or pillaged the town of Matamoras was no Mexican authority." He held (1) that the question of domicil was not material, (2) that the case did not depend upon the "fortunes of war," and (3) that the government was responsible for the acts of Canales as a Mexican authority.

The *prestamo* is a pestilence to trade and industry which breaks out sometimes in a city, sometimes in a district, and is never laid on the whole country. * * *

"Promises of repayment are profuse, but no time is fixed, no place is fixed, and years go by, a lifetime, without any effort at compensation on the part of the authorities. * * *

"It is possible that I may misconceive the point in the umpire's decision in the McManus case. He there decides that these forced loans are legal indeed, but I do not understand by that that it is intended to decide that the authorities are not bound to return the money 'loaned' at the point of the bayonet, or from behind the bars of a very dirty prison. This does not follow. The forcible seizure of horses, wagons, provisions, etc., for public use, is just as legal as the forcible seizure of money, and in such cases the umpire awards indemnity. He awards for the taking of real estate by the troops for a barrack; yet the right of the sovereign to appropriate real estate to public use can not be doubted; it is one of the most usual cases of exercise of the right of eminent domain; it is legal. It should be regulated by law, and it is so regulated in every country where there is any respect for law. But it is no more legal to take money by force than land, even where by his mere pleasure some chief vests in himself 'ample faculties.' In all these cases of the legal exercise of the right of forcible seizure of private property for public use, there is a legal and moral duty to make compensation. * * *

"Admitting the premises, then (for the sake of argument, however), that loans of money obtained by force are legal, is not the injured party entitled to indemnity? Undoubtedly. Why need we inquire whether the forced loan is a tax, ordinary or extraordinary, when the authorities take the money under a promise to return it and give a voucher to this effect and admit the obligation to do so? It has none of the features of a tax or contribution (which is an extraordinary tax), * * * levied upon all the inhabitants and for which no other compensation is promised or given than the blessing of a good government. A tax is always known by these features, uniformity in its operation upon the inhabitants, and the absence of any promise or duty to make compensation in money to the taxpayer. Hundreds of times the judges in civilized and free countries have decided that unless the levy is uniform, it is a taking of private property for public use, and that compensation must be made. Even in Mexico the law is sound enough. The constitution of 1857, article 27, forbids the taking of private property for public use without compensation. The treaty of 1831 between the United States and Mexico is to the same effect (article 8). It won't do to argue that the word 'property' in the Mexican constitution and the word 'effects' in the treaty do not embrace money, and that therefore the government has a right to take all the money it pleases without responsibility. * * *

"Forced loans, unknown in all well-governed countries, are of frequent occurrence in Mexico. They multiply in modern times. The commissioners of 1839 and 1848 had but few cases before them, compared with this commission, although the period of their investigation covered a longer time. The fact does not encourage us to hope for an abatement of a practice so scandalous and so wicked. I have no sympathy with it. The money is only taken to feed perpetual riots and increase the flow of blood. Not a solitary benefit to the unhappy people results from this waste of treasure, and I shall do what I can in the exercise of my functions to restrain the evil.

"This man was put in prison and treated shamefully to compel him to surrender the loan. It will be difficult, by any process of reasoning known to me, to prove that the government authorities had no right to use force to compel the loan of the money, if they had a legal right to force a loan. And if they had a legal right to force a loan, they had the right to employ enough force to make the rebellious foreigner bring out his money bag. I can't deny that. * * * If he will not give up the money which is legally demanded of him, why may they not (the authorities demanding) shoot him if it becomes necessary to enforce compliance? Is a whole army to starve or disband because the persons ordered legally to pay out the needful funds refuse to do it? I see no way to limit the employment of force, in forcing a legal loan, but the measure—no more than is necessary. Well, this stubborn claimant would not pay, do what ill thing they might to him, until they put him in prison and gave him so many minutes in which to pay or be shot. In my humble judgment that is good law in cases of forced loans. * * *

"I regret that the commission should decide the same question in two contrary ways, because both can't be right, and I hope that such a result may be avoided. I am still of opinion that we fell into an error in adopting 6 per cent as a proper rate of interest for money borrowed by force. It offers an inducement to weak and disorderly governments to resort to such disreputable means to live, rather than to rely upon a credit cherished by good faith and punctuality, and fed by the perennial stream of national order and industry. Mexico can't borrow money in the market at 12 per cent. It is also a common rate of interest there for money, and the claimant from whom the authorities took it by violence and imprisonment could have loaned it at that rate. For reasons of this nature I think the interest should be 12 per cent."

Opinion of Mr. Zamacona.

Mr. Zamacona said:

"The interlocutory question in this case, as to the claimant's citizenship, having been settled, the time has arrived for considering the claim on its merits. The difference of opinion between the United States commissioners and the undersigned concerning the responsi-

bility (international) of the Mexican Government for the imposition of fored loans became apparent at the time of the difference of their opinions as to the preliminary question of citizenship. Fortunately, however, it is not necessary to revive the question in the present case or in any other, it having been finally decided in the case of McManus, No. 348, by the umpire. We may therefore accept it as legally settled in matters of this nature that the Mexican Government did not violate her own laws nor her treaty obligations with the United States by imposing forced loans on the citizens of the United States."

Mr. Zamacona then reviewed the evidence in the case, concluding that the claim did not "possess those features of truth about it which would be necessary in order to decide that it is a good claim upon the strength of the evidence on which it rests."

Umpire's Decision.

Sir Edward Thornton, September 13, 1875, rendered (MS. Op. VII. 418) the following decision:

"With regard to the case of *Francis Rose* v. *Mexico*, No. 344, as the question of forced loans has been so earnestly discussed the umpire thinks it right to make some further observations. But he can not see that there is any force in the argument that his predecessor has given different decisions upon such questions. He regrets that it should be so, but if these matters are to be settled entirely by such precedents the umpire does not understand why, where there has been a decision upon the matter by a previous umpire, the question should be referred to the present umpire at all. It can only be with the intention that he should express his unbiased opinion upon the matter.

"The umpire has already expressed his opinion in other cases that United States citizens residing in Mexico are not by treaty exempt from forced loans. This opinion he maintains. But he must explain his understanding of a forced loan. A forced loan is a loan levied in accordance with law. It is equally distributed amongst all the inhabitants of the country, whether natives or foreigners. It is a tax which becomes smaller or greater according as it is repaid sooner or later, partially or not at all. If the foreigner is reimbursed at the same time as the native, or if neither of them are reimbursed at all, the foreigner has no ground for remonstrance. As long as the foreigner is placed upon the same footing as the native he can not complain. But if there be unfairness in the distributing of the loan or in its repayment, and if any preference be shown to the native, the foreigner has good ground for complaint. A forced loan equitably proportioned amongst all the inhabitants is a very different thing from the seizure of property from a particular individual.

"In the case now under consideration it is not shown that there was any partiality shown against the claimant or that Mexicans were not in as bad a position as himself. Indeed, although witnesses alleged that the claimant was made to pay a forced loan of $550, no receipt is shown for that amount, and there is no proof that he was not reimbursed.

"With regard to the other sums which are stated to have been exacted as forced loans, and for a portion of which receipts are shown, no proof is even given that they were really forced loans, the receipts themselves purporting that the money was freely given.

"But the mode employed by the authorities of enforcing the payment of the forced loan of $550 the umpire does not think justifiable. If the forced loan was legally imposed, there must have been means of enforcing its payment by judicial proceedings, and the arrest and subsequent detention of the claimant, though it is not proved that the latter was of long duration, and the menaces to which he was subjected, were not justifiable and entitled him, in the opinion of the umpire, to some small compensation.

"The umpire therefore awards that there be paid by the Mexican Government on account of the above claim the sum of five hundred Mexican gold dollars ($500)."

In the case of *George L. McManus* v. *Mexico*, No. 488, it appeared that the claimant was arrested and imprisoned on the night of August 4, 1865, at Chihuahua for failure to pay a forced loan of $1,000 levied on the firm of McManus Brothers, of which he was a member, in aid of the constitutional government of Mexico, whose chief executive, Jaurez, was at the time in Chihuahua with his cabinet. Claimant, after a few hours' detention, was released by order of Señor Lerdo de Tejada, then secretary for foreign affairs, on condition that one Creel, who had offered himself as surety, should make himself responsible for McManus's appearance to answer the demand for the loan. In this case, as in that of Rose, Sir Edward Thornton allowed $500, without interest (the claimant asked $50,000), for the arrest and imprisonment. He made the same allowance for about a day's imprisonment in the case of *Bartolo Hicks* v. *Mexico*, No. 487.

Cole's Case.

"The umpire has frequently expressed his opinion that United States citizens in Mexico are not exempt from forced loans, where these are universally and impartially imposed and levied both upon natives and foreigners. In this case it is proved by the evidence of the claimant's witnesses that they were universal,

and it is not shown that any partiality was exercised as against the claimant."

Thornton, umpire, July 15, 1876, *John Cole* v. *Mexico*, No. 948, Am. docket, convention of July 4, 1868, 6 MS. Op. 497. *S. P.*, Thornton, umpire, *Rudolph Brach* v. *Mexico*, No. 462, Am. docket, convention of July 4, 1868, 7 MS. Op. 455; *Francis Nolan* v. *Mexico*, No. 337, Am. docket, 7 MS. Op. 411; *Patrick F. Ryder* v. *Mexico*, No. 101, Am. Docket, MS. Op. VII. 365. In the case of *James P. Hickman* v. *Mexico*, No. 545, Am. docket, Mr. Wadsworth, delivering the opinion of the commissioners (MS. Op. V. 21) said: "All the items of the claimant's demand are extrordinary but general taxes. They are not individual levies, but were shared by the whole State in a fixed proportion. They do not constitute 'wrongs' within the sense of our convention, and the claim is accordingly dismissed." In the case of *Julian Palacios* v. *Mexico*, No. 444, Am. docket, Sir Edward Thornton (MS. Op. VII. 444) said: "In this case it appears from the tenor of the receipts that the sums paid by the claimant were really for forced loans, and each of the receipts conveys that the sum therein stated was the claimant's share of the loan, showing that it was also levied upon the other inhabitants of Montemorelos. The umpire therefore awards that the abovementioned claim be dismissed." In the case of *Manuel I. de la Vega* v. *Mexico*, No. 746, Sir Edward Thornton, in the course of his opinion (MS. Op. IV. 621), said: "He [the umpire] does not consider that this [forced loan] is a matter with regard to which the commission has power to order compensation; although the right of the claimant to ask from the Mexican Government reimbursement of forced loans is not prejudiced on that account." In this case it was contended that the claimant had a remedy before the commission appointed by the Mexican Government to consider such cases. Mr. Wadsworth referred to the fact that it was decided by Dr. Lieber, umpire, in *Manassee & Co.* v. *Mexico*, No. 432 (MS. Op. II. 485), that this Mexican tribunal, organized under a law of November 19, 1867, was no bar to the jurisdiction of the commission. Sir Edward Thornton did not take up the point, but in *Heirs of John Young* v. *Mexico*, No. 59 (MS. Op. IV. 618), he intimated that such claims must be presented to the Mexican tribunal. In the case of *John D. Pradel* v. *Mexico*, No. 813, in which a claim was made on account of forced contributions of various supplies taken by the republican army from March to June 1867, during its siege of the City of Mexico, Sir Edward Thornton observed, in dismissing the claim, that there was no proof that the claimant availed himself of his right to present his claim to the Mexican Government, or that if he did so he was refused payment. It could not be maintained that an injury had been done to the claimant until the Mexican Government had been made aware of the debt and refused to cancel it. In the present case, continued Sir Edward Thornton, there could be no excuse for the failure, since the claimant lived almost at the gates of the City of Mexico, and might have presented his claim in person. If he had lived in a remote part of the country, distant from any authorities to whom an appeal could be made, there might be some excuse for his omission; but in fact he was perfectly conversant with the language, was married to a Mexican woman, and had resided in the country for many years.

Weil's Case.

"It further appears that in April 1867 Colonel Conreco called upon the claimant to pay a forced loan of $200, and that, on his neglecting to pay this sum, he was imprisoned for two days and was compelled to pay not only the loan but a fine of $250. The umpire is of opinion that the plea of the claimant that he was not liable to the loan because he was not resident in the district, but was merely passing through, was a just one and that the levying of the loan was illegal. The fine was therefore unjustifiable, and still more so was the imprisonment. * * * He therefore awards that there be paid by the Mexican Government on account of the above-mentioned claim the sum of two hundred and fifty Mexican gold dollars ($250), with interest at 6 per cent per annum from the 15th of April 1867 to the date of the final award, and further five hundred Mexican gold dollars ($500), without interest, as compensation for the claimant's imprisonment."

Thornton, umpire, April 8, 1875, *Lewis Weil* v. *Mexico*, No. 792, Am. docket, convention of July 4, 1868.

CHAPTER LXIII.

CONTRACT CLAIMS.

1. CASES UNDER THE CONVENTION BETWEEN THE UNITED STATES AND MEXICO OF APRIL 11, 1839.

Case of the "Hermon:" Advances for the Repair of a Man-of-war.

"The undersigned, commissioners under the convention of the 11th of April 1839 between the United States and the Mexican Republic, having in full board considered the case of the brig *Hermon*, Chas. E. Hawkins, captain, are of opinion that the Mexican Government is justly indebted to Hetty Green, administratrix of Pardon C. Green, who was a citizen of the United States and a resident at Key West, in the Territory of Florida, the sum of $9,653.55, advanced by the said Green in the year 1828 to the brig *Hermon*, a vessel of war belonging to the Republic of Mexico, at the instance of Chas. E. Hawkins, captain thereof, for repairs of that vessel and for naval stores and supplies, the said vessel having, while engaged in a cruise against the commerce of Spain off the Island of Cuba, put into Key West in distress, and the said Pardon C. Green having, at the instance and solicitation of Captain Hawkins, in faith of the Mexican Government, advanced that sum to repair and supply her. And they do unanimously award, determine, and decide that the Government of Mexico shall pay to the said Hetty Green, administratrix as aforesaid, the sum of $16,941.89, being the amount advanced by the said Pardon C. Green to the brig *Hermon*, as above stated, with interest thereon at the rate of 6 per centum per annum (that being the legal rate of interest in Florida at the time of the advances) from the 1st day of July 1828 till this date.

"Given under our hands and seals this 5th day of February 1841."

Mixed commission, under the convention between the United States and Mexico, of April 11, 1839.

Case of Alvarez: Loans to Persons in Service of Government.

"The claims of the American citizens, residents of Santa Fé, coming up next in order, it was, upon discussion thereof, agreed by the board that the Government of Mexico is not liable for said claim. Thereupon the said board unanimously adopted a decree on said claim in the words following, to wit:

"The case of Manuel Alvarez and other citizens of the United States, hereinafter mentioned, residents of Santa Fé, in New Mexico.

"Having duly examined the claim of * * * citizens of the United States residing in Santa Fé, New Mexico, which claim relates to sundry advances in money and goods which they allege to have been made up till the year 1837 to certain individuals, now deceased, and late in the service of the Mexican Republic, and having also examined the documents exhibited in proof thereof;

"We, the undersigned commissioners on the part of the United States and of Mexico, do unanimously award and decide that there is nothing due in this case by the government of said republic to the * * * claimants, and that consequently their claim aforesaid is rejected."

Commission under the convention between the United States and Mexico of April 11, 1839.

Cases of Hunter, Duncan, and others.

In a series of cases before the mixed commission under the convention between the United States and Mexico of April 11, 1839, awards were made in favor of certain persons, citizens of the United States, who furnished various military supplies to the Mexican Government while it was engaged in its revolt against Spain and before its independence had been recognized by any power. In these cases no question was raised by the Mexican or the American commissioners as to the competency of the commission to entertain such claims. The Mexican commissioners concurred in the allowance of the claims without discussion, except so far as questions of evidence gave rise to differences of view. The following awards of the class in question were made:

In July 1816 Don José Manuel de Herrera, the authorized agent of the so-called independent government of Mexico, then engaged in an armed revolt against the Spanish crown,

purchased at New Orleans, in Louisiana, from Dr. George Hunter, 70 kegs of gunpowder at $1.25 a pound, amounting to $2,187.50. The powder was shipped by the vendor on the schooner *Rebecca*, a vessel which had been purchased by Señor Herrera for the service of the Mexican Government, and was delivered to the Mexican authorities at the port of Boquilla de Piedra. Dr. Hunter then sought payment for the powder from the Mexican general, Victoria, but the entire sum he obtained, either from him or from Señor Herrera, was $25. A claim for the rest of what was due him was presented to the mixed commission under the convention between the United States and Mexico of April 11, 1839. The Mexican commissioners did not deny the competency of the commission to entertain the claim, but contended that there was not sufficient evidence (1) of the contract with the claimant, or (2) of the powder having been delivered to and accepted by the Mexican authorities. On this question of evidence the umpire decided in favor of the claimant, and awarded $5,509.94, the amount found by the American commissioners to be due.

John Nicholson, executor of Abner L. Duncan, of Louisiana, who, to employ the language of the commissioners, furnished "moneys, vessels, and munitions of war" to "divers Mexican patriots engaged in the years 1815, 1816, and 1817 in the struggle of Mexico against Spain for the independence and self-government of the former," presented a claim for $90,013.98. The commissioners concurred in allowing it, with interest at 6 per cent, the legal rate in the State of Louisiana, "where the parties lived and the advances were made."

The commissioners made a similar decision in almost the same language in the case of Louisa Livingston, widow of Edward Livingston, who held as assignee a claim for advances precisely the same as that of Duncan.

So in the case of William H. Sims, also of Louisiana.

In each case the commissioners referred to the supplies as having been furnished for "the promotion of the great object aforesaid," viz, the independence and self-government of Mexico.

On the same principle the commissioners made awards in what was known as the Oliver case, which comprehended the claims of Dennis A. Smith, amounting to $84,230.72, and of the Mexican Company of Baltimore, amounting to $160,563.72,

both claims being for arms, vessels, munitions of war, goods, and money furnished by Smith and the Mexican Company, respectively, to General Mina for the service of Mexico in the years 1816 and 1817.

An award was made in favor of James Hepburn and Robert M. Welman for the equipment of the ship *Cleopatra* and her sale to General Mina in 1817, certain questions of evidence being referred to the umpire.

Thomas Tenant, Henry Didier, John Sullivan, Michael McBlair, and John Laborde received an award for military supplies furnished to the Mexican schooner *Highflyer* in 1817, under a contract with Don José Villejunta, a Mexican agent. Certain questions of evidence were referred to the umpire.

Nathan W. Wheeler and James B. Murray sold muskets in 1816 to General Victoria, as the agent of the Mexican Government. An award was made in the same manner as in the last preceding case.

Acting in the same spirit, the commissioners made an award in favor of Samuel Chew for furnishing a war vessel to the Mexican Government in 1830, when that government, though its independence had been acknowledged by the United States and other powers, was still in a state of war with Spain. The record of the award in this case is as follows:

"The board having considered the claim of Samuel Chew, a citizen of the United States, and resident of Philadelphia, in the State of Pennsylvania, are of opinion that the Mexican Government is justly indebted to the said Chew in the sum of $11,236.82; that sum being a balance due to him for the corvette, a vessel of war, called the *Tepeyac*, built in Pennsylvania by his procurement, and at his expense, under an agreement to that effect between the Mexican Government and himself; and they do hereby unanimously award and decide that the Government of Mexico shall pay to the said Samuel Chew the sum of $18,291.98, with interest included thereon, at the rate of 6 per centum per annum, that being the rate of interest in the State of Pennsylvania, where the parties contracted, from the 10th day of September 1830 up till this date, namely, the 2nd day of March 1841."

This decision is followed in the record by this note:

"And at the time of signing and sealing the above the Mexican commissioners stated that they did so because they considered the payment to be just, it not appearing that since the 24th of February 1834, the date the last communication addressed to Mr. Chew by the Mexican minister in the United States, any settlement had taken place between the interested party and the Government of Mexico."

2. Commission under the Act of March 3, 1849.

Eckford's Case. A claim was presented to the board under the treaty of 1839 by the Mercantile Insurance Company of New York against the Government of Mexico, growing out of a contract with Henry Eckford for the building of the man-of-war *Guerrero* for that government in 1826. It appeared that Eckford, having completed the vessel, received as security therefor the promissory note of Eugenio Cortez for $20,000, payable in four months from April 25, 1826, with interest; and the payment of this sum to Eckford was also guaranteed by Señor Don Pablo Obregon, Mexican minister in the United States. The note, having arrived at maturity, was protested for nonpayment. Subsequently various sums were paid on the contract by authorized agents of Mexico, but a considerable sum still remained due. The claim for this sum the board refused to consider, on the ground that it had not been the subject of reclamation by the United States on Mexico. In 1842, however, it was, at the instance of the Secretary of State, brought to the notice of the Mexican Government by the minister of the United States in Mexico, who in 1844 reported that the claim was acknowledged by Mexico, and that the mode of payment was to be adjusted. On these facts the commissioners, under the act of Congress of March 3, 1849, to whom the claim, which still remained unpaid, was presented, said:

"This claim therefore has been recognized both by the Government of the United States and that of Mexico as a claim which the latter ought to pay; and this board is consequently of the opinion and does decide that the aforesaid claim of the Mercantile Insurance Company of the city of New York, of which William R. Thurston is president, is a valid claim against the Government of Mexico; and the same is allowed accordingly."

Parrott's Case. William S. Parrott, a citizen of the United States, presented to the commissioners under the act of March 3, 1849, a claim against Mexico for the amount of a bill of exchange drawn by José Manuel Herrera on Gen. Guadalupe Victoria on April 27, 1816, in favor of John Delarme, for $6,000, payable three months after date. The commissioners said:

"At the time this bill was drawn by General Herrera he was the agent of the Mexican patriots to obtain supplies to aid them in their struggle for independence, and this bill, with others of

a similar character, was given to cover advances which were made to him for the patriot cause. The Government of Mexico, after the independence of the country was established, recognized the contracts of General Herrera as binding upon it. The board has no difficulty in determining that the bill of exchange creates a valid claim against Mexico."

Case of Cox and Elkins.

In the cases of Ann B. Cox, executrix of Nathaniel Cox, and Calvin J. Keith, administrator of Samuel Elkins, both decedents being merchants of New Orleans who had furnished supplies to General Herrera, but who had never secured the adjustment of their claims by the issuance of a bill, or in any other manner, the same commissioners said:

"It does not appear that Mexico, though often and strongly pressed to pay them [the claims], ever denied her liability. Her inability to make payment appears to be the reason why the amount for which she should be responsible was never adjusted with that government. * * * One object, and perhaps a leading one, of the treaty of 1848, under which this board is constituted, was to provide for the adjustment of these claims which were submitted to the former commission, but upon which no decision was had. It was well known to this government that many claims of this character, for the ancient debts of Mexico, had been allowed by the former board, and it must therefore be taken as the deliberate purpose of both governments, in negotiating the treaty of 1848, to provide for the adjustment of any similar outstanding claims, and especially of those which had been acted on by the former commission, but had failed to receive the decision of the umpire. The principle upon which these claims rest having been thus recognized and established by the governments of the two countries, and the board being satisfied by the proofs exhibited in the case that the supplies were furnished and the moneys advanced by the claimants in the manner hereinbefore stated, for the use of Mexico, is of opinion, and does decide, that the said claims, severally, are valid."

Meade's Case.

The reason given by the commissioners for their decision in the cases of Cox and Elkins was elaborated by them in the case of Margaret C. Meade, executrix of Richard W. Meade, in which a claim was made, among other things, for commissions charged by Meade for receiving and delivering to the Mexican Government certain vessels of war which were fitted out in the United States for that government about 1825. The commissioners, in an opinion of December 21, 1851, said:

"The vessels were sent by Meade, under the American flag, to protect them from the armed vessels of Spain, with whom

Mexico was then at war. This was done at the request of the Mexican Government and solely for its benefit. The expense incurred in thus sending them out could not, with propriety, be chargeable to Mr. Meade. The money thus paid by him Mexico was in good faith bound to refund.

"An objection to this claim, however, is to be found in the fact that the services rendered by Mr. Meade for the Mexican Government in thus fitting out armed vessels to be used by that government in a contest with Spain, with whom the United States were then at peace, was in violation of the provisions of an act of Congress approved 20th April 1818, which declares it a penal offense, punishable by fine and imprisonment, 'knowingly to be concerned in the furnishing, fitting out, or arming of any ship or vessel with intent that such ship or vessel shall be employed in the service of any foreign prince or state, or of any colony, district, or people with whom the United States are at peace.' The United States could not with propriety interpose to enforce the payment of a claim to any one of its citizens created by services which were rendered in violation of its own laws. If this claim were now presented for the decision of the board, upon the principles of national law, without reference to the past action of the two governments, it would be rejected without hesitation.

"The board, however, is bound to look at the several treaties heretofore made with Mexico providing for the settlement of claims of citizens of the United States against the Mexican Government, and to respect the construction which the two governments have placed upon these treaties. The convention of 2nd February 1848, under which this is organized, provides that 'the board shall be guided and governed by the principles and rules of decision prescribed by the first and fifth articles of the unratified convention, concluded at the City of Mexico on the 20th day of November 1843.' The unratified convention referred to was intended to provide for the settlement of 'all claims of citizens of the United States against the government of the Mexican Republic, which, for whatever cause, were not submitted to, nor considered, nor finally decided by the commissioners, nor by the arbiter appointed by the convention of 1839.' The first article of the unratified convention required the board therein provided for to decide the claims which should be presented to them 'according to the proofs which shall be presented, the principles of right and justice, the laws of nations, and the treaties between the two republics.' In conforming to the rules of decision thus prescribed, it is necessary to look at the construction which has been placed upon the treaties referred to by the two governments, respectively, as well as to their letter.

"The records of the joint commission, created by the convention of 11th of April 1839, show that several claims, involving the same principles as those embraced in * * * Mrs. Meade's claim, were considered and allowed by both the American and Mexican commissioners, as well as by the umpire, thus

receiving the deliberate sanction of every member of that commission. The construction thus given to that convention has received at least the tacit sanction of both governments.

"Although the Government of the United States could not be justified, under the law of nations, in interposing its authority to enforce a claim of one of its citizens growing out of services rendered in violation of its own laws, and its duties as a neutral nation, yet if the nation against whom such claim exists sees proper to waive the objection, and agrees to recognize the claim as valid and binding against it, the tribunal to which it is referred for settlement can not assume for it a defense which it has expressly waived.

"If the commission contemplated in the unratified convention of 1843 had been created, it could not, under the view taken by this board, have rejected this claim. The United States having released the Government of Mexico and assumed her entire liability under the principles and rules of decision prescribed by the unratified convention, she is bound to admit as valid any claim embraced by the rules of decision thus prescribed. They therefore decide that the * * * claim of Margaret C. Meade, as executrix of Richard W. Meade, is a valid claim against the Government of Mexico, and award accordingly."

Zander's Case.

"The memorialist alleges that James Johnston, a naturalized citizen of the United States, 'in the years 1812 and 1813 advanced goods, arms, and money for the use of the Mexican patriots in the district under the command of Don José Bernardo Gitting.' * * * The supplies appear to have been furnished for the use of the Mexican patriots shortly after the earliest attempts were made to resist the authority of Spain, and before even a provisional government had been organized by the Mexicans. The claim differs materially from that of Duncan's heirs, which was allowed by the mixed commission, and those of Cox and Elkins, which have been allowed by this board. (*Supra*, 3430.) The supplies upon which those claims were based were furnished by express contract with an agent duly appointed by the leaders of the revolution, and who was sent by them to the United States to procure aid, with a promise that all obligations contracted by him should be ratified. In addition to this obligation the Government of Mexico, after the independence of the country had been fully established, recognized and sanctioned his acts, and assumed the responsibility of his contracts.

"In this case, neither the original authority of Gutierrez as an agent of the patriots, nor a subsequent ratification of his

contracts by the Mexican Government, is shown. It is not shown that the claim was ever presented to the Mexican Government, or that a right to demand payment from it has ever been asserted before the claim was presented to this board. The memorial alleges that 'the claim was prepared for presentation to the board of commissioners appointed by the Government of the United States and Mexico, under the convention of 11th of April 1839, and was sent, but failed to arrive in time for the commissioners to act upon it.' No notice of the claim appears upon the records of that commission. The report of the American members embraces a list of all the claims which were received too late for action; but this claim is not found in the list.

"It is not alleged in the memorial, nor is it shown by the proofs, that Johnston was naturalized at the time that it is alleged the supplies were furnished. This would be indispensable to an award, if the claim were in other respects proved.

"In the opinion of the board it is not a valid claim against the Republic of Mexico, and it is accordingly disallowed."

Case of *John A. Zander:* Opinion of Messrs. Evans, Smith, and Paine, commissioners, February 26, 1851, under the act of March 3, 1849.

Underhill's Case: Charter of a Vessel to the Government.

"The memorialist and one William McKinley on the 1st day of June 1843 were the owners of the brig *Spy*, then lying at Lerma, within the territories of Mexico, under the command of Capt. Charles Lander. The State of Yucatan was at that time in insurrection against Mexico, and a division of the Mexican army was then at Lerma for the purpose of subduing the insurgents. A contract was entered into on that day between Captain Lander and the paymaster-general of the Mexican army, who was authorized to do so by the general in chief, whereby the said brig was chartered for the use of the Mexican army, at the rate of $40 per day, for the period of 15 days. The service stipulated was duly performed, but the amount agreed upon was never paid. * * * The service was performed for the Mexican Government under the express agreement of its principal military commander. The board is of opinion and decides that the claim is valid and allows the same accordingly."

Memorial of *William S. Underhill:* Opinion of Messrs. Evans, Smith, and Paine, commissioners, January 13, 1851; act of Congress of March 3, 1849.

Ulrick's Case: Lease of House for a Legation.

"Upon the death of Mr. Martinez, minister plenipotentiary from Mexico to the United States, which took place in Washington in February 1840, all the archives, books, papers, office furniture, etc., belonging to the Mexican legation were placed in the possession of Mr. Alvear, the minister of the United States for the Argentine Confederation, by one of the attachés of the legation. Mr. Alvear, on behalf of the Mexican Government, rented of the claimant certain rooms in her house for the storage and safe-keeping of these articles, at the rate of $25 per month. Under this agreement the apartments were occupied until Mr. Almonte, the successor of Mr. Martinez, arrived in Washington, when all the property thus kept was delivered to him. The claimant presented her demand for the stipulated compensation, but it was not paid by Mr. Almonte, he not finding it convenient to do so, or not feeling authorized without orders from his government. Mr. Alvear testifies that Mr. Almonte said he would forward the bill to his government and 'he had no doubt it would be paid.' The board is of opinion and decides that the claim is valid and allows the same accordingly."

Case of *Hannah Ulrick:* Opinion of Messrs. Evans, Smith, and Paine, commissioners, February 7, 1851, under the act of Congress of March 3, 1849.

Case of the Union Land Co.: Colonization Contracts.

Richard S. Coxe, trustee of the Union Land Company, presented to the mixed commission under the convention between the United States and Mexico of April 11, 1839, a claim against Mexico growing out of the alleged violation by that government of certain colonization contracts entered into by the Mexican authorities with Lorenzo de Zavala, Joseph Vehlein, and David G. Burnet, as *empresarios.*[1] The American and Mexican commissioners, differing upon the claim, reported to the umpire upon it, but the latter, owing to want of time, if not to other causes, at the close of the commission returned it undecided. In a synopsis of all the claims before the commission subsequently prepared by Mr. Brackenridge, one of the American commissioners, it was stated that Mr. Brackenridge drew up the report of those commissioners to the umpire upon the claim in question, and that he considered the measure of damages to be "the lowest sworn estimate of the value of the land, at the time of the forcible interruption, without interest."

[1] "*Empresario.* * * * The person who undertakes to do or perform, on his own account, some business of great importance." Velazquez.

The claim of the Union Land Company, together with various other claims growing out of or related to the same transaction, was presented to Messrs. Evans, Smith, and Paine, the commissioners under the act of Congress of March 3, 1849, and among the representations submitted in behalf of the Union Land Company were arguments prepared by Mr. Webster and Mr. Thomas Corwin.

The claims in question all grew out of the alleged interruption by Mexico of the performance of certain contracts for the settlement of vacant lands in Texas, which had been entered into by Messrs. Zavala, Vehlein, and Burnet, with the State of Coahuila and Texas, in conformity with the laws of that State and of the republic of Mexico. The parties before the commissioners derived their interests in the contracts by assignments, either direct or intermediate, from the original *empresarios;* and the claims, though differing in some of their circumstances, all had a common origin and were supported in essential matters by the same proof. The commissioners therefore discussed and decided them together.

The laws under which the original contracts were made were (1) the colonization law of Mexico of August 18, 1824, and (2) the colonization law of the State of Coahuila and Texas of March 24, 1825, made in pursuance of the former. Taking up the national law, the commissioners observed that the first article declared: "The Mexican nation offers to foreigners who come to establish themselves within its territory security for their persons and property, provided they subject themselves to the laws of the country." The second authorized the State legislatures "to form colonization laws or regulations for their respective States," conformably to the national law and the constitution. The fourth forbade the States to "colonize any lands comprehended within twenty leagues of the limits of any foreign nation," or "within ten leagues of the coast," without "the approbation of the supreme executive power." The seventh declared that after 1840 "the general congress shall not prohibit the entrance of any foreigner as a colonist unless imperious circumstances shall require it with respect to the individuals of a particular nation." The eighth, notwithstanding this prohibition, reserved to the government the power, "without prejudicing the objects of this law," to "take such precautionary measures as it may deem expedient for the security of the confederation as respects the foreigners who come to colonize." The ninth required a preference, in

the distribution of the lands, to be given to Mexican citizens. The twelfth forbade the uniting in the hands of one person, with the right of property, of more than one square league suitable for irrigation, four square leagues of arable land without the facility of irrigation, and six square leagues of grazing land. The fourteenth guaranteed "the contracts which the *empresarios* may make with the families which they bring at their own expense, provided they are not contrary to law." The fifteenth article was as follows: "No person who by virtue of this law acquires a title to lands shall hold them if he is domiciliated out of the limits of the republic."

The provisions of the State law were harmonious with the foregoing. It offered to persons, already in the State, lands for settlement upon application to become an inhabitant and taking an oath to obey the State and Federal constitutions, and to observe the religion which the latter prescribed. The sixth article was substantially the same as the seventh and eighth articles of the national law, requiring all who should be admitted to subject themselves to such precautionary measures of national security as the national government, without prejudicing the objects of this law, may think proper to adopt relative to them. The eighth, ninth, twelfth, thirteenth, and fourteenth articles related particularly to the system of colonization by contract. The eighth provided that projects for new settlements, into which one or more persons offered to bring at their own expense one hundred or more families, should be presented to the government, and, if found conformable with the law, should be admitted; that the government would immediately designate the lands which were to be settled, and allow the contractors six years within which to introduce the number of families contracted for, under penalty of losing their rights and privileges in proportion to the number of families which they should fail to introduce, the contract to be wholly annulled if they should not bring at least one hundred families. The ninth article guaranteed the contracts which the *empresarios* should make with the families brought at their expense, so far as such contracts were conformable to the law. The eleventh established the standard of measure, referring to which the twelfth article provided:

"Taking the above unity as a basis, and observing the distinction which must be made between grazing land, or that which is proper for raising stock, and farming land with or without

the facility of irrigation, this law grants to the contractor or contractors for the establishment of a new settlement for each hundred families which he may introduce and establish in the State, five *sitios* of grazing land and five labors at least, the one-half of which shall be without the facility of irrigation, but they can only receive premium for 800 families, although a greater number should be introduced, and no portion whatever less than one hundred shall entitle them to any permission, not even proportionally."

The thirteenth article provided that if any contractor should, on account of the families which he should have introduced, be entitled, according to the foregoing article, to more than eleven square leagues of land, he should be obliged to alienate the excess within twelve years, and that if he should fail to do so the alienation should be effected by the proper political authority at public sale, the proceeds to be delivered to the owners of the land after deducting the costs of sale. The fourteenth article provided that to each head of a family whose sole occupation was cultivation of the soil, one labor should be given; that if he should also be a stock raiser, grazing land shall be added to complete a *sitio;* and that if his only occupation was the raising of stock he should receive only a superficies of grazing land equal to 24,000,000 square varas. The twenty-second article required the settler, as an acknowledgment to the State, to pay for each *sitio* of pasture land $10, and for other quantities and descriptions of land other sums, one third in four years, one in five, and the remainder in six years, under penalty of losing the land for a failure in any of the payments. From these provisions the premium land was exempt. The twenty-fourth article authorized the government to sell lands to Mexicans and to them only, fixing the price and the quantity which any person might hold. The twenty-fifth prohibited the legislature for a term of six years from altering the law touching the acknowledgment and price to be paid for the land in respect of "the quantity and quality to be distributed to the new settlers or sold to the Mexicans." Article 26 read as follows:

"The new settlers who, within six years from the date of possession, have not cultivated or occupied the lands granted to them, according to their quality, shall be considered to have renounced them, and the respective political authorities shall immediately proceed to take possession of them and recall the titles."

It was under these provisions of law that the contracts with Zavala and others were made. The first in order of time was

that of Vehlein, who presented his petition to the governor of the State November 23, 1826, offering to colonize certain described lands "with 300 Catholic families, of good moral and religious habits, partly Germans or Swiss and partly North Americans." The proposal was accepted December 21, 1826, and "in compliance with the eighth article of the law" the land was designated.

Burnet's petition was presented June 15, 1826, offering to introduce 500 families, and as many more as the land which the government might put under his charge would accommodate. This proposal the government accepted December 22, 1826.

A second proposal was made by Vehlein October 13, 1828, "to colonize with 100 families of German, Swiss, and English origin," a small tract on the Gulf of Mexico, near the bay of Galveston. This proposal was accepted by the supreme government November 17, 1825, but for less land than was stated in the petition.

Burnet's petition was presented June 15, 1826, offering to introduce 500 families, and as many more as the land which should be put under his charge might accommodate. The government accepted his proposal December 22, 1826, "so far as" it was "conformable to the law of colonization of the State of March 24, 1825," and assigned to him "in fulfillment of the eighth article, for the purpose of colonizing with 300 families having the qualifications and conditions stated in his petition," a certain described tract of land, which was a part only of that designated in the petition.

Zavala's proposal was made on March 6, 1829, for the introduction of 500 families on lands bordering upon "the United States of the North;" and he promised to do everything "in his power to introduce the greatest possible number of Mexicans," who would form "a rampart for the security and integrity of the country." The proposal was accepted on the 12th of the same month, on condition that a certain part of the families should be of Mexican origin.

Each of these contracts was to be performed within the term of six years from its date. It was also provided that the families already residing within the territories, and having the qualifications required by law, should be permitted to remain, and that their titles should be respected; and that the surplus lands within the allotted districts should remain at the disposal of the State, "to sell the same to any Mexican subject, to

reward military men who shall obtain grants from the supreme government, or to grant to any individual paying due regard to and respecting the private property of settlers established according to law under this contract, or the instructions of the commissioner."

Having thus set forth the pertinent provisions of the laws and contracts involved in the cases before them, the commissioners proceeded to consider the nature and extent of the rights granted to the *empresarios;* and as to the interpretation of the laws they said:

"In construing these laws the objects and policy of Mexico in adopting them must be kept in view. And undoubtedly the peopling of her vast tracts of unoccupied land by emigration from abroad was the leading purpose to be accomplished. The appeal was made to foreigners to occupy and improve her wastes, and she promised security and protection and held out liberal inducements. But at the same time she appears not to have been without some apprehension that some degree of danger to her supremacy might arise from an indiscriminate admission or an undue preponderance of foreign population within her territories, and especially upon the borders of other nations. Her laws, therefore, while offering large inducements to emigration from other countries, contain provisions reserving to the government the right of control and interference whenever it was deemed necessary for the preservation of its supremacy on the colonized territories. They must therefore be construed as well with reference to the general objects to be accomplished as to the rights of Mexico, intended to be secured by some of these provisions."

The lands embraced in the contracts with the *empresarios* aggregated about 14,000,000 acres, much more, as the commissioners observed, than was required for the families to be introduced and the premiums to the contractors, since if each family had received one *sitio*, the largest quantity allowable, little more than 5,000,000 acres would have been needed for the colonists and *empresarios* together. But it was argued that the whole described territory was in effect granted to the *empresarios;* that they had exclusive control over and virtual possession of it; that their title to the whole could be forfeited only by nonperformance of the conditions of the grant. Pursuing this idea, and deducing from it a right to sell, the argument asserted that the *empresarios* by their attorneys "sold to the Union Land Company twenty-eight leagues of land within the assigned grants," and that "the purchase thus made, when reduced to acres, would amount to 123,924 acres." The commissioners, however, declared that they could find no ground upon

which this argument could be maintained. There was, they said, no language in the contract, or concession, imparting a grant of land. All that was granted was a concession or permission to the *empresario* to introduce, under certain conditions, the stipulated number of families upon the described lands, with the understanding that when this was done he should then be entitled to a grant in absolute property within the allotted limits. At most he had an inchoate or inceptive title to the premium lands promised by the laws, and such a degree of control and possession over the whole tract as might be necessary to enable him to perform the conditions of the contract on his part.[1]

It was contended by some of the claimants that the *empresario*, having exclusive power and control over the whole territory described in his concession, had the right to colonize the whole of it; that he was not restricted to the number of families stipulated for, but might introduce as many as the allotted district would accommodate, although he could not receive premium for a greater number than 800. One of the claimants (General Sumner) said: "What we designed to do, if we had been permitted, was not to settle that part only for which premium was allowed to us, but the whole tract, disregarding the premium, which was but a trifle." The commissioners were of opinion that this interpretation of the contract could not be maintained. In each of the contracts the right of the State to dispose of "the surplus land" was expressly reserved. By "the surplus land" could only be understood

[1] At this point the commissioners discussed certain cases before the Supreme Court of the United States, reported in 3 Howard, 773, and 8 Howard, 833. These cases involved the laws of Spain in regard to grants to *empresarios*. The commissioners said:

"We think the reasoning of the court in these cases entirely applicable to the cases before us. It can make no difference that the contractors there were to be remunerated in some other mode than by land within the allotted district. How they were to be compensated does not appear, nor in our opinion is it important. The question there, as here, was one of construction and interpretation of the words of a contract. If there be any distinction between the cases we should incline to the opinion that those before the court stood upon stronger grounds as grants than these before us, for the reason that they appear to have conferred exclusive rights upon the contractors of introducing settlers within the district. 'As colonizer the baron had a monopoly within the district to introduce settlers.' Whether such was the nature of the contracts under the laws of Mexico will now be considered."

the excess beyond what would be required for the number of families stipulated for, and for premiums according to law. The twelfth and thirteenth articles of the law of Coahuila and Texas, which was supposed to give the authority contended for, could not, in the opinion of the commissioners, be so construed. Those articles limited the amount of premium to which the contractor might be entitled, but did not profess to limit or fix the number of families, except that it could not be less than 100. His right, said the commissioners, to introduce any number, depended upon the acceptance of his proposals by the government, and when the law spoke of a greater number than 800 families having been introduced, it could only mean rightfully introduced, in conformity with the terms of the concession. The limitation was to be found in the contract, which in some instances specified a smaller number than the contractor proposed, as in the case of Burnet, who proposed to colonize with 500 families and as many more as the limits assigned to him would accommodate, but whose proposal was accepted for 300 only. Could it be contended that he nevertheless had the right to introduce 500, and any greater number that the limits would allow? The commissioners thought not; and such, they said, was the construction of the contracts by the Government of Mexico before the present claimants had obtained any interest in them, and even before anything had been done by the original *empresarios* in fulfillment of them, as was shown by a report made by Mr. Alaman, the Mexican secretary of state, to the Mexican Congress, on March 4, 1830, upon the subject of Texas and the practices which had prevailed under the colonization contracts, copies of which were delivered to Mr. Butler, the American chargé d'affaires in Mexico, and transmitted by him to his government. There was, the commissioners further said, among the proofs furnished by some of the claimants, evidence that the government of Coahuila and Texas had given an explanation of the law of colonization in the same sense, and that this explanation was communicated at an early day to the agents and attorneys of the *empresarios*, who must therefore be considered as granting only such rights as by the explanations they were authorized to grant.

The *empresario*, said the commissioners, could under the law give neither possession nor title to the colonist whom he should introduce. This was to be done by a commissioner,

appointed by and acting under instructions from the government, who was to judge of the moral qualifications and fitness of the emigrant, to refuse admission to such as he deemed unsuitable, to issue, in the name of the State, titles to the land, and to put the new colonists in possession with all legal formality. The whole business of surveying, allotting, and giving possession and title was reserved to the government and was to be performed by an officer of the government, who was in other particulars also to keep a supervision over the colony.

The result to which the commissioners came was "that the *empresario* was limited to the number of families named in his contract, and could obtain no right by the introduction of a larger number; that these contracts or interests in them were assignable, and might be performed so far as obtaining and transplanting families were to be done, by agents, attorneys, or assignees;" that "Mexico could not rightfully annul or intercept the performance of them merely for that cause;" and that "foreigners or citizens of other countries could lawfully become such agents or assignees, and thereby obtain valuable rights and interests in these contracts, for the violation of which Mexico would be justly responsible." They had, they declared, "come to this conclusion, not without hesitation, principally from the fact which appears in proof, that the contracts in question were renewed or prolonged, after full information had been communicated as well to the Government of Mexico as to that of Coahuila and Texas, that they had been assigned, in a manner to be hereafter stated, to certain citizens of the United States, and that it was intended to perform them by such assignees or trustees, under certain articles of association, which were also fully made known to both these governments."

The prolongation or extension of the contracts, under such circumstances, must, said the commissioners, be regarded as a ratification and sanction of the proceedings which had taken place so far as they were communicated to the proper authorities of Mexico. But the rights which could thus be obtained by assignment from the *empresario* were such only as he himself possessed. He was undoubtedly entitled, upon the performance of his contract, to the premium offered by the law; and this they thought him justly and equitably entitled to, even though the contract was not performed, provided that the failure was occasioned by the acts of Mexico. But the

claims before the board did not rest on that basis. There was no evidence that the premiums had not been allowed. On the other hand, there was reason to believe that Burnet's had been claimed and admitted, and that the other parties might with equal success claim theirs. But the claims before the board were for the value of the colonists' or settlers' lands, which the parties alleged that they were entitled to, by virtue of arrangements actually made, or which could have been made, with the emigrants, but for the wrongful acts of Mexico. They therefore rested upon the ground that the *empresario* was entitled to any portion of the land set apart for the colonist which the latter should relinquish to him. Before entering upon the consideration of this question, it was, said the commissioners, necessary particularly to state what proceedings had been taken under the contracts, and the manner in which the claimants deduced their right to indemnity for the alleged wrongful interruption of their performance by Mexico.

It did not appear, continued the commissioners, that anything was done by either of the original *empresarios* toward the fulfillment of their several concessions till October 1830, when a "tripartite" agreement was entered into in New York City between the *empresarios* of the first part, Messrs. Dey, Sumner, and Curtis of the second part, and such other persons as should become parties to the agreement of the third part, whereby the *empresarios* sold and conveyed to "the parties of the second part, and their successors irrevocably," "all the right, title, interest, property and estate" which they had "in and to the contracts and grants before referred to," and "to the lands in said grants described and contained, in an absolute and perfect possession and property," and to all the privileges and advantages arising therefrom "or in any way incident thereto," in trust for the use of the parties of the first, second, and third parts, "in the proportions and according to the number of shares respectively held by each of them therein." Under this arrangement an association was formed by the name of "The Galveston Bay and Texas Land Company," the capital stock of which consisted of the contracts or lands assigned by the *empresarios* to the trustees, and such sums as were paid by the persons admitted as shareholders. The concerns of the company were to be managed by the trustees named in the "tripartite" agreement and their successors, and all the power and authority which the *empresarios*

had under the contracts was vested in them. The stock or property of the company was divided into 1,000 shares, the whole of which appears to have been subscribed for; and it was provided in the articles of association that "scrip" should be issued by the company, divided into "*sitios* and labors," which should be transferable by indorsement and delivery. The trustees were authorized to sell or mortgage the scrip thus issued, and to distribute it as dividends among the stockholders in proportion to the number of shares held by them. In form, the scrip was merely a certificate of the trustees that the holder of it had the consent of the *empresarios* to locate and hold "in severalty" the quantity of land which it specified, anywhere within the four allotted districts. The trustees of the company were each to receive 500,000 acres of land, being about 113 *sitios* or leagues, for his personal services, and for this quantity scrip was issued to them. Dividends were made among the shareholders, and some certificates were sold; and a considerable amount appeared to have been deposited with different persons upon certain conditions, generally that the depositary should obtain a certain number of families to settle upon the land, under agreements that would secure to the company a considerable proportion of the land to which they should obtain title. The whole quantity of land for which scrip was thus issued was 10,216,655 acres, about double what was appropriated by the contracts, according to the interpretation of the commissioners. Of this amount the association called the Union Land Company held 28 *sitios*. The Trinity Land Company, another association, claimed to be the holder of other scrip. Anthony Dey, one of the trustees and attorneys of the original *empresarios*, claimed 148 *sitios* and 24 labors. George Sumner, also one of the trustees, claimed 141 *sitios* and 12 labors. George Griswold and Nathan Griswold claimed 94 *sitios* and 12 labors; Stephen Whitney, 48 *sitios;* Nathaniel Lord, 43 *sitios;* George Griswold and others, composing the Pilgrim Company, 132 *sitios*, and Nathaniel Lord and Nathaniel Richards, each 11 *sitios*, being a part of the 132 represented by the Pilgrim Company. These parties respectively claimed for the value of the land for which they held scrip, or for the value of the scrip which, as they asserted, was rendered wholly unavailable to them by the wrongful acts of Mexico.

Early in 1831 the Union Land Company sent from New York a considerable number of emigrants to take possession of the

lands for which it held scrip, under agreements that the emigrant should convey to the company, when required so to do, all the land to which he should obtain title except one labor (177 acres), which he was to retain for himself. About the same time the Galveston Bay and Texas Land Company sent other emigrants under a similar agreement, together with surveyors, agents, and officers of different kinds to establish the colony. The emigrants arrived in Galveston Bay in February and March 1831. They were met by Colonel Bradburn, a Mexican military officer, then in command of a small force stationed at Anahuac, who prohibited them from entering upon the land or in any way prosecuting their plans of colonization, and finally compelled them by threats of imprisonment and military coercion to desist from the undertaking. These proceedings broke up for a time all attempts at colonization by the companies under the Zavala and other contracts. Several years were spent by their agents in endeavoring to obtain from the Mexican Government a withdrawal of the interdict which had been placed upon their operations, but they accomplished little beyond the repeal, on November 21, 1833, of a law of April 6, 1830, which was regarded by the companies as the authority of Colonel Bradburn's proceedings against them, and which was in these words:

"By virtue of the power reserved to the General Government in the seventh article of the law of August 18, 1824, this act prohibits citizens of foreign countries lying adjacent to the Mexican territory from settling as colonists in the States or Territories adjoining such countries, and suspends contracts not executed and opposed to this article."

Meanwhile the State of Coahuila and Texas on April 27, 1832, upon the application of John T. Mason, who acted as one of the agents of the trustees and also under powers of attorney from the original *empresarios*, passed a decree granting three additional years to Vehlein and Burnet for the establishment of the colonies "which they contracted with the government on the 21st and 22d of December 1826." Their contracts were thus extended to December 1835. On January 27, 1834, the Zavala contract was extended four years, or till March 1839. Stimulated by these apparently favorable proceedings and by the assurances of General Mason and other agents in Mexico, the companies, trustees, and scrip holders commenced fresh operations. In February 1834 the Trinity Land Company was formed, and in June following it sent out about fifty emigrants

under contracts similar to those heretofore described. Mr. Dey, General Sumner and others made extensive arrangements for surveying the lands mentioned in their scrip and obtaining colonists to settle thereon, and agents were sent to Texas to prepare for the reception of the colonists as they should arrive. Surveys were made under the authority of the commissioner who had been appointed by Coahuila and Texas. With the exception of a single instance, there was no satisfactory proof of any interference in the colonizing operations by any Mexican authority, after the renewal or extension of the concessions. Large numbers of emigrants from the United States established themselves within the districts allotted to Zavala, Burnet, and Vehlein. During the years 1834 and 1835 more than 800 colonists were admitted by the land commissioners to lands within the assigned limits, with the consent of the *empresario*, which was necessary till May or June 1835. Among those thus admitted there appeared the names of several persons who went to Texas in the employ of the scrip holders or of the companies. Indeed it was in proof that the whole number of families stipulated in Vehlein's second concession were actually in possession of their lands under authority of the Galveston Bay and Texas Land Company's agent. How many were admitted into the other colonies there was no means of ascertaining with precision. At that time, however, Texas contained a population of about 30,000, and a large proportion of them were recent emigrants.

The difficulties which the colonizers were thenceforward to experience had, said the commissioners, a different origin. The hold of Mexico on Texas was fast relaxing. Disputes had grown up between the colonists and the military authorities of Mexico, and arms were soon appealed to. Revolutions were also going on in Mexico proper, and an attempt was made in 1834 to abrogate the federal constitution of 1824 and to establish a central or consolidated government. Against this the people of Texas remonstrated. Popular meetings were called, a committee of safety was appointed, and the people were advised to prepare for war. During the commotions which ensued, Texas furnished few inducements for emigrants to settle her vacant lands. Some already there left the country, discouraged by the dangers which seemed to threaten it. Many of the plans of the claimants to obtain emigrants from Europe were abandoned for that reason. Besides, there appeared to

exist among the people in Texas a strong and active hostility to the scheme of colonization which had been projected, growing out of a feeling that the whole country was likely to be taken up by a few proprietors. In consequence some of the emigrants who went to Texas with the companies' scrip, upon their arrival there repudiated it, and obtained in other colonies, or upon lands not granted, possession of a whole *sitio*, instead of the quantity which they would have received under their contracts. The continued operation of these causes almost entirely destroyed the value of the scrip held by the claimants, and resulted in the breaking up of their extensive schemes of colonization. But the principal blow, said the commissioners, was given by the new government of Texas, or rather by the people themselves in the establishment of the provisional government which was instituted in 1835. In the declaration issued on that occasion, as well as in the constitution adopted in 1836, it was difficult, said the commissioners, not to see a distinct and settled purpose on the part of the people of Texas to abrogate and put an end to the entire system of colonization which had before been practiced. No rights or titles but those of the settlers or citizens of the republic were recognized. No alien could hold title unless derived from the republic. No transfer was valid, except to a citizen of the republic, and the leading object of "quieting the people in the possession of their lands" was conspicuous throughout. In this series of events there was abundant cause for the depreciation of the scrip and the overthrow of all the plans of colonization, which constituted the foundation of the larger part of the claims before the commission.

Was Mexico, asked the commissioners, responsible for these proceedings? It could hardly be seriously contended that Mexico should be held responsible, upon the ground that by her arbitrary proceedings and attempts to establish military control over Texas she brought those troubles upon herself and drove the colonists to take up arms in their defense. The board could not undertake to pass upon the internal concerns of that nation, or its right to change its form of government. The right of Mexico to maintain her dominion over Texas and to reconquer it, if she could, was uniformly recognized by the United States, and the duty of strict neutrality on the part of citizens of the United States was enjoined by the highest authority. The commissioners therefore could find no ground

upon which Mexico could be held responsible for the loss of value which the scrip underwent, and which formed the basis of several of the claims before them and entered largely into the remainder. The following memorials, setting forth claims of this character only, they accordingly rejected:

George Griswold and others, for 132 *sitios*, under the name of the Pilgrim Company.

George Griswold and the executors of Nathaniel L. Griswold, for 94 *sitios* and 12 labors.

Stephen Whitney, for 48 *sitios*.

Nathaniel Lord, for 43 *sitios*.

Nathaniel Lord, for 11 *sitios*, being a part of that comprised in and claimed by the Pilgrim Company.

Nathaniel Richards, for 11 *sitios*, being also a part of the Pilgrim Company's claim.

Anthony C. Dey, for upward of 48 *sitios*.

The claim of General Sumner contained some items of a kind not embraced in those already disposed of, but the commissioners found that those items were not sustained by the evidence, and rejected the claim on the same ground as the foregoing.

The Galveston Bay and Texas Land Company claimed specifically for the amount paid to Zavala, Vehlein, and Burnet to obtain the assignment of their contracts; for sundry expenditures in sending settlers to colonize the lands in 1831, and for sums paid in supporting the colonists; for damages recovered against them by some of the persons thus sent, who were prevented from taking possession of the lands by the m litary interference of Colonel Bradburn; for large expenditures in sending agents to Mexico to procure a repeal of the act of April 1830, and the recognition of their claims; for the value of 248,000 acres of land, to which they would have been entitled under the agreement with the colonists sent by them, if they had been permitted to take possession of the quantity allowed to them; and for 26 *sitios* more, which they surveyed in 1835, but for which no colonists were sent.

The Trinity Company, by R. S. Coxe, trustee, claimed for the value of 121 *sitios*, less certain deductions; for various expenses, including those incurred in sending emigrants who were not allowed to take possession of their lands in 1834; for property seized on board of some of the vessels employed in transporting provisions for the settlers, and for a small

vessel or boat used as a tender or lighter in Galveston Bay and taken by a Mexican vessel of war.

There was, said the commissioners, very little information as to the ground upon which the Mexican authorities at one time undertook to interdict the colonizing of the lands, but there was much reason to suppose that it was connected with personal and party considerations. The movement was originated by General Teran, who was represented as being personally hostile to Zavala. Mr. Alaman's report, which had already been adverted to, was founded on information derived from General Teran, and the law of April 6, 1830, was the result of that report. That law, however, which forbade the introduction of citizens of coterminous nations, did not exclude the settlers sent by the companies, except so far as they were citizens of the United States, and the most of them were proved to have been of foreign origin. There was strong ground for the belief that many of them were admitted as settlers and received land upon surrendering their contracts with the companies. It was in proof that at the time of the occurrences of 1831 a land commissioner was present to receive the settlers and put them in quiet possession of the land, but that he was seized and imprisoned by Colonel Bradburn's orders. That the law of 1830 was misconstrued or perverted by General Teran was rendered highly probable not only by its repeal, but also in immediate connection with its repeal, by the renewal of the contracts expressly upon the ground of the interruption by the State authorities.

After the repeal of the law of 1830 the only interruption by the Mexican authorities of the work of colonization was that caused by the objection of a Colonel Contreras to the admission of the emigrants sent by the Trinity Company in June 1834. The difficulty arose out of a claim of the collector of the port for payment of duties on the cargo of the vessel in which the emigrants were sent. The company insisted that the cargo was not subject to duty and refused to pay it. The collector refused to admit the vessel to entry and obtained the aid of Colonel Contreras to enforce the demand. Finally, after the lapse of some days, the matter was compromised by the company paying a part of the sum demanded. But there was no commissioner of the State then in office to give possession, and before one was appointed the emigrants had become dissatisfied. Some of them commenced suits against the company and recovered damages, others obtained titles in the

other colonies, and some obtained rights directly from the government.

There still remained for consideration, said the commissioners, a grave and important question respecting the validity of the contracts between the emigrants and the companies, whereby a large proportion of the land to which the former might obtain title was to be held for the benefit and at the control of the latter. Were these contracts valid by the law of Mexico? If not, no injury had been sustained for which indemnity could be claimed. If, on the other hand, they were binding obligations, conveying valuable interests, which could be maintained and enforced, a just claim for any injury done to them by the unauthorized acts of Mexico would arise. The colonization law of the State of Coahuila and Texas did not contemplate that the settler could obtain a perfect title until the expiration of six years from the time of possession, and in that interval he was expressly prohibited from alienating the land. And by the laws of Mexico no foreigner could hold title to land within the republic. It was quite clear from these provisions that by the contracts in question no present title to the lands could be acquired by the companies.

The obligation on the part of the emigrant, as expressed in the contract, was to convey to the company, whenever required so to do, all lands over and above one labor to which a title might be given to him as a colonist by the government. Was this a valid and binding contract, or was it void, as being repugnant to the laws and policy of Mexico? By the twenty-seventh article of the State colonization law of March 24, 1824, settlers were "authorized to alienate their land when they shall have completed the cultivation thereof and not before." This was a direct and positive prohibition against alienation, until an absolute title was acquired by the specified period of cultivation. If therefore the contracts in question were to be regarded as conveying lands or interests in lands, they were, said the commissioners, clearly repugnant to the law and wholly void. The question was indeed so decided by the supreme court of Texas, in December 1847, in the case of *Hunt* v. *Robinson* (1 Texas Reports, by Webb and Duval, 748). In that case Hunt obtained a *sitio* of land as a colonist in February 1832, and received the usual certificate of right of possession. In December following he entered into a contract to sell the land to Robinson, and to give him a deed therefor "as

soon as the law of the State will permit the alienation and transfer." A part of the consideration paid by Robinson was a conveyance to Hunt of other lands, which the latter entered upon and cultivated. Robinson went into possession of the league contracted for with Hunt, and made improvements upon it. After the death of the original parties, no deed having been given, the heirs of Robinson instituted suit against the heirs of Hunt for a specific performance of the contract. The supreme court of Texas decided that the contract was wholly void and inoperative, being repugnant to the laws and the policy of Mexico, and of the State of Coahuila and Texas. It was contended by the claimants before the board, said the commissioners, that the principle of this case did not apply to their claims, since the decision appeared to have been founded upon a law of Coahuila and Texas, of April 28, 1832, which was enacted after the injuries complained of by some of the claimants had been inflicted. By that law it was declared: "No new settler, Mexican or foreigner, shall under any pretense sell or alienate the land or water that falls to his share, until after six years from the time of taking possession." It was also contended that the enactment of the law of 1832 was a clear admission that no similar restraint upon alienation previously existed. It would be seen, however, said the commissioners, by reference to the whole law of 1832, that it was a comprehensive statute, which repealed the law of 1825 and established in its place a new colonization law, which was the only one in force at the time when the contract between Hunt and Robinson was entered into. But, in their provisions against alienation, the language of both laws was substantially alike; and the commissioners declared that they were "constrained to come to the opinion that the contracts by which the holders of the scrip attempted to secure to themselves a portion of the land that might be awarded to the colonists were void, conveying no rights, and for the loss of which no indemnity can be claimed."

Were the claimants entitled on other grounds to any indemnity for the losses which they had undoubtedly sustained in prosecuting their enterprise? In answer to this inquiry the commissioners observed that they were authorized by Article I. of the unratified convention of 1843 to decide all claims upon "principles of right and justice," which terms, as they understood them, were "equivalent to a broad equity, taking into

consideration all the circumstances of the case." There could hardly be a doubt that the claimants acted "in good faith, and under a full conviction that they were authorized to do what they engaged to do. Opinions of eminent lawyers were taken. Men of the highest respectability were concerned. Assurances were given by their agents in Mexico that their proceedings were conformable to law. The practice under other and earlier colonization contracts induced them to believe that there would be no interruption of their plans. No judicial decision had at that time given an interpretation to the laws of the State;" and, so far as could be seen, "they had no admonition or reason to doubt that the settlers they sent would be received and admitted to the possession of their lands." Many of the emigrants "were possessed of the qualifications to be received as colonists." Many were admitted, as there was reason to believe, after they had been released from their contracts. Continuing, the commissioners said:

"Having been released from their obligations, so far as they availed themselves of their presence in Texas to obtain lands they were bound to repay the expenses of their transportation. The authorities of Mexico might well be required to admit the emigrants as settlers, notwithstanding their contracts, leaving to them to repudiate the agreement, or to the State to refuse granting a title because of the attempted alienation whenever the time for giving it should arrive. It was not for Mexico to refuse to receive a settler otherwise qualified, because she apprehended he had entered into agreements which her laws did not permit. * * * The whole control was in her own hands; and she could legitimately have withheld the title when called for, for the reason that the settler had no right to transfer it. It was not until 1847 that the claimants can be regarded as having knowledge of the true interpretation of the laws of the State, and considering that they acted in good faith, and incurred great expenses and sustained heavy losses in being prevented from doing what they had good reason to suppose they were authorized to do, and that Mexico had furnished ground by tolerating similar undertakings for their honest belief as to their rights, we think that in equity and according to principles of right they ought to be indemnified for the expenses actually incurred in sending emigrants who were entitled to be admitted as colonists, and for the expenses incurred in their support and for damages paid by the refusal of the Mexican authorities to receive them as such. It may fairly be inferred, we think, that Mexico by the repeal of the act of 1830, under the provisions of which the proceedings complained of took place, and the State of Coahuila and Texas by the renewal of the contracts, admitted

that some wrong had been done, and intended thereby to make a reparation, and if subsequent events already detailed had not prevented that reparation from being available, undoubtedly to some extent remuneration would have been received. But without enlarging upon these considerations, we are of opinion that an equitable and just claim exists for the amount of expenses before enumerated, and to that extent we decide that the claims of the Union Land Company and the Trinity Land Company are valid.

"The claims of the Galveston Bay and Texas Land Company, so far as they stand upon the same grounds, are also allowed.

"It is contended very earnestly, and in elaborate arguments, that the claims of the Union Land Company stand upon a different footing from all the others before us, growing out of the same transactions, for the reason that they were presented to the commission under the convention of April 1839, and upon a difference of opinion between the American and Mexican members of that board were referred to the umpire, and by him returned without a decision thereon.

"It does not appear that any reference was made by the Mexican commissioners to the question of damages, and hence it is insisted that there was no point of difference upon that subject to be submitted to the umpire, or which we can now determine, and that an award must be for the amount, and for the grounds of claim, which in the opinion of the American commissioners the claimants were entitled to. We are not prepared to admit this conclusion. On the contrary we hold that where, on the one hand, the claim was wholly rejected and nothing allowed, or, on the other, the claim was admitted and a given sum allowed, both the validity of the claim and the amount of it are to be considered as points of difference. It appears to have been so regarded by the umpire, for in several instances where no notice was taken by the Mexican commissioners of the amount of damages claimed, his award fell far short of the sum reported by the American members as being justly due. In a few cases objections were made as well to the amount as to the validity of the claim, but it is not to be inferred thence that where no objection was distinctly made a difference of opinion in regard to it did not exist. It is rather to be inferred that the subject was never a topic of discussion and was not therefore a point to be reported by either party for the decision of the umpire.

"It is unnecessary, however, to pursue these observations further, because we find that the report of the American commissioners, which is urged as conclusive as to the amount to be awarded, is substantially in conformity with the views which we have already expressed. No sum whatever was allowed by them for the value of the land, or for damages sustained by depriving the emigrants of their title to be held for the benefit of the company. The only amounts reported by them to the umpire were for the expenses incurred upon the

principles already stated by us. The original report is before us. It is quite voluminous, and although it argues in the main body of it, at much length, the validity of the claim for the value of the land, yet before it was assented to, and in the statement of the amount of claim, it is clearly shown that that part of it was abandoned.

"The report refers to an account or statement appended, showing the amount to which, in the opinion of the American commissioners, the claimants were entitled. It was subscribed by Mr. Brackenridge, one of the members of the board, and immediately following his signature was a note or addition to the report as follows:

"'Concurring as I do with my American colleague in sending the foregoing report to the umpire, it is proper that I should say that, owing to the late period at which this case was presented to the board and the many others then pending before it in my hands entitled to precedent consideration, I have not been enabled to solve some doubts which I have in relation to the damages claimed for the lands from which the colonists sent out by the claimants were excluded by the interposition of the Mexican authorities.

"'W. L. MARCY.'

"This note admits of two interpretations: 1. That Governor Marcy entertained doubts as to the amount which ought to be awarded, etc. 2. Doubts as to the claim itself. We think the latter the true interpretation. It is not doubts as to the amount of damages claimed, but rather doubts as to the claim for damages, which was entertained. A further examination of the report confirms us in this opinion. The last item in the account appended to it has this note prefixed: 'Suspended item—see Mr. Marcy's note.' It has been strongly urged that these words constituted no part of the report as it was drawn and submitted to the umpire, but that they have been interpolated since, and are not to be regarded by us as of any meaning. There is no evidence or explanation tending to show that they were not a part of the report when it was finally agreed to by the commissioners. They were undoubtedly added, as was Governor Marcy's note, after the report was drawn, and added because Governor Marcy would not assent to it without such modification. We are greatly at a loss to imagine upon what principle we can be called upon to expunge these words, more than any other words, from the document, which is the only record we have of the opinion to which the American commissioners came in the case under consideration. We are bound to regard it, until the contrary be most satisfactorily established, as a true and perfect record and as being the exact report submitted to the umpire. The words alluded to are in entire harmony with Governor Marcy's note, and the whole together amounts precisely to this. Governor Marcy agreed to send the report to the umpire, but entertaining doubts as to the claim for damages for loss of land, that item of the account was to be considered as suspended, or not embraced in the computation to which he did agree. There is other evi-

dence in the paper itself showing, as we think conclusively, that this item was not embraced in the report of the American commissioners to the umpire. The conclusion of the account or statement is in these words:

"'Thus the account has been adjusted on the following principles: 1st. The amount of goods according to invoices and the profits thereon at the time and place, which, according to proof, was 200 per cent with interest thereon. 2nd. Disbursements attending the shipment, etc., allowed with interest at 5 per cent. 3rd. Expenses incurred in consequence of the breaking up of the colonization and therefore withdrawing the same from the commercial capital and allowing a profit thereon of 100 per cent in lieu of estimated damages. These different heads are indicated by Nos. 1, 2, and 3 in the following account.'

"Looking to the account, we find these numbers in the margin, against the items, with words explanatory of their character, conforming to the foregoing classification; but against the item for land damages there is no number and no explanation, leaving it to stand as before stated 'suspended.' The sentences last quoted appear to have been written after the report was drawn as at first contemplated, and, as well as we can judge, are in the handwriting of Mr. Brackenridge, and were undoubtedly added as explanatory and to show that the claim for damages for loss of land was not embraced in the report. The whole amount of the three items allowed was $40,606.40.

"In view of all this evidence we think it utterly impossible to maintain that the American commissioners reported in favor of the specific sum here claimed, or of any sum for the loss of the land, or that they ever decided that a valid claim for any amount existed on that ground. It might be urged with quite as much if not more plausibility that as the American commissioners did not report a larger amount than $40,606 as the measure of damages to which the claimants were entitled, we are restricted to that sum.

"We feel no embarrassment therefore from the restriction imposed upon us by the first article of the unratified convention of 1843, in awarding to the Union Land Company such amount as upon the principles hereinbefore stated it is proved they have sustained. * * * The board is of opinion, and decides, that a portion of the claims set forth in the memorials of the Union Land Company, the Trinity Land Company, and the Galveston Bay and Texas Land Company, severally, is valid, and to the extent indicated in the foregoing opinion allows the same."

The commissioners subsequently made the following awards: Richard S. Coxe, trustee of the Union Land Company, principal, $40,606.40; interest, $18,272.70; total, $58,879.10. Richard S. Coxe, trustee of the Trinity Land Company, principal, $34,356.64; interest, $29,202.60; total, $63,559.24. Wm. H. Sumner, George Curtis, and Anthony Dey, trustees, principal, $25,000; interest, $25,000; total, $50,000.

"The claim is founded on an order given to the claimant in 1832 by one Cortina, on the commissary at Matamoras, for the sum of $211. It is in evidence that Cortina was at the time acting as commissary for the garrison at Anahuac, and that the claimant furnished supplies to that garrison in the month of July 1832, at which time the aforesaid order bears date. It is also in evidence that the order was presented for payment at Matamoras in 1834 and payment was refused. The right of an individual to make contracts for his government must be clearly established, in order to render such government responsible therefor. It is not sufficient in the present instance to show that the person with whom the contract was made is one who (from his official character it is presumed) discharged the duty of issuing supplies to the garrison; but it is further necessary to prove that he had the power to make contracts for such supplies on behalf of the government. The board is not cognizant of the particular powers and duties of a commissary in the Mexican service. In the absence of such information, the refusal of payment by the officer on whom the order was drawn must be considered as denying the right or authority in Cortina to make contracts for supplies as a public officer.

Case of Mary Smith.

"This claim does not appear to have been presented to the Mexican Government for payment; nor to the Government of the United States for their interposition in behalf of the claimant. It can not be considered in any other light than as a contract between individuals, for the due enforcement of which the courts of Mexico were open to the claimant and for which the Government of Mexico was not otherwise responsible.

"The board is therefore of opinion and does decide that the aforesaid claim * * * is not a valid claim against the Government of Mexico, and accordingly the same is not allowed."

Case of *Mary Smith:* Opinion of Messrs. Evans, Smith, and Paine, commissioners, January 22, 1850, under the act of Congress of March 3, 1849.

"This claim is founded on a written agreement entered into at Philadelphia on the 12th day of May 1827 between Samuel Chew and Thomas Hayes, memorialists' intestate, by which the former agreed to pay the latter $200 per month for his services in fitting for sea and navigating to Vera Cruz a certain 'corvette vessel' called the ———, otherwise the *Kensington.*

Case of Hayes.

The memorialists allege that there was a balance due to Hayes in his lifetime for services rendered under this contract amounting to the sum of $1,868.13, and which is now presented as a claim against the Republic of Mexico, for the reason, as alleged, that Chew was the agent of Mexico in executing the contract.

"The contract was made by Chew in his own name, and, so far as appears upon the face of it, for his own benefit. Nor is there any other evidence before the board to show that he acted as the agent of Mexico in the execution of the contract, or that he had any authority from the Government of Mexico to bind it by any such agreement. There is, in short, an entire absence of testimony to show any privity of contract between the memorialists' intestate and that government. But in addition to this the evidence which the memorialists have filed goes very far to raise the presumption that Hayes in his lifetime regarded his claim, if he had any, as a claim against Chew individually, and not against the Government of Mexico. A receipt was executed to Chew, September 9, 1829, acknowledging the delivery by Chew of two notes of $1,000 each, which, when paid, were to be in full for Hayes's claim for wages and services against the ship *Kensington*, her owner or owners, reserving a right to look to said Chew for $500 more. * * * It is clear from the terms of this receipt that Hayes looked to Chew alone for the payment of any claims which he had growing out of the contract. It was agreed that no further claim should be urged until Chew should obtain his own account against the vessel.

"Chew afterward presented a claim before the Government of Mexico, before the joint commission under the convention of 11th of April 1839, which was allowed, and which was for expenses incurred on account of the same vessel named in the contract. In that account are embraced several charges for payment made to Captain Hayes. Whether these charges are embraced in the whole of Hayes's claim the board does not deem it necessary to inquire.

"The contract was made with Chew alone, and his liability alone was looked to and contracted for by Hayes. No claim against the Government of Mexico was preferred by Hayes before the joint commission, nor does it appear that such a claim has ever been preferred, either directly or through the Government of the United States. The claim is now presented

for the first time, after a lapse of twenty years since its origin. * * * The board therefore decides that the claim now preferred * * * is not a valid claim against the Government of Mexico."

Case of *Hayes and Jaudon, administrators of Thomas Hayes:* Opinion of Messrs. Evans, Smith, and Paine, commissioners, January 23, 1850, under the act of Congress of March 3, 1849.

Rowland's Case.

"The memorial alleges 'that in June 1837, at the time of a revolution in which Don Alverier Perio was overthrown and General Armijo obtained the supremacy in the province of New Mexico, the said Perio and other officers of the government were indebted to the memorialist in the sum of two thousand dollars, to be paid out of the receipts of the custom-house at Santa Fé; that the said debtors were all overthrown and killed, and that the memorialist until this time has been wholly remediless, etc. It is not alleged that the Government or the Republic of Mexico was indebted to the memorialist, or was in any way responsible for the obligations of its civil officers. That they lost their lives in endeavoring to maintain the authority of the government against a portion of its revolted subjects imposed no obligation upon that government to pay their private debts. Nor does the fact alleged in the memorial that the debts were 'to be paid out of the receipts of the custom-house' impose any obligation upon Mexico, unless those receipts had been pledged by the government for the payment of these debts, which is not asserted in the memorial."

Memorial of *Thomas Rowland:* Opinion of Messrs. Evans, Smith, and Paine, commissioners, December 11, 1849, under the act of Congress of March 3, 1849.

3. CONVENTION BETWEEN THE UNITED STATES AND GREAT BRITAIN OF FEBRUARY 8, 1853.

Case of Hudson's Bay Co.: Claim on Government for Succor of its Citizens.

In the autumn of 1847 a number of American settlers were attacked in Oregon by the Cayeuse Indians, some being killed and others captured. At that time the territory was not under a government regularly established by the United States, but the settlers, having organized a government of their own, resolved to raise 500 men and borrow $10,000 to repel the attacks of the Indians. They applied to the Hudson's Bay Company for the money, and its agents, while not

feeling authorized to make a loan, furnished the volunteers with provisions and stores of the value of $1,800. Of this amount the Oregon Government had paid $599, leaving $1,201 still due. On another occasion the company supplied goods of the value of $1,838.91 from Vancouver's Island, in December 1851, on the application of American officers on that coast, for the purpose of procuring the release of some American mariners who, being shipwrecked near Queen Charlotte's Sound, were captured by the Indians.

Though these claims never were presented to the United States, they were laid before the commissioners under the convention between the United States and Great Britain of February 8, 1853, and the agent of the United States did not contest them. The commissioners said:

"In this case we are fortunately relieved from any conflict between the parties, as I understand it to be conceded that the case is submitted to our consideration for such allowance as we think is justly sustained.

"It will not be denied that the settlers of the Oregon Territory were entitled to the protection and aid of the United States Government. She had not, up to the period of the calamity referred to, extended a formal territorial government over the country, but her citizens, in considerable numbers, had gone on, in advance of provision made for them in that respect, and were occupying the country for the ultimate benefit of the United States, and with the early expectation of the formal extension of the powers of the government over them.

"While in this situation they had established, temporarily, a government of their own, and were attacked by the Indians, under circumstances of much barbarity, and which were calculated to put in jeopardy the safety of the whole colony.

"The circumstances required immediate effort and assistance, and this assistance, as far as it was in their power, was promptly rendered by the agents of the Hudson's Bay Company.

"The form of the claim as it originally existed was not directly against the United States, but no objection is interposed from that cause. The assistance is precisely of the character the government would have rendered could application have been made to it; and, on every consideration, we are quite sure we shall have its approbation in the allowance of the claim which appears to be preferred here for the first time.

"The other item of claim depends on circumstances somewhat similar.

"Assistance rendered to shipwrecked mariners is in conformity to the established policy of both governments through their consuls and other officers abroad, and in this case the captivity of these men by savages was superadded.

"The assistance rendered through the agents of this company, made by request of Americans on the coast, secured the release of these unfortunate men, and I am happy in having the concurrence of my colleague in granting full remuneration for the expenditures incurred in effecting so laudable an object. The claims for these services are therefore allowed."

Hornby, commissioner, delivering the opinion of the commission, convention between the United States and Great Britain of February 8, 1853. (S. Ex. Doc. 103, 34 Cong. 1 sess. 164.) An award was made in favor of the Hudson's Bay Company for $3,182.21.

4. CONVENTION BETWEEN THE UNITED STATES AND PERU OF JANUARY 12, 1863.

Eldredge's Case: Loans and Supplies to Government.

A claim was presented to the mixed commission under the convention between the United States and Peru of January 12, 1863, on behalf of Thomas R. Eldredge, a citizen of the United States, against the Government of Peru, consisting of the following items: (1) The sum of about 9,000 soles for supplies furnished to the Peruvian army, including a small sum of money advanced for the purchase of a medicine chest; and (2) the sum of 2,250 soles for a bill of exchange drawn by the Peruvian minister of finance against the British loan, in 1825, in favor of one Colonel Aldao, from whom it was transferred to Mr. Eldredge by the former's agent, Captain Beteta.

The Peruvian commissioner opposed the admission of the claim. Taking up the second item, they stated that in December 1826 the Peruvian Government, on Aldao's misrepresentation that he had lost the draft, paid part of it, and issued to him a paper recognizing the debt (*reconocimiento*) for the rest; that it subsequently appearing that the draft was in circulation, the government published a notice to the effect that the draft was of no value; that Eldredge nine months afterward purchased it, not in virtue of an indorsement of the owner, but of an informal paper signed by Beteta, as Aldao's agent; that Eldredge paid only a fourth of the value of the draft, thus recognizing the risky character of the transaction; and that his claim for the payment of the draft was rejected by Peru in 1831. In regard to the first item for supplies, the Peruvian commissioners stated that the government, by a decree of January 20, 1839, ordered the amount of money in question to be paid; that this decree was subject to serious question, since General Santa Cruz, to whose government the supplies were

furnished, was defeated at the battle of Ancach on the very day on which the decree was issued; that it thus appeared that the decree was issued in a time of "much inquietude;" and that the credit to Aldao was not embraced in the debts ordered to be paid.

On these several grounds the Peruvian commissioners objected to the admission of each of the claims. They also raised an objection to both claims on the ground that Mr. Eldredge should have submitted them according to the provisions of the law of 1850 for the consolidation of the public debt. They contended that this law was obligatory on all creditors alike, native and foreign; that Mr. Eldredge had subjected himself to it by petitioning for the consolidation of the debt on the Aldao draft, and on certain supplies; and that he might still seek the consolidation of all the debts claimed to be due him from Peru.

The American commissioners replied that the purchase of the Aldao draft by Eldredge was *bona fide;* that its transfer, though informal, was admitted by Peru to be valid; that the notice published by the Peruvian Government contained a description differing in amount and in other respects from that of the real draft, and that the draft, even if purchased for only a fourth of its nominal value, brought more than the government securities, called *billetes*, were then selling for. As to the suggestion that the decree ordering payment of the debts for supplies was issued at a time of inquietude, the American commissioners observed that, as the battle of Ancach was fought a hundred leagues from Lima, at a time when no railroads or telegraphs existed in Peru, its result could have had no influence on the councils of the government at Lima on that day, even if it were admissible to consider whether or no the persons by whom the decree was issued were in a state of excitement. The American commissioners denied that Mr. Eldredge had asked for the consolidation of any of the debts due him, except that on the Aldao draft, the debt on which had neither been paid nor consolidated, but merely held in suspense; and they maintained that the terms of the law relating to the consolidation of the public debts did not purport to be obligatory on the national creditors.

Being unable to agree, the commissioners submitted to the umpire, General Herran, three points for his decision.

1. The validity of the claim on the Aldao draft.

2. The obligation of Mr. Eldredge to present his whole claim for consolidation.

3. The consequences to Peru of establishing a precedent by admitting Mr. Eldredge's claim:

The umpire held:

1. That it was not denied that the Aldao bill was unexceptionable in its origin; that its transfer to Eldredge, though informal, was valid; and that it constituted a valid claim.

2. That while the laws of Peru were binding on natives and foreigners alike, and while the authority of the government to provide for the establishment, acknowledgment, and liquidation of its debts was undoubted, yet it did not follow that when the government made proposals to its creditors they were obliged to accept them; that while the consolidation law, so called, of 1850, offered liberal terms to creditors, it could not be said that creditors who declined the benefit of it disobeyed it, since it commanded nothing, but merely made an offer; and that the rights of those who omitted to accept what was tendered remained in the same state as before, especially as the operation of the law was suspended in 1852.

3. That the mixed commission, being subject to no other law than that derived from the principles of justice and equity, international law and the public treaties, could foresee no consequences other than those that proceeded directly from its awards; and that the third point of difference was, therefore, beyond its jurisdiction.

The umpire further awarded to Mr. Eldredge the sum of $15,000 in the currency of Peru, in full payment of his claim, principal and interest.

5. CONVENTION BETWEEN THE UNITED STATES AND MEXICO OF JULY 4, 1868.

Case of Manasse & Co.: Supplies and Munitions of War: Opinion of Dr. Lieber.

"In the year 1866, General Placido Vega purchased from Manasse & Co. supplies and munitions of war amounting to the sum of $3,972.99, payable in United States gold coin. On the 23d of June 1866 they received on account from General Vega the sum of $1,054.50, so that $2,918.49 remained to be paid. Vega gave them three drafts of $500 each in part payment, but these were protested and never paid. On July 18th, 1866, Vega gave claimants a bond for the full amount

due them of $2,918.49, together with interest at the rate of 5 per cent per month, compounding every four months from the 18th day of November 1866 until paid. * * * They never applied to the Mexican Government in a direct way for payment. Whether they intended to let the avalanche roll on until it should crush the whole of the Republic of Mexico, it is not for us to say. The joint commission came to be established, and Manasse & Co. present their claim, together with the financial plan and device of 5 per cent per month compound interest.

"The chief and, it must be owned, well-developed argument on the part of Mexico is that the claim of Manasse & Co, arising out of nonfulfillment of a contract, is not within the scope of 'injuries to their persons or property by authorities' of that republic, namely of Mexico. The quoted words are *ipsissima verba* of the convention. I do not agree with the whole of the argument, but it is not necessary for the present purpose to go over the whole. So far as the present case is concerned, it was an injury 'to the person or property by an authority,' in the sense of the convention, when General Vega omitted to pay the remainder of a sum due to Manasse & Co. for the delivery of supplies and means to carry on the just war of Mexico against France and the improvised pretender supported by the emperor, now himself unseated. But it was not 'an injury to person or property by authorities' when a contract was left unfulfilled which the American commissioner has already designated by the most stigmatizing and yet by appropriate terms. I leave it here undecided whether a claim, such as is meant by the convention, can arise out of a contract, and, being an unfulfilled contract, is within the limits of 'injury to person or property.' The opprobious so-called contract of Manasse & Co., made with General Placido Vega, is wholly dismissed. * * *

"But the unpaid portion of the sum originally due by Gen. Placido Vega, for warlike material, does constitute a claim which in my opinion falls within the legitimate province of the commission. It is asked why did not Manasse & Co. profit by the proclamation of President Juarez of November 19th, 1867, in which he calls all inhabitants of Mexico to present 'all claims for credits contracted to sustain the war against foreign intervention,' and to have them adjusted according to certain rules

prescribed by him. The answer is that Manasse & Co. did not do so, and that their not doing so does not necessarily deprive them of the right to appear before an international commission and have their claim adjudicated; and moreover, that if we are going to decide this according to the strictest letter of the law, as counsel for Mexico seems to desire it, it must be remembered that the proclamation is addressed by the 'Constitutional President of the United Mexican States, to the inhabitants thereof,' and Manasse & Co. were not inhabitants of Mexico, whether the Spanish word used for the English inhabitant means dweller in Mexico or more especially citizen.

"Equity—prescribed by the convention as one of the elements of our decisions—seems to demand that the sum still unpaid be paid at length. It is a part of a debt incurred to baffle an atrocious invader. * * *

"The commission has nothing to do with the punishment of any offense, but the umpire admits that it went hard with him to allow interest. Still, if the sum is due, interest is due also. As it is, I give the following as the final decision in the case of *Manasse & Co.* v. *Mexico:* The United States are to be paid by the Government of Mexico for the use of the claimants, in the currency of Mexico, the sum of $2,918.49, with the annual interest at 6 per centum from July 18, 1866, to the close of the United States and Mexican Claims Commission."

Lieber, umpire, July 19, 1871, *J. A. Manasse & Co.* v. *Mexico,* No. 432, convention of July 4, 1868, MS. Op. I. 479.

Case of Iturria: Supplies to Troops: Award of Dr. Lieber.

A claim was made against Mexico for the value of certain supplies furnished to the "Capistran brigade" at Matamoras, in 1862, under a contract with its commander, a Mexican Liberal general. On a part, at least, of the debt contracted interest was stipulated at the rate of 50 per cent per annum. The commissioners differing, the case was referred to the umpire, whose opinion, so far as it related to principles and jurisdiction, was as follows:

"Whether conformably to the mere form of the agreement, any sum can be obtained by the United States from Mexico, and especially so when claimant has made no application for payment to the Mexican Government, I refer to my decision in the case of Manasse & Co. (No. 432). In all equity Mexico must be supposed cheerfully to avail herself of an opportunity to pay off debts incurred for the purpose of repelling the odious

and arrant invasion whose object it was to subvert its entire government."

Discarding the stipulation for 50 per cent interest, the umpire awarded the amount of the unpaid balance and interest at 6 per cent from the date of the voucher for each respective sum to the closing of the commission, all in Mexican currency.

Lieber, umpire, July 19, 1871, *Francisco Iturria* v. *Mexico*, No. 533, convention of July 4, 1868, MS. Op. I. 528.

Moses's Case. A claim was made for arms furnished to the Mexican army. The Mexican Government had provided for their payment out of certain custom-house receipts, but after a certain amount was paid, the custom receipts were diverted by public authority to other purposes, and a final reduction was made of $30,000 in the amount acknowledged to be due. Mr. Wadsworth, the United States commissioner, held that this was a tortious act, which formed a basis for an award, without reference to the question whether the commissioners could allow claims founded in contract. Mr. Palacio, the Mexican commissioner, joined in the award without stating his reasons for so doing.

Moses v. *Mexico*, No. 543, May 22, 1871, convention of July 4, 1868, MS. Op. I. 335.

Newton's Case: Custom-house Drafts. In the case of *Frederick A. Newton* v. *Mexico*, No. 927, the commissioners, November 17, 1871, made an award in favor of the claimant for certain unpaid custom-house orders.

Steelman's Case: Sale of Arms. A claim was made for arms furnished to the Mexican Republic in November 1860. A part payment was made, and for the rest of the price a certificate was given acknowledging the debt. The Government of Mexico never refused to pay it, and when the war with France was over established a special bureau for the liquidation of such debts. Claimant made his application before that bureau, and his credit was admitted as valid, but before receiving payment he withdrew his application and came before the mixed commission under the convention between the United States and Mexico of July 4, 1868. The commissioners made an award in his favor, saying that as no objection was ever made to the claim, nor any doubt raised as to its justice, it should be paid.

Augustus Morrill, assignee of *Lewis Steelman* v. *Mexico*, No. 891, December 20, 1871, MS. Op. II. 332.

Thore de Lespes's Case: Hire of a Steam Tug.

A claim was made for the hire of a steam tug which was used by the Mexican Government. The umpire in the course of his decision said:

"But, however well founded this claim may be, the United States have, in my opinion, nothing to do with it. It is exclusively a matter between the claimant and the Mexican Government, apparently ready to receive her and consider her claim. It is a matter of debt, the creditor being a woman who has no claim whatever to make the United States Government her collector of debts. The tug was used by agreement at so much a day, and if the Government of Mexico has not paid, I can not see that the case would fall within the pale of our treaty, and I find it impossible to award any sum to be paid by the Republic of Mexico to the United States for the benefit of the claimant."

Lieber, umpire, April 10, 1872, *Josefa Thore de Lespes* v. *Mexico*, No. 596, convention of July 4, 1868, MS. Op. II. 439.

Jurisdiction of Contract Claims: Opinion of Sir Edward Thornton: De Witt's Case.

The umpire "has carefully studied the able and lucid argument with which he has been favored by the commissioners and by counsel on each side, and has been forced to the conviction that the words of the convention of 1868, viz, 'All claims, etc., arising from injuries to their persons or property by authorities,' etc., comprise claims arising out of violations of contracts; and further, this view of the question is confirmed by other portions of the convention. The umpire believes that the government of the claimants has the right to support such claims and to insist upon justice being done, although it may not be under a peremptory obligation to do so. In exercising that right, the government would use its own discretion, and would probably be guided by the circumstances attending each case and by the extent to which injustice may have been committed. That the commission has, by the wording of the convention, jurisdiction over claims arising out of contracts the umpire can not doubt, and the commissioners, in his opinion, have the right to exercise the same discretion as would be used by their respective governments. The umpire considers that the claim before him arose out of a contract, and as a member of the commission he claims the right to decide upon its merits."

Thornton, umpire, March 6, 1875, *Heirs of John M. De Witt* v. *Mexico*, No. 431, convention of July 4, 1868, MS. Op. IV. 42. The claim was disallowed.

Requisites of Jurisdiction: Opinion of Sir Edward Thornton: Pond's Case.

"The umpire has already expressed his opinion that claims arising out of contracts come under the cognizance of the commission, but as these contracts are made voluntarily between the two parties, the umpire thinks that the validity of the contract should be proved by the clearest evidence, and that it should also be shown that gross injustice has been done by the defendant."

Thornton, umpire, May 19, 1875: *Charles H. Pond, successor to Cooper & Pond*, No. 190, convention of July 4, 1868, MS. Op. III. 177; IV. 599. The claim was disallowed.

Question of Loans: Opinion of Sir Edward Thornton: Widman's Case.

"It does not appear that Gen. Placido Vega was empowered by his government to contract a loan such as is stated to have been made to him by the claimants; he was authorized only to negotiate orders on certain Mexican custom-houses to the amount of $260,000, and yet the claimants seem to have preferred simply to lend their money rather than receive in return such positive guaranties as custom-house orders. But, putting aside all these minor considerations, it must be admitted that the claimants lent their money of their own free will, trusting to the good faith of Gen. Placido Vega, or on the supposition that he had power to pledge the Mexican Government, and were allured into the transaction with the hope of the enormous interest of 2 per cent per month. But even if Gen. Placido Vega had been fully authorized to pledge his government to the payment of such a loan, the umpire considers that the claimants have no more right, if so much, to come before the commission for a settlement of their claim, than if they had bought Mexican bonds in the open market, a right to which the umpire would in no case hold them to be entitled."

Thornton, umpire, July 15, 1875, *Adolph Widman & Brothers*, No. 74, convention of July 4, 1868, MS. Op. VII. 359. On the same ground Sir Edward Thornton dismissed the claim of *Salvio Pacheco* v. *Mexico*, No. 366, MS. Op. VII. 427, for an alleged loan of $26,000 contracted with Gen. Placido Vega.

Consequences of Imprudence in making Contracts: Kearney's Case.

October 27, 1867, claimant entered into a contract with Col. Enrique A. Mexia, as agent of Gen. Desiderio Pavon, governor and military commander of the State of Tamaulipas, for the supply of arms and munitions of war. It did not appear that General Pavon had any authority from the Mex-

ican Government to commission Mexia to make the contract, and the latter seemed even to have made purchases beyond the instructions which were given to him. "Even supposing that the contract was made with a duly authorized agent of the Mexican Government," the umpire did not think that the claimant would have been entitled to seek redress before the commission. Continuing, the umpire said:

"He entered into the contract of his own accord, fully aware of the condition of the Republic of Mexico and of its ability or otherwise to pay its debts, and trusted to the good faith of the Mexican Government. If the circumstances of the country afterward became such that it found a difficulty in paying its debts, or even if there was bad faith on the part of the government, the claimant can not expect the support of his own government to remedy the consequences of his imprudence. But in this case there seems to have been no want of good faith on the part of the Mexican Government, for the contract was not with it, but with Colonel Mexia, as agent of General Pavon, governor and military commander of the State of Tamaulipas."

Thornton, umpire, July 16, 1875, *Edward Kearney* v. *Mexico*, No. 91, convention of July 4, 1868, MS. Op. VII. 361. In the case of *Alfred P. Phipps* v. *Mexico*, No. 435, a claim was made growing out of a contract said to have been entered into by the claimant with Señor Blancarte, who, it was stated, was at the time governor of Lower California. There was no written proof of the celebration of the contract, of the delivery of the goods, or of their receipt by Blancarte. The claimant, said Sir Edward Thornton, entered into the contract "spontaneously, and with the hope, no doubt, of making an enormous profit." Nor was there "sufficient proof that he was treated with gross injustice, even if the contract was really a fact." The claim was therefore dismissed. (MS. Op. VII. 440.)

Proof of "Injustice:" Treadwell's Case.

In the case of *Leonard T. Treadwell & Co.* v. *Mexico*, No. 149, a claim was made growing out of a contract for the sale of arms and ammunition. The jurisdiction of the commission being contested, Mr. Wadsworth, the United States commissioner, said that the commission had already allowed such claims, and that its decision should not be changed. He cited *Menasse & Co.* v. *Mexico*, and *Francisco Iturria* v. *Mexico*, No. 553, in the latter of which Mr. Palacio, the Mexican commissioner, said that if the claimant had asked for payment and it had been refused him the refusal would have constituted an injury to be redressed by the commission. He also cited *Moses* v. *Mexico*, No. 543, and *Augustis Morrill* v. *Mexico*, No. 891, observing that in the latter case, though there was no proof of demand

or refusal, Mr. Palacio, who wrote the opinion of the board, said that as the debt remained unpaid, owing to different decrees issued by the Mexican Government in and after 1861, stopping payment of all creditors because of a lack of funds to the most urgent necessities, the claim might be allowed. Of the same tenor, said Mr. Wadsworth, was the case of *Frederick A. Newton, assignee*, v. *Mexico*, No. 927, in which Mr. Palacio wrote the opinion and made the award.

Mr. Zamacona, the Mexican commissioner, maintained that the claim should not be allowed.

The umpire, Sir Edward Thornton, thought that there were grave doubts as to the making of the contract, but, waiving them, said:

"The umpire * * * will go further and will repeat what he has already said in a previous decision in the case of *Charles Pond* v. *Mexico*, No. 190, that even if so many defects were not obvious, the commission ought not to take cognizance of claims which have arisen out of contracts between citizens of the United States and the Mexican Government, entered into voluntarily by the former, unless the validity of the contracts should be proved by the claimant's evidence, and it should also be shown that gross injustice had been done by the Mexican Government. In the above case the contracts, if they can be so called, were entered into by claimants voluntarily, and the later ones even rashly. In 1860 and 1861, and still more in 1864, they must have well known, as every one knew, that the Mexican Government was in the greatest financial difficulties, and that there was but little chance of their being paid promptly, although the umpire can not doubt that, if well founded, the claims will be finally paid by the Mexican Government, to which the claimants state in their memorial that they had never been formally presented. The umpire accordingly awards that the above-mentioned claims be dismissed."

August 7, 1875, convention of July 4, 1868, MS. Op. IV. 248.

Loan Voluntarily Contracted. Chase's Case.

"In the case of *Franklin Chase* v. *Mexico*, No. 453, it is claimed that a forced loan was imposed upon the merchants of Tampico, of which claimant was called upon to pay a share, amounting, as he declares, to more than $5,000. Of this loan only a part had been repaid to him. With regard to the forced loans the umpire has already expressed his opinion on several previous occasions that such claims do not come under the cognizance of this commission. But in the present instance the umpire can not even admit that the loan in question was a forced loan; for there is no evidence to that effect. On the contrary, it

seems to have been a loan made in consequence of a contract voluntarily entered into by certain merchants of Tampico with the collector of customs of that port. There is no proof whatever that the three merchants who signed the contract represented other merchants at the time they so signed the contract, or that the claimant was one of the original contractors. It would appear that the claimant voluntarily took a share in the loan, hoping, no doubt, that it would be a lucrative speculation. But in doing so he had no arrangement with the Mexican Government or with its authorities; he merely, of his own accord, or at the invitation of the contractors, took a share in a loan contracted for with a government authority by others. The umpire is of opinion that such a claim is not within the province of the commission and that it has no jurisdiction in the case."

Thornton, umpire, October 2, 1875, convention of July 4 1868, MS. Op. VII. 448. In the case of *Richard Chenery* v. *Mexico*, No. 597, claimant was to have had a commission on a loan which he was to have negotiated under a contract with Gen. Sanchez Ochoa. He did not place the loan, but incurred some expenses. Mr. Wadsworth, the United States commissioner, held that he ought to be reimbursed these expenses. Mr. Zamacona, the Mexican commissioner, held otherwise. Sir Edward Thornton decided that the claim was inadmissible.

Contract for the Construction of a Railway. Hammaken's Case.

"In the case of *George L. Hammaken* v. *Mexico*, No. 158, it is clear that the claimant is a citizen of the United States. The claim arises out of a contract between the claimant and the Mexican Government to construct a railroad between the City of Mexico and Tacubaya. The claimant at first proposed to construct a wooden railway, but was induced to make an iron one by the offer of greater facilities and immunities than he had at first asked. It was therefore the Mexican Government itself which inveigled him into incurring greater expenses than he would otherwise have done. The railroad was opened for traffic on the 1st of January 1858. During that year Zuloaga gained possession of the political power and held the capital, and Miramon was elected president. During 1858 and 1859 the *de facto* authorities of Mexico despoiled the claimant of many of the rights and immunities possessed by him and guaranteed to him by the decree of August 26, 1856. These were as much his property as the dollars in his pocket, and the umpire considers that the injustice committed with regard to the contract was of so grievous a nature that the commission is justified in awarding compensation.

The persons who committed these acts must, in the opinion of the umpire, certainly be held to be *de facto* authorities of Mexico. The Mexican Government on the 2nd of May 1862, allowed the claimant $100,000 as indemnification for the losses occasioned him by the aforesaid injustice, which sum was to be paid out of the proceeds of a loan which had been negotiated by treaty with the United States. The treaty, however, was never ratified.

"By allowing this indemnity the umpire conceives that the Mexican Government admitted that an injustice had been done to the claimant and by Mexican authorities. The umpire cannot concur in the suggestion of the agent of Mexico that the grant was a 'gracious donation' (donacion graciosa) on the part of the Mexican Government. If the latter did not think that the wrong had been done by the Mexican authorities, it would not have agreed to grant compensation; if it had not so done, the natural course would have been to reinstall the claimant in possession of the railroad; but it appears that it preferred to allow the claimant an indemnity rather than revoke the measures of the authorities acting under the Miramon government.

"In inquiring into the amount of the compensation to which the claimant is entitled, nothing can be fairer than to refer to the agreement which was come to between the Mexican Government and the claimant in 1862. This agreement was for the payment to the claimant of $100,000 by installments at stated though conditional periods. Both parties believed at the time that the indemnity would be paid to the claimant. The amount, therefore, with the conditions of payment annexed, may certainly be taken as the fair value of the claim at that time.

"The umpire has always been opposed to consequential damages, and thinks that they ought never to be taken into consideration. It is impossible to measure them with any approach to justice; they are of an uncertain and imaginative nature, particularly in a country where the rate of interest is so high, and where the chances of losing both capital and interest are quite as great as those of the realization of an immense capital. The certainty of a smaller interest upon the compensation allowed is much more substantial than imaginary consequential gains.

"The claimant presented to the commission seventeen out of nineteen of the orders on the United States Secretary of the

Treasury delivered to him by the Mexican Government. He states that the two remaining orders are under his control, but he has not presented them to the commission, although he alleges that one of them is in his possession. The umpire is of opinion that in equity these also should be paid if presented at the time of the payment of the remainder of the claim. As it was originally intended that the payments should be made by installments, and as the exact date of those payments can not now be fixed, the umpire considers that it will be more convenient to fix a precise date for the commencement of interest, and that the 1st of July 1863 may be taken as an equitable date for that purpose."

Thornton, umpire, August 10, 1875, convention of July 4, 1868, MS. Op. VII. 387. If the two missing orders should be presented, the umpire awarded $100,000, Mexican gold, with 6 per cent interest from July 1, 1863; if not, $90,909.09, Mexican gold, with the same rate of interest from the same date.

Sale of Arms: Shumaker's Case.

"The claim involved in the case of *Lewis Shumaker* v. *Mexico*, No. 539, arises out of a contract for supplying arms alleged to have been made with an agent of the Mexican Government. Supposing that the contract was really made with the Mexican Government itself, and that the arms were duly delivered to and used by the Mexican Government, facts of which the umpire does not admit that there is sufficient proof, he is of opinion that the case is not one of which the commission should take cognizance. Looking at it in the best point of view for the claimant, it was a contract voluntarily entered into by him for gain. If he trusted that the Mexican Government would pay him, he did so with his eyes open and in the hope that his speculation would turn out well. If he was disappointed, this is not, in the umpire's opinion, one of those injuries by the Mexican Government which were contemplated by the convention of July 4, 1868."

Thornton, umpire, October 15, 1875, convention of July 4, 1868, MS. Op. VII. 476.

Sale of Vessels and Munitions of War: Taussig's Case.

In the case of *Taussig* v. *Mexico*, No. 39, Sir Edward Thornton, November 29, 1875, disallowed a claim growing out of the alleged nonfulfillment by the Mexican Government of a contract, made before claimant became an American citizen, for vessels and munitions of war alleged to have been sold to the Mexican Government. He inferred that the vessels were

purchased before coming to any arrangement with the Mexican Government, and with the secret intention of subsequently selling them to it. Such contracts, said the umpire, were not, in his opinion, of such a nature that the commission ought to view their not being fulfilled as an injury to the person or property by authorities of the Mexican Republic. He said that before making an award in such cases the most rigorous examination would be indispensable, both with regard to the real value of the articles involved in the bargain and the price agreed to be paid, and with regard to the certainty of the injustice committed by the Mexican Government; otherwise there would be great danger that the commission might be drawn into countenancing and encouraging the most extravagant speculations and fraudulent transactions.

Sale of Arms: State Bank of Hartford's Case.

"In the case of *The State Bank of Hartford* v. *Mexico*, No. 535, the claimants allege that they agreed to sell to the Mexican Government on the 19th of August 1859 certain arms for which they were to be paid $20,950, one year after the delivery of the said arms with interest at 6 per cent. Supposing that these facts were sufficiently proved, the umpire, after having carefully perused and reflected upon the voluminous evidence accompanying the case and the arguments furnished by claimants' counsel and the agent of the United States, does not feel justified in departing from his opinion or abandoning his conviction that where a contract is thus voluntarily entered into with the Mexican Government its nonfulfillment is not one of those injuries by Mexican authorities which was contemplated by the convention of July 4, 1868. In this instance the umpire considers that his opinion is most remarkably confirmed by the fact that the claimants subsequently made two further sales of arms to Mexican authorities, with respect to which they agreed that the value of the said arms should be paid on their delivery, and it was so paid. There was no compulsion with regard to the first sale; they might have refused to sell except for ready money, and there was no reason for their being less cautious in the first than in the second and third.

"But there are many defects in the evidence. There is no proof that the governor of Nueva Leon and Coahuila was authorized by the Mexican Government to purchase arms for it, or that it made itself responsible for those arms; no proof that Ignacio Galindo was empowered to sign bills for him, or even

that the signature attached to the bills is really his; no proof that Mr. McGraw was appointed to receive the arms and did receive them; no proof that the arms were ever forwarded to Mexico or ever received by the Mexican Government, and not the slightest proof that the Mexican minister, Señor Mata, had any authority from his government to make a contract for the purchase of arms or to accept bills for their payment.

"But on the general principle of the spontaneity of the sale, the umpire is of opinion that the above-mentioned claim does not come within the province of the commission, and he therefore awards that it be dismissed."

Thornton, umpire, July 27, 1876, convention of July 4, 1868, MS. Op. VI. 437. On similar grounds Sir Edward Thornton dismissed claims for the sale of arms and munitions, or of vessels, to the Mexican Government in the following cases: *Rene Masson* v. *Mexico*, No. 787, MS. Op. VI. 449; *Carlos Butterfield & Co.* v. *Mexico*, No. 966 A and 966 B, MS. Op. VI. 508; *M. G. Vallejo* v. *Mexico*, No. 822, MS. Op. VI. 467; *Charles H. Emerson* v. *Mexico*, No. 673, MS. Op. V. 448, VI. 383.

"Contracts Made Voluntarily:" Case of Kennedy & King.

"In the case of *Kennedy & King* v. *Mexico*, No. 579, the claims arise out of agreements made between the claimants and General Carvajal to carry an imperialist division from Matamoras to Vera Cruz, out of goods sold to General Carvajal, out of the sale of a steamer to him, out of freight of arms to Tampico, and for repairing the steamer sold by the claimants and converting it into a gunboat. It appears to the umpire that all these transactions were nothing more than contracts made voluntarily with General Carvajal, and that there was no compulsion whatever. The claimants might have refused to supply goods, or to do any of those things on account of which the claims are presented. An attempt is made to prove that the conveyance to Vera Cruz of the imperialist division was forced upon the claimants, and the evidence of General Carvajal is relied upon for this purpose. But the umpire is of opinion that the compulsion is not proved. It is admitted that the claimants made no resistance. Carvajal says that they were in no condition to resist, but that can not be the case; for there is no doubt that they might have refused to furnish the means of conveyance, and might have obliged Carvajal to take them by force. Carvajal deposes that had the claimants resisted, he could have forcibly taken possession of the steamboats. Of that there can be little doubt. But he does not declare that he would have done so. The claimants

were, doubtless, like many others in Matamoras, interested in preventing the destruction consequent upon the place being taken by storm; but however praiseworthy their action may have been in that sense, the umpire does not consider it to be proved that they were compelled to this action.

"It is further to be observed that the claimants had taken their remedy by submitting their claim to the Mexican Government, and that by the fact of their having done so they bound themselves to abide the decision of the 'Seccion Liquidataria,' or of the higher authorities, to whom it was in their power to appeal. They accepted also from that government a certificate admitting that it was indebted to the claimants in the sum of $76,032.90. The certificate itself states that it was granted by an order of the general government, dated the 23rd of February 1869. The umpire is of opinion that the defense is justified in claiming that if any injury was done to the claimants, by not allowing the whole of their claims, or not having paid the amount allowed by the certificate till now, that injury having been done after the exchange of the ratifications of the convention can not come under the consideration of this commission.

"The umpire is therefore of opinion, for the reasons given above, that the claims involved in the above-mentioned case do not come under the cognizance of this commission."

Thornton, umpire, January 25, 1876, convention of July 4, 1876, MS. Op. VII., 597.

Unneutral Contracts: Wallace's Case.

"The claim involved in the case of *Lew Wallace* v. *Mexico*, No. 425, arises out of a contract alleged to have been made by the claimant with General Carvajal, as agent of the Mexican Government. The contract in question seems to have been to the effect that the claimant should assist in procuring emigrants from the United States to Mexico, who should subsequently enlist there, in the purchase of arms and ammunition, and in raising a loan for Mexico. As it appears that the first of the three points may be a violation of the laws of the United States, the commissioner of the United States has only supported the two latter points.

"In the first place, the umpire can not find in the authority given to Carvajal on November 12, 1864, a copy of which is exhibited by the claimant, that any power is given him to make such a contract as that which he agreed to with the claimant,

Carvajal was authorized to engage men for enlistment, to raise a loan, and to purchase arms and munitions of war; but he was not empowered to employ anyone else for that purpose. But even if Carvajal had that power, the contract was entered into voluntarily by the claimant; nor is any gross injustice proved against the Mexican Government, for, putting aside the question of obtaining emigrants for enlistment, it is not shown that any service was rendered by the claimant in raising a loan or in the purchase of munitions of war, or that these were delivered in Mexico, without which condition there was by the sixth clause of the authority no obligation.

"Further, although it does not appear that the claimant actually received his commission as major-general or was enrolled in the Mexican army, there is no doubt that he considered himself in the service of the Mexican Government, and the umpire is of opinion that *pro tanto* he had abandoned his rights as a citizen of the United States. As far as any compensation is concerned for the services which he rendered to the Mexican Government, he is not entitled to appear before the commission as a citizen of the United States.

The umpire therefore thinks that though the Mexican Government may be morally indebted to the claimant, his claim is not within the cognizance of the commission, and that, indeed, the claimant has no standing before it with regard to the claim as it is described by himself."

Thornton, umpire, September 24, 1875, convention of July 4, 1868, MS. Op. VII. 438.

Unneutral Contract: Fitch's Case.

"In the case of *Frederick G. Fitch* v. *Mexico*, No. 777, the claim * * * is for the payment of services voluntarily rendered to the Mexican Government, which the claimant accepted of his own free will and even sought, and to the performance of which he was in no way compelled. In performing a portion of these services the umpire is decidedly of opinion that the claimant violated the neutrality which, as a citizen of the United States, he was bound to observe. If the taking charge of the military engineering and erection of proper fortifications around Mazatlan, and the doing so a part of the time under a heavy fire from the French frigate *Cordillera*, is not a breach of that neutrality, it is difficult to say what can be considered so. Of a similar character was the claimant's exploit of penetrating into Mazatlan, when held by the imperialists, and obtaining

therefrom a hundred thousand gun caps, which he subsequently delivered to General Corona. It is even stated in the defensive evidence that the claimant actually held rank as a colonel in the Mexican army. However meritorious, then, the services of the claimant may have been as far as Mexico is concerned, and however great, if the facts should be well proved, her moral obligation may be to compensate him, the umpire is of opinion that this commission can not take cognizance of the case, and he therefore awards that the above-mentioned claim be dismissed."

Thornton, umpire, June 21, 1876, convention of July 4, 1868, MS. Op. VI. 441.

Unneutral Contracts. Cucullu's Case.

Joseph S. Cucullu, a citizen of the United States, on February 2, 1858, at New Orleans, Louisiana, advanced $40,000 to José Mariano Salas, Juan Manuel Fernando de Juaregui, and two other persons, all Mexican citizens and distinguished military chiefs, who, with the leader of their party, Santa Anna, had been defeated and driven into exile by the Liberal forces in Mexico. For the sum so advanced Cucullu presented to the commission under the convention between the United States and Mexico of July 4, 1868, a claim in which he asked for an award for the sum in question, with interest, less $1,250, which he admitted that he had received from the government of the "regency" set up by the French arms in the Mexican capital. In an acknowledgment signed and given to Cucullu by the persons in question when the advance was made, it was stipulated that the money should "be employed in the service of the Mexican nation," and that it should be repaid by a government which they proposed to establish in Mexico, the first installment of $12,500 to be paid from the proceeds "of the first maritime custom-house over which the flag which they [the signers] defend should be hoisted." In the memorial of the claimant it was stated that Zuloaga, before the loan was made, had "sent a letter to General Salas and his companions in exile, ordering them to return to Mexico at once, as their services were much needed by the government."

Opinion of Mr. Wadsworth.

On these facts Mr. Wadsworth, the United States commissioner, said:

"It was to enable these generals, colonels, etc., so much needed by General Zuloaga to return to the scene of the pending struggle and play a useful part in establishing the new

government and in capturing the maritime custom-houses (all held by the constitutional government at the time) that claimant parted with his money. * * * It was too much money to pay the passage home of a dozen exiles (a few hundred dollars would have accomplished that); it was for the public service the money was advanced, and the government to be established was to repay it. * * * A few hundred dollars of the loan was paid to each of the exiles, and the remainder invested in munitions of war for the use of the Zuloaga government, against the government established by the people of Mexico under the constitution of 1857. And this is what claimant meant by advancing $40,000 for 'the service of the Mexican nation.'

"At the time that claimant, a citizen of the United States, took the risk of advancing this sum of money to provide the means for a hostile enterprise from the shores of the United States against the constitutional government of Mexico, the Government of the United States was at peace with that government, and the act of claimant was apparently in violation of the neutrality laws of his sovereign and punishable as a misdemeanor. If I am not incorrect in this view, the question is presented, whether claimant can enforce a contract made with one belligerent against the other, when by the *lex loci* the contract was in violation of the neutrality law. It is certain that the municipal courts of the sovereign whose laws have been violated, bound to uphold the laws by their decisions, will treat the contract as a nullity. (*Deacon* v. *Oliver et al.*, 14 Howard, 610; *Gill* v. *Oliver*, 11 Howard, 529, citing *Williams, trustee, etc.*, v. *Oliver et al.*, Maryland Ct. Appeals, June term, 1843.) But an international tribunal like this has not always taken the same view of the question, *where an award was sought against the belligerent himself with whom the contract was made.* The case of the contracts made by General Mina will furnish an illustration. The supreme court of Maryland decided these contracts a nullity, because they were in violation of the neutrality laws of the United States, the *lex loci.* The Supreme Court of the United States dismissed the appeals taken from the decisions of the State court for want of jurisdiction; but the language of the learned justice delivering the opinion of the court in those cases, shows a concurrence on their part in the view taken by the State court of the effect on the contract of a violation of a penal law. And of the correctness of the opinion of the Maryland court on the point there can be no doubt. (See *Kennett et al.* v. *Chambers et al.*, 14 Howard, 38, and cases cited.) Notwithstanding, the American and Mexican commission which sat at Washington under the convention of 1839 allowed the claim of the shareholders in the Mexican Company on the contracts made with General Mina, and the money was paid. It will not much affect the question to say that after General Mina's death the Mexican Congress ratified the contracts. *This did not relieve them of the impurity which nullified them in the court of the American sovereign;* they were

still a breach of the law, and, notwithstanding the Mexican act of recognition, had a suit been brought in any of the courts of the United States to enforce those contracts, the decision must have been, 'they are a nullity,' because the reason remained and could not be removed by Mexico, i. e., the contract violated the public policy of the United States, and the courts of that country must always consider a contract in violation of a penal law thereof a nullity.

"But if the sovereign, whose laws have been violated by a contract for aid between a belligerent power and his subject, waives the offense and demands indemnity according to the contract, is it admissible to allow the offending government to say, 'I violated your laws in making such a contract, therefore I ought not to comply with it upon your demand?' Would not the injured sovereign reply with much reason, 'The enforcement of my laws, broken by you, can not concern you; that is an affair exclusively my own; if I see cause to overlook it, how can you rightfully judge it?' Now, it appears to me that the mixed commission could not have ordered and awarded payment on the contracts of General Mina if they were impure or a nullity, and I am certain that a recognition of them by the Mexican Congress did not prevent them from being flagrant violations of the neutrality laws of the United States.

"But this case stands upon a different footing. It is an immoral contract, made by a citizen of the United States with the agents of an insurgent party seeking to establish itself as a government in fact, by force of arms, over the established and *de jure* government with which the United States was at peace; which contract, it is now said, the latter must perform as the successor of the former, claimed to have been *de facto* the government at date of the contract. The constitutional government of Mexico was interested in this instance in the enforcement of the neutrality laws of the United States and of the treaty obligations between the countries of amity and friendship, and the latter was under the strongest obligations, imposed by treaty and the duty of an impartial neutrality, to enforce its laws; and if it wrongfully neglected to do so, much more if it connived at the violation, to the injury of the former, it would be responsible for the consequences and bound to indemnify the injured party. There is a sense of justice felt in every right mind, which at once revolts at the idea of requiring the successful party resisting an attempt within the state to overthrow its authority by another party, to pay the money advanced to its enemy for its destruction, upon the demand of a sovereign whose treaty engagements and neutrality laws were violated by the contract of aid. The case of *Kennett et al.* v. *Chambers*, *supra*, was that of a contract made in Ohio by the appellants, citizens of the United States, with Chambers, a citizen of Texas, in September 1836, whereby Chambers agreed to sell and convey certain lands in Texas to them for $12,500, they reciting in the contract, as the motive of the pur-

chase, their desire to 'advance the cause of freedom and the independence of Texas, etc.' The Supreme Court of the United States was disposed to regard the contract as in violation of the neutrality laws of that country; nevertheless, in adjudging the contract a nullity, it says (Judge Taney delivering the opinion):

"'But the decision stands on broader and firmer ground, and this agreement can not be sustained either at law or equity. The question in this case is not whether the parties to this contract violated the neutrality laws of the United States or subjected themselves to a criminal prosecution, but whether such a contract, made at that time, within the United States, for the purposes stated in the contract and the bill of complaint was a legal and valid contract.'

"The court answers this question in the negative. The United States being at peace with Mexico under a treaty of amity and friendship, every citizen was 'equally and personally pledged with his government,' and could 'do no act nor enter into any agreement to promote or encourage revolt or hostilities against the territories of a country with which our government is pledged by treaty to be at peace without a breach of his duty as a citizen, and the breach of the faith pledged to the foreign nation,' says that high court. In further support of that view the court said:

"'It was upon this ground that the court of common pleas in England in the case of *De Wurtz* v. *Hendrick* (9 Moore's C. B. Reports, 586) decided that it was contrary to the law of nations for persons residing in England to enter into engagements to raise money by way of loan for the purpose of supporting subjects of a foreign state in arms against a government in friendship with England, and that no right of action attached upon any such a contract. And this decision is quoted with approbation by Chancellor Kent in 1 Kent's Commentaries, 116.'

"It is of the highest importance that citizens of the United States, disposed to aid by their money or otherwise revolutionary attempts against governments with whom the United States are at peace, should carefully consider this language of the supreme court of their country. I desire myself to give it my humble sanction with such weight as belongs to the responsible post I now occupy."

Opinion of Mr. Palacio.

Mr. Palacio, the Mexican commissioner, concurred in the views of Mr. Wadsworth. The citizens of a country could not, said Mr. Palacio, by the same act violate its laws and become entitled to its protection against foreign governments. If a municipal law declared that the giving of assistance to a belligerent was a punishable offense, but at the same time the executive assumed to guarantee the execution of the contract, there would result an antagonism between the courts and the executive which

would tend to nullify the law. Speculators would reason in this way: "The courts fine me $10,000, but the government will support my demand for $110,000, and consequently by violating the law I gain $100,000 through the efficient protection and support of my government." It could not, said Mr. Palacio, be maintained that the question what a government could or could not do in behalf of the claims of its citizens was merely a matter of internal consideration, in which foreign governments were unconcerned. The contrary was the case. The neutrality laws of the United States only recognized the government's international duties. There were indeed cases in which contracts not legally valid might be enforced on principles of equity, as giving rise to a natural obligation. But in order that such an obligation might exist, some benefit must have been received by the obliged person through the action of the other party. Considering the present case in that light, it would, said Mr. Palacio, be found "that the Mexican Republic did not receive any benefit, from the fact that Cucullu supplied a dozen rebel emigrants with the means of promoting and encouraging the civil war against the institutions adopted by the people and the authorities actually in power." In the course of his opinion Mr. Palacio said:

"That the individuals with whom Cucullu made the contract had been exiled by the Mexican Government, he knew perfectly well. It is he who tells us so in the statement presented by him in regard to his claim to the Secretary of State, as late as the 10th of March 1870. The following are his words:

" 'In November 1857, General Mariano Salas, ex-President of the Republic of Mexico, in company with Generals Guitian, Pacheco, and other officers of the Mexican army, were exiled to the United States by President Comonfort. General Salas and others above named were placed on a steamer bound for New Orleans, where they arrived in the month and year stated.' * * *

"Persons placed in that position were the persons whom Cucullu took for representatives of the Mexican Government, and through whom, as he thinks, that nation contracted a valid obligation. It is possible that the banishment of those individuals might be unjust; it is possible that President Comonfort might abuse his powers in imposing it; it is possible that it might not produce, according to Mexican laws, the *maxima capitis diminutio* which I have supposed to give strength to my reasoning; but certainly it always results that individuals whom a government has placed in that condition, with justice or without it, can not be taken in good faith by anybody for representatives of that government, and that they could not

assume the character of *negotiorum gestor* of said government, nor expect that their acts or obligations contracted *sub spe rati* should be ratified. It was not possible for Cucullu to think that the government who had exiled Salas and his companions should consider themselves obliged to fulfill the contract made by those persons. What Cucullu did think was that those exiles *would make themselves the government* by overthrowing and dispossessing the government at Mexico; and he wished to lend them his assistance. * * *

"It has been pretended that the decision of this case depends upon that of the question whether or not the government of Zuloaga was a *de facto* government for whose acts the Mexican Republic is to be held responsible. It would be very easy to show that it was not such a *de facto* government, but only a faction which succeeded to some extent in acquiring the appearance of a government, without ever having a real authority freely obeyed, or in any way recognized or accepted by the Mexican people. But the question concerning the character of the so-called government of Zuloaga has not in this case the importance which has been attributed to it, since it can be decided in either sense without altering the final decision of the present claim. Whatever might have been the character which the so-called government of Zuloaga acquired at length, it is evident that on the 2nd of February 1858 it could only be considered at New Orleans as a band of rebels against the existing Government of Mexico, with more or less hopes to become a government. This is indubitably shown by the terms of the agreement made with Cucullu, which speaks of 'raising flags,' of 'conquering maritime custom-houses,' of 'the government to be established,' and of 'those who will form the government.' It was known at New Orleans (at least Cucullu knew it) that 'Juarez had withdrawn to Vera Cruz with the leaders of the Liberal party and established a government there.' These are his words in the exposition addressed to the Secretary of State. Cucullu knew, then, that Zuloaga had established a 'government of the Mexican Republic' in the City of Mexico, and that Juarez had carried another 'government of the Mexican Republic' to Vera Cruz. Who authorized Cucullu to decide which of these two pretenders was 'the government of Mexico?' If he took for the government that which was not such he was bound to know that he ran that risk; that he intrusted his interests to the contingencies and result of the civil war; that he took sides with one of the belligerents, and that he could not promise himself that the acts of the one would be respected or legalized *by the other* belligerent. If the precedent be established that the government which becomes consolidated after a civil struggle takes upon itself the obligations contracted by its enemy, the condition of those who speculate in affording assistance to revolutionists would be made too favorable and advantageous, and a premium would be offered to those who engage political exiles in enterprises against the authorities of their country and furnish them with the means

necessary to participate in the civil war. Such men as Cucullu would indulge in this reasoning: 'If the party which I support triumphs I shall not only be paid, but shall be esteemed and considered by the victors; if the existing government triumphs and succeeds in overpowering my friends it may, perhaps, refuse to pay me, but I shall invoke the interposition of my government, will make an international claim, and that government which I tried to overthrow will have to pay me one dollar for each cent lent by me to its enemies.' In this same way, as it is said, the Sultan used to make the heirs of a vassal whom he commanded to hang himself pay for the silk cord he sent him for that purpose. That there should be speculators who make such pretension is not surprising; what is surprising is that they should succeed in having that same pretension presented and supported by a government who has so justly acquired the reputation of being just and enlightened. This can only be explained by supposing, as it is true, that that government has not a perfect knowledge of the circumstances of the case. * * *

"I wish that my opinion shall never be construed to involve the understanding that if the persons with whom Cucullu dealt had ever succeeded in forming the Government of Mexico, my judgment would be favorable to this claim. Even in that case I should be unable to see anything other than a debt of the republic in favor of Cucullu. This debt is not an injury by the authorities, and while, perhaps, a feeling of honor and a certain respect to purely moral obligations could give it in that supposition some efficiency and practical validity, it is indubitable that it could never be the subject of an international claim, and much less a claim arising out of injuries. Even if the meaning of this word should be extended to the extreme, comprehending the mere *omission* of payment (which never was *refused*), it would be always necessary that the debt, either really or presumptively, should have been placed within the knowledge of the indebted government. It does not appear in this case that any intimation as to the payment of such a debt has ever been made to the Government of Mexico. The payment was claimed only from the enemies of the republic, and I do not think that this fact can be considered as a notification to the government of the republic. The claim submitted to the so-called government of Zuloaga and to the so-called regency of the Mexican Empire could not produce the result of making the republican government acquainted with that obligation. Does the present Government of the United States know what were the debts contracted by Jefferson Davis? Should the United States ever know such debts, will they go to the bondholders, and, without their previous demand, pay them in gold, since the legal tender was not admitted by the defunct Confederation?"

Joseph H. Cucullu v. *Mexico*, No. 779. Both commissioners also concurred in the view that the Zuloaga government could not be considered an authority of Mexico.

Claim for Medical Services: Light's Case.

"In the case of *William W. Light* v. *Mexico*, No. 912, the umpire can not but express his surprise that it should have fallen to his lot to have to decide upon this claim, for which, it appears to him, there is no ground whatever for making the Mexican Government responsible. If the claimant rendered medical services, he did so of his own free will, and it is not shown that he ever even presented an account to the authorities, or that he was not paid for his services."

Thornton, umpire, convention of July 4, 1868, MS. Op. VI. 488.

Claim for a Reward: Nolan's Case.

"In the case of *Francis Nolan* v. *Mexico*, No. 337, there are a variety of claims. The first is that the State of Sinaloa offered a reward of $3,000 to the person who first raised a hundred bales of cotton in the State, and that although the claimant complied with the condition, the State refused to pay him the reward. The umpire conceives that this is a question which does not come within the cognizance of the commission. It was a sort of contract, which the claimant voluntarily entered into with the State of Sinaloa, and for which the Mexican Government can not certainly be held responsible. Nor is it even proved that the claimant was the first man who raised a hundred bales of cotton in accordance with the prescribed conditions; on the contrary there were others who made a similar claim."

Thornton, umpire, No. 337, convention of July 4, 1868, MS. Op. VII. 411.

Debt of Municipal Corporation: Thompson's Case.

A claim for a debt due from a municipal corporation of Mexico was rejected by the commissioners on the ground that the Government of Mexico was not obliged to pay the debts due from or by its cities, villages, or their inhabitants.

William L. Thompson v. *Mexico*, No. 765, convention of July 4, 1868, MS. Op. VII. 7.

6. ARTICLE XII. OF THE TREATY OF WASHINGTON OF MAY 8, 1871.

Use of a Patented Article: Hubbell's Case.

William Wheeler Hubbell v. *Great Britain*, No. 17.

"The memorial of the claimant alleged, in effect, that prior to the 1st of July 1844 the claimant was the inventor of a certain improvement in breech-

loading firearms, for which letters patent were issued to him by the United States, dated 1st July 1844.

"That in the year 1844 the British Government, through Her Majesty's consul at Philadelphia, ordered of the claimant two specimen guns made under the claimant's invention and patent, which were thereupon procured to be made by the claimant, and furnished through the consul to Her Majesty's government in 1845, and paid for by that government.

"The memorial further alleged that 'it was understood and agreed that the invention of said mechanical principle' of the claimant 'should be paid for by Her Majesty's government whenever it should be determined upon for adoption in Her Majesty's service.' That after the receipt of the specimen guns, in 1845, it was determined by Her Majesty's government, in the same year, that it was not expedient to adopt them for use, but that subsequently, on the 14th March 1865 Her Majesty's government made 'a full determination of adoption in Her Majesty's service of breech-loading firearms' known as the Snyder-Enfield rifle, containing and embodying the mechanical principle covered by the claimant's invention and patent; and that after such official 'determination of adoption,' in March 1865 Her Majesty's government issued to Her Majesty's army and navy 500,000 muskets of the pattern named and covered by the invention and patent of the claimant.

"The claimant claimed a royalty of $1 each upon these muskets, amounting to $500,000, besides interest.

"A demurrer was interposed by Her Majesty's counsel to the memorial, on the ground that the commission had no jurisdiction of the claim stated in the memorial, and that the memorial alleged no sufficient ground of claim against Great Britain, in that—

"1. The claim was based upon a contract, express or implied, which was not a claim within the terms or intent of the treaty, not being a claim 'arising out of acts committed against the persons or property of citizens of the United States.'

"2. That if such claim on contract were within the jurisdiction given by the treaty, the claimant could have no standing before the commission as an international tribunal until he had exhausted the remedies in all the municipal courts of Great Britain, and until justice had been denied him by such tribunals *in re minime dubia*.

"3. That the facts alleged in the memorial established no such contract as claimed by the claimant for the payment of a royalty upon guns subsequently used and covered by his invention.

"4. That no act of Her Majesty's government was alleged as happening within treaty time, except the 'full determination of adoption' alleged to have been made in March 1865, and that this was not an act committed against the property of the claimant.

"5. That the claimant did not appear to have had any property in his alleged invention in England, and that his property in the invention in the United States had expired prior to March 1865, and was open to the whole world.

"On hearing on the demurrer the claim was unanimously disallowed by the commission."

Am. and British Claims Commission, treaty of May 8, 1871, Art. XII., Hale's Report, 40. See also Howard's Report, 160, 752, 754.

7. CONVENTION BETWEEN THE UNITED STATES AND FRANCE OF JANUARY 15, 1880.

"WASHINGTON, *March 26th, 1884.*

Supply of War Material: Case of Barlow, Assignee, etc.

"The contract of November 28th, 1870, entered into by and between the Government of France and Messrs. Valentine, Billings & St. Laurent for the supply of a large amount of war material, was executed at a time when the French Government was in a great and urgent need of arms and ammunition for the prosecution of its war against Germany. By that contract a very short time was allowed to the contractors within which the material was to be furnished; and that fact shows that both parties understood that time was to be considered of the essence of the contract.

"One of the conditions of the contract was that the contractors should make at New York a large money deposit as security for their performance of their part of the undertaking. These contractors, being unable to make such a deposit, it was agreed between them and the French Government that a penal bond of Mr. C. K. Garrison, in the sum of 1,000,000 francs, should be substituted for the money deposit originally required by the contract, and the bond was furnished on the 21st of January 1871 by said Garrison to the agents of the French Government. That government assumed no contract

relations with Mr. Garrison, and knew him in no other light than that of a surety or guarantor of the contract of Valentine, Billings & St. Laurent.

"On the 11th of February 1871 the French Government, in view of the failure of the contractors to dispatch from New York the war material that it had contracted for on November 28th, 1870, on the condition that it should be shipped within eighteen days from the beginning of the inspection of the material by its agents, instructed its agents in the United States to cease inspecting the material, and thus abrogated the contract.

"All of the parties interested in said contract with the French Government thereupon appointed Mr. S. L. M. Barlow their trustee and agent to obtain a settlement from that government of the claim which they conceived themselves to have for the improper abrogation of the contract.

"One step in the prosecution of the claim was the institution, at London, of a suit to enjoin the agents of the French Government in that city from paying out a sum of 6,000,000 francs, which had been deposited with them to meet anticipated drafts to be drawn against shipments of the war material. A preliminary injunction was granted by the chancery court of England.

"On June 7, 1871, Valentine, claiming to represent himself and Billings and St. Laurent, made with the French Government a new contract for the supply of part of the war material that had been contracted for on November 28th, 1870. One of the conditions of this new contract was that the old contract should be considered as annulled. Another condition was that the injunction suit at London should be discontinued. This latter condition was promptly complied with. The correspondence between Mr. Barlow, trustee and agent of the original contractors of A. B. Steinberger, assignee, and of the surety, C. K. Garrison, and Mr. J. P. Benjamin, his counsel at London, and the evidence of Barlow in the suit of Howes and Crowel *v.* Garrison, which is found in the record, show that it was with the knowledge and consent of Mr. Barlow, the trustee and authorized agent, and therefore of his principals, that said injunction suit was withdrawn.

"The new contract of June 7, 1871, was carried out by the contractors and the French Government. Garrison furnished the war material which he had purchased, and provided for the

execution of the original contract; drafts were drawn by the contractors upon the agents of the French Government in payment for said material; the proceeds of the drafts went into the hands of Barlow, the agent of the contractors; Garrison received more than he had expended in the purchase of the war material that was duly inspected or disbursed in the way of incidental expenses; the purposes of the compromise contract of June 7, 1871, were fully accomplished, and the French Government was relieved of all liability, if any had existed, to indemnify the original contractors for the abrogation, on February 13th, 1871, of the contract of November 28th, 1870."

Opinion of the commission in the case of *S. L. M. Barlow, assignee, and A. B. Steinberger, assignee*, v. *The Republic of France*, No. 18, Boutwell's Report, 176.

Mixed Questions of Contract and Tort: Frear's Case.

"The record in this case, with the briefs and printed arguments, contain about 1,800 pages. The evidence is conflicting. The questions of fact and of law are many and difficult. We have endeavored to examine the case carefully and thoroughly.

"It is impossible for us to set forth in detail our views as to the evidence and facts proved. All we can do is to indicate briefly our decisions and the reasons of them.

"The claim consists—

"1st. Of four items for potatoes, contracted to be delivered by one Chevannes to the French Government in Paris, 'within eight days following the raising of the siege of Paris.'

"Chevannes assigned the contract to claimant, and he claims that he delivered the potatoes in Paris according to contract. Two of the items are for interest.

"The French Government claims that the potatoes were not delivered according to the contract, and that when delivered they were seized by the commune, then in insurrection against the government.

"When was the siege of Paris raised?

"There was no official announcement of the raising of the siege. The armistice was signed on the 28th of January 1871. By the terms of the armistice the Prussian authorities agreed to give all possible facilities to the French Government and its agents to bring provisions into Paris.

"On the 31st of January the French minister of foreign

affairs directed the French chargé in London to send provisions by Dieppe, 'Dieppe being chosen because it is connected with Paris by railroad lines which have not been devastated.'

"On the 2d of February the French Government gave public notice that all merchandise necessary for food could be safely brought into Paris, and that the government renounced all right to requisitions.

"On February 3d trains of provisions from Dieppe were brought into Paris. On the 4th and 5th of February 227 carloads of provisions arrived at Paris, and from that time on the revictualing of Paris proceeded with great activity and without obstruction by the Prussians. For all practical purposes as to the delivery of provisions in Paris the siege was raised by (at the latest) the 6th day of February.

"The claimant says that he delivered the potatoes at the railway station in Paris by the 16th of March; that is, not within eight days after the raising of the siege, but only within 38 days after.

"This was not performance of the contract. Clearly the French Government was not bound to receive the potatoes.

"It is true that many questions as to the terms on which peace might be made were still under discussion, and till these were settled the Prussian forces were not withdrawn; but as to the revictualling of Paris, the siege was raised.

"Item 5 is for 112,808 francs due on the contract for provisions delivered March 10, 1871.

"Mr. Frear claims that he delivered, and the French authorities received, provisions to the value of 2,765,382 francs, and paid him only a sum less than that amount by 112,808 francs.

"But the French authorities claimed that there was a deficiency in the quantity and quality of the provisions delivered, amounting to 226,000 francs; so that, according to their claim, they had overpaid him.

"This dispute was finally settled by one Harouel, acting on behalf of Frear. He allowed 70,000 francs for the alleged deficiency, and the French authorities paid him the balance. Mr. Frear claims that Harouel was not authorized to make such a compromise. We think he was so authorized, and that that settlement is binding on the claimant.

"With the disallowance of the fifth item, the sixth, seventh, and eighth items for interest, and the ninth for loss of profits on the balance of the contract, are also disallowed.

"Mr. Frear had become bankrupt, and the 'oppositions' of his creditors, by which the money coming from the government had been attached, and so the payment of it either to him or his creditors was delayed, can not be made chargeable to the government.

"So, too, we think item 9th, for loss of profits, is not chargeable to the government, for in reality he had not performed his contract in delivering the provisions within the time specified; and the acceptance of the amounts delivered by the French authorities was upon the basis of compromise that no further claims under that contract should be made.

"Lariviere had an assignment of the contract, and was fully authorized to make the compromise. Item 10th is disallowed with item 9. Item 11th is for the loss of profits on the contract for cartridges.

"On December 1, 1870, Mr. Frear made a contract with the French Government to supply them with 20,000,000 cartridges, which, after being submitted to a test, if satisfactory, were to be forwarded to the director of artillery at Cherbourg at the rate of 1,000,000 for the week beginning December 16th, and 2,000,000 for each week thereafter, and all to be delivered by February 28, at the latest. The dates for delivery were to be strictly kept.

"It is plain that delivery at the times fixed was of the essence of the contract. This is obvious both from the terms of the contract and from the nature of the case.

"So far from complying with the terms of the contract, Lariviere, to whom Frear had assigned the contract, and Cannot, the manufacturer, had delivered only 1,584,000 cartridges (as he claims) on the 30th January. At that time 11,000,000 should have been delivered. In point of fact, the 1,584,000 were not delivered on the 30th January, though the French agent had given the required certificate. They were not delivered till the 1st of March, when the whole 20,000,000 were due.

"Various excuses and pretenses for not delivering according to the contract are set up, but we think none of them satisfactory or sufficient. The French authorities were fully justified in annulling the contract and refusing to receive any more. They did receive 2,586,658 cartridges, and paid for them 393,172.08 francs.

"This item is disallowed.

"Item 13th. Damages for defamation of claimant's character by the French Government.

"Art. I of the convention gives us jurisdiction of claims 'arising out of acts committed against the persons or property of citizens of the United States by the French civil or military authorities upon the high seas or within the territory of France,' etc.

"Neither government intended to include slander and libel among the 'acts committed against the persons or property of citizens.'

"We do not deem it necessary to dwell upon this point."

The claim was disallowed by the unanimous vote of the commission.

William H. Frear v. *The Republic of France*, No. 9, Boutwell's Report, 202.

8. CONVENTION BETWEEN THE UNITED STATES AND VENEZUELA OF DECEMBER 5, 1885.

Military Supplies: Idler's Case: Opinion of Mr. Little.

In the case of *Jacob Idler* v. *Venezuela*, No. 2, under the convention between the United States and Venezuela of December 5, 1885, Mr. Little, delivering the opinion of the commission, made the following statement of facts:

"In 1817 Venezuela, then engaged in war for independence, through her chief magistrate—military and civil—Simon Bolivar, issued what was denominated a 'diploma,' addressed 'To all those who may see these presents,' from which the following extracts are taken:

"'We do hereby authorize Brigadier-General Lino de Clemente, and, in case of his death or absence, Señor Pedro Gual, both of them residents of Philadelphia, in the United States of North America, to enter into all the political and commercial stipulations and agreements herein to be explained, to the faithful fulfillment of which we do pledge beforehand, in the most sacred manner, the faith of the republic." * * *

"'And give them authority to execute validly and juridically, in the name of the republic, subject to the instructions given them separately, all kind of deeds and instruments of obligation, which they may have agreed upon with other parties, in the form and on the terms and conditions which may have seemed *to them* to be the best, it being understood that *we* shall abide literally by whatever they may have agreed to, without entering into any inquiry or examination, or making any remarks or objections on or to the contracts made by them. All of the said contracts which the said agents or commissioners may make, or enter into, are beforehand approved of by us, as made and entered into in use of the full unrestricted powers and faculties given them by us. faculties and powers which authorize them to deal and stipulate in the name

and in the behalf of the republic, and to mortgage her property and her revenue and resources. The said property, revenue, and resources shall be pledged with absolute preference to the payments of the debts contracted by virtue of this authority and in use thereof by the said Brigadier-General Lino de Clemente, or by Señor Pedro Gual, as the case may be, if the former is absent or dead.'

"The 'instructions given them separately,' above referred to, include these paragraphs:

"'*Second.* They shall purchase vessels of war, muskets, gunpowder, lead, clothing, equipments, sabers, helmets, harness, and all kinds of elements of war, and shall draw on the exchequer of the republic, the prices to be paid either by giving their equivalent amount in cocoa, coffee, indigo, cotton, mules, horned cattle, hides, and produce of the country, or by setting off equivalent sums due the same exchequer for duties on imports or exports, as set forth and agreed upon in the contracts.'

"'*Fourth.* They are empowered to grant the contractors who may take to our ports the above said elements of war, all the advantages that may be deemed just, relative either to preference in the payment, or to the choice of the particular kind of articles produced in the country, or to the amount being credited to set off custom duties.'

"From its address and contents, it is manifest the diploma was intended to influence dealings with, as well as to define the authority of, the agents of that province.

"Beginning that year, accordingly, in the exercise and on the faith of the powers thus given, contracts on behalf of Venezuela were entered into at Philadelphia, with Jacob Idler, a merchant of that city, whereby, as it seems—though the contracts themselves have not been exhibited, and their purport is in some degree inferred—he undertook for himself or for himself and those concerned or to be concerned with him, called in the papers his 'associates,' to furnish military supplies for the use of the patriot forces in that country.

"The associates were Bogart & Kneeland, Thaddeus Phelps & Co., and Benjamin L. Swan, of New York, and Hammond & Newman, of Baltimore. Just to what contracts or shipments their interests respectively extended is involved in some uncertainty. There is an agreement, however, on file, made March 17, 1868, which frees the case from embarrassment in this respect if its recitals touching Hammond & Newman can be taken as correct, as we suppose they may be. All were citizens of the United States and representation is made here in their behalf.

"For three years Clemente acted as the agent of Venezuela in that behalf; then, instead of Gual named in the diploma, Torres succeeded to the agency, but whether on behalf of the same principal is one of the questions raised.

"The business on the agents' part seems to have been done with Idler, who was looked to as the responsible contractor. During four years, the most uncertain perhaps in the long struggle of the Spanish-American provinces for liberty, he alone, or in association as aforesaid, in the execution of the contracts thus made, sent out large quantities of arms and army stores to Venezuela. Of flints there were over 250,000; of fire-locks over 25,000; and of muskets, in the last eighteen months of the period, over 11,000 (the record does not show how many before).

"At the completion of the contracts on their part, and for several years afterward, four invoices remained, contrary to agreement, in largest part unpaid for. One of these was by the brig *Elena*, lost by capture at sea in 1817 through the alleged fault of the Venezuelan agent, and liquidated by the agreement of the parties in 1820; two by the brigs *Wilmot* and *Endymion*, arriving in Angostura in May and November, respectively, 1820, and a fourth and last, also by the *Endymion*, arriving at La Guayra in October 1821. The last embraced 4,360 French muskets, which became a subject of controversy.

"The balance remaining due on these four shipments, exceeded, according to liquidations, in 1824, $157,000—a large sum in that time to be owing an American firm, to say nothing of other items of charge brought forward later, connected with the transactions, amounting to nearly half as much more.

"Naturally, Idler and associates, after their money was overdue a few months, became solicitous about payment.

"The banks which had accommodated them became urgent. Pressing requests—even appeals to the South American authorities were made—but without present relief. Payment on account was urged without response. Then began a course of liquidation resulting in litigation, and, finally, in diplomatic action, which, taken all in all, presents certainly a remarkable chapter in the history of reclamations.

"The Idler claim has been a theme for the press and pamphleteer in both countries. It has arrested the attention of the foreigner. Among the papers is an autograph letter from Rudolph Humboldt on the subject, a nephew of the great savant and himself a distinguished traveler and scholar. The claim has been before the Congress, more than once, of each country, and has been the subject of at least earnest discussion, long continued, and ending only with the treaty of 1866 between the two governments.

"Among the difficulties confronting the contractors at the outset of their efforts at collection, seems to have been uncertainty as to the place and source of settlement. The remark may be applied also to the South American authorities. And there is not unanimity even now among the learned upon the question, as the *expediente* and briefs—numerous and voluminous—in the case abundantly testify.

Provision for Liquidation of Debts.

"Just here it may be well to note some changes that had taken place meantime affecting Venezuela. In 1819–1821 Venezuela and New Granada united and formed the Republic of Colombia. On the one hand, it is contended, the union occurred December 17, 1819; on the other, July 12, 1821. The question will be recurred to further on.

"The 'fundamental law,' so called, of July 12, 1821, adopted by the Colombian Congress, provided:

"'The debts which the two peoples may have contracted separately are acknowledged *in solidum* by this law as a national debt of Colombia, and all the property of the republic is responsible for its payment.'

"A commission was created to sit at Bogota for the liquidation of such debts.

"The constitution of Colombia was adopted August 30, 1821. Under it a complete transformation in administrative affairs took place. A central government was established at Bogota. The chief executive power was vested in a president. Bolivar was made that officer, and clothed with extraordinary authority. The territory of Colombia was divided into seven departments. There were three in Venezuela, each with its distinctive name. The central one, comprising not more than a third of Venezuela, though greatly more than that proportion of its inhabitants and wealth, was called the Department of Venezuela. Its executive seat was Caracas.

"The law establishing the division provided:

"'The political command of each department is vested, pursuant to the constitution, in a magistrate called *intendente* under the orders of the President of the republic, whose natural and immediate agent he shall be.'

"He was invested, 'in his capacity of chief of the department,' as the law ran, with all the police, judicial, and administrative powers formerly conferred upon colonial chiefs or governors by the former parent government. These were extensive. There was also provided for each department, quoting from the statute, 'a deputy learned *asesor* with the same object, jurisdiction, and powers.'

"Venezuela was made a judicial district, having a superior court with three judges of general jurisdiction, sitting at Caracas. This was subordinate to the supreme court at Bogota. The intendant held a court which was inferior to the superior court. It had jurisdiction, among other things, in treasury matters till 1825, when the prefect's court was established in its stead. Still the intendant seemed to exercise an authority in that behalf, not well defined.

"Such was the governmental situation in 1822.

"The last three invoices had been purchased by Torres after April 1, 1820. Whose agent was he then, Venezuela's or Colombia's? Were liquidation and payment to be made at Caracas or Bogota? These were questions then as well as now.

"The four accounts, appended to this opinion, were made out against Colombia.

"There were three liquidations of these accounts current, more or less complete and correct.

"The first was in 1822–23, by Idler and associates through their attorney in fact, William Duane, a distinguished citizen and editor of Philadelphia, with the Colombian board of liquidation at Bogota, established under the law mentioned. It was interrupted by the arrival and interference of an agent of the associates, and by the Venezuelan intendant, to whom Duane had first gone, and who, after some delay, had disclaimed jurisdiction of the accounts and stated that Bogota was the only place of liquidation and payment. He now asserted the 'exclusive faculty' of settlement at Caracas by custom-house allowances—an assertion recognized and acted on then, it seems, by the Colombian authorities. So far as Duane had proceeded, there was shown a balance due the contractors of $104,412, for which a certificate was issued by the board, but nothing ever came of it. The other two liquidations were made late in 1824; one by Idler (who had gone out to Caracas in May 1823), with the Venezuelan intendant, Escalona, showing a balance due the contractors, including interest at 6 per cent, to its date, November 21, of $164,763.89; and the other by the associates, without Idler's authority, it is claimed, through their attorney in fact, Henry Ogden, with the board of liquidation, at Bogota, showing a balance, including interest to its date, December 31, of $119,265.84 due them, and $38,076 (estimated as of that date from their balance) due Idler; in all, $157,342.01.

"After Ogden's settlement, Idler, denying its legality and correctness, authorized his attorney in fact, Santos Michelena, June 1825, at Bogota, to receive his share. The amount due him thereunder was calculated by the board of liquidation, with interest to June 25, and found to be $38,192.72. This sum was paid Idler by drafts of the Colombian Government on London. The associates were also paid the amount found due them, the payments amounting in all to $157,458.56.

"Copies of these liquidations are also appended hereto. There was a fourth in 1829, attempted at Bogota by one Vargas, but as it seems to have been unauthorized, it needs only to be mentioned.

"The two liquidations of 1824 pertained to the four accounts current.

"Idler, it seems—just when the record does not reveal, but after his liquidation—added to his account some items of charge, unnecessary to be detailed, against the government on account of damages and correction of errors. These did not properly pertain to either of the four accounts current. The principal one of them was for $53,781.63, damages for alleged breach of contract in respect to Barinas tobacco, again to be recurred to.

"These added to the balance—difference between liquidations—with interest, amounted in 1827–28 to near $80,000. When President Bolivar was in Caracas in that year it would seem that the Idler and Ogden liquidations, with alleged 'undue rebatements and substantial errors' of the latter pointed out, including the omission of an item for demurrage of $6,336, together with the damage item for the nondelivery of the Barinas tobacco, were laid before him. What resulted is certified by Clemente, May 13, 1833, the former Venezuelan plenipotentiary and agent, at Philadelphia, then a major-general in the Venezuelan army:

"'I further certify that the President, Simon Bolivar, examined the said documents carefully, and decided that the claims should be paid at Bogota, where the general treasury was; and His Excellency promised to see the said payments made in full, according to the contracts, * * * and ordered Mr. Idler to go to Bogota, for which city His Excellency himself started on the 5th of July 1827. Mr. Jacob Idler also started for that city, and had it not been for the unfortunate events which destroyed harmony in the republic, he then would have been paid.'

"It will be borne in mind the intendant exercised his functions under and as 'the natural and immediate agent' of the President. The latter's action, therefore, in treasury (as in other) matters had all the legal efficacy throughout the republic which the intendant's had in his own department.

"Idler went to Bogota as directed in 1827. After some delay because of suits instituted against him by indorsees of the London drafts received for the Ogden balance, as above stated, which had been returned protested (and on account of which his losses were heavy—one letter says three-fourths of the whole), he began the liquidation of his account.

"Finding need for some documentary evidence which was at Caracas, he returned to that city for it in May 1828. Soon after his arrival there, as it would seem, he was sued in the prefect's court by the treasurers of the Venezuelan Department for a balance of some $37,000, alleged to be due the government because of overpayment at Bogota and a failure to receive credit for sums paid.

"The record touching the institution of the suit, and the pleadings being meager, much in this respect is left to inference. Idler, it would seem, set up his account showing the balance alleged to be due him as aforesaid, and asked its allowance and payment.

"May 28, 1828, the following order was made in the case by the *intendente* and his *asesor:*

"'For the better settlement of this claim of Mr. Jacob Idler against the government, and in order to render easier the study of its merits, bringing to it light and an intelligent consideration, Señors Vicente Aramburu and Elias Mocatta are hereby appointed referees. In case that both gentlemen should

find themselves unable to agree, they shall have authority to appoint, upon consultation with this court, a third referee or umpire. The referees are hereby given the power to call for papers and documents, and to ask all other information needed, either from the Treasury, Mr. Forsyth, Mr. Idler, or Señor Santos Michelena, who was attorney for the latter at Bogota; and they are particularly recommended to make their report as early as practicable.

"'Let notice of the above be given to Messrs. Idler and Forsyth.'

"Forsyth, the old agent, whom Idler had lately sued in attachment at Bogota, had promoted the suit.

"Notwithstanding this suit Idler, who had been put under bonds of $40,000 not to leave Caracas till its termination, seems not to have given up thought of securing a liquidation still at Bogota through Bolivar. Accordingly he memorialized the President September 28, 1828, on the subject, setting forth his balance then as amounting with interest to $81,386.

"The secretary of the treasury replied November 5:

"'His excellency (President Bolivar) has directed me to say that the government acknowledges the justness of your claim, but that the present circumstances of the treasury do not permit its payment. You are therefore to wait some time further in the assurance that very soon you will be paid.'

"Meantime the intendant issued the following, dated October 23:

"'I must for the sake of precaution declare the following: It is absolutely necessary that this intendancy write communications and orders to the authorities of this city and of the ports of Cabello and La Guayra and to all authorities, civil, military, and of high police, not to permit his [Idler's] departure over the sea under any pretext whatever; further, to notify him personally not to absent himself from this city till the results of the pending operation with the government are known, and finally, to give communications to the treasury of Bogota, and [of ?] the state in which this affair is now existing, so that all liquidation and payment of his accounts be suspended.'

"This was followed by an order of the same officer, November 6, in these words:

"'Mr. Idler is to be notified that he shall not absent himself without having secured the result of this lawsuit.'

"No further attempt was made by the now defendant Idler toward securing his demand from Bogota.

"On the 14th of January 1829 the referees above designated, not having served, the intendant entered this order:

"'Let the record in this case be referred to the treasurers [there were two] with instructions to make an examination and liquidation of the accounts; the said examination and liquidation to be made with intervention of Mr. Jacob Idler and Mr. Samuel D. Forsyth.'

"The treasurers responded in the following report, and at about the time, it may be worth while to note, of Venezuela's declaration of secession and independence:

"'*To His Lordship the Intendant:*

"'In strict observance of your lordship's decree of the 14th of January of the present year, on the examination and liquidation of the accounts of Mr. Jacob Idler and associates with this State, we have formed the annexed statement, having before us, for that purpose, the principal judicial proceedings, together with all other annexed or connected therewith:

"'It appears from the whole, that the aforesaid gentlemen have secured, over and above what was due to them by the several contracts entered into with this government, the sum of $37,795.22, as the same is evident by the comparison between the credit and debit; for the recovery of which your lordship will dictate such orders as you may think the most expedient. We must also remark, should the same hereinafter be necessary, that what this treasury department has done has been established entirely on the documents that it has examined; from which it is inferred that there must be other former documents to refer to. In consequence of which we are of opinion that the whole proceedings must be sent back, together with everything done in the premises, to the first court where they took their origin, in order to rectify the first operations; Mr. Idler *paying or securing previously* what he lawfully owes. For by the said statement it is evidently proved that he has received the above said sum.

"'However, your lordship will please to direct whatever you may deem the most just.'

"The chief of the items, unnecessary to be enumerated, going to make up this sum was one for $21,285, relative to French muskets, to be explained further on.

"Thus the issues were made up, each party having fully set out his account.

"Thereupon, January 8, 1830, the prefecture or treasury court ordered that—

"'This case be delivered to Señor G. B. Sprotto, in order that he, as umpire, may *settle* the question arising out of the disagreement between the liquidation made by the treasury and the liquidation made by Mr. Jacob Idler.'

"Seventeen days afterward, Sprotto returned his award in writing in favor of Idler for $72,346.34, including interest at 6 per cent to June 25, 1825.

"The items of debit and credit, with the interest added as to each, were all set out and a balance struck. It would seem (see letter of council of government, 1834, hereinafter referred to) that by agreement of parties the whole accounts were gone into irrespective of the liquidations.

"Here it may be well to observe that Venezuela, having separated herself from the rest of Colombia, resumed her inde-

pendence January 1, 1830. Her reorganized judiciary, under the constitution of September of that year, was substantially as before, with a supreme court of justice added, consisting of a president judge, and three associates, with a fiscal or attorney-general. The treasury court was now to be presided over by an officer learned in the law called *juez de letras*. Its judgments in treasury matters were required to be affirmed by the superior court *in consulto* before becoming binding.

"*On August 31, 1830*, a short time before the prefect was succeeded by the *juez de letras*, the prefecture, in accordance with the prayer of the treasurers before quoted, entered this order:

"'Upon consideration of the representations of the auditors (contadores) let this expediente be forwarded to the secretary (of the treasury) in order that if it seems proper to the government it may be sent up to the commission of Bogota, so that, after examination of the documents appended thereto and of the observations made by the general treasury and by the tribunal of accounts, the said commission may again liquidate the amount of Messrs. Jacob Idler and his associates; and in the mean time let Mr. Idler give bonds for the $37,795.22 of the balance now standing against him, or let him file the original bills of exchange drawn in his favor against the English loan.'

"The order was not complied with, but, August 25th, 1831, the treasury court confirmed Sprotto's award. Its action, objections to which had been filed by the treasurers, was disapproved, and in July 1832 José Cadenas was appointed and qualified as revising umpire. In September of the same year he filed his report of great length. Every item or point of difference was taken up and weighed, and his conclusions stated with reasons therefor. He found a balance in favor of Idler for $70,520.11½, including interest as before to June 25, 1825. Thereupon the following order was entered by the treasury court:

"'Let the foregoing award be communicated to Mr. Jacob Idler and to the counsel for the state (ministerio fiscal), and if desired by them let also the record of the proceedings be communicated to them.'

"Both parties assented in writing to the entry of the award. No objection seems to have been made to it from any source. On *September 18, 1832*, that court rendered this judgment:

"'Administering justice in the name of the republic and under the authority of law, it is hereby declared that the public treasury is responsible to Mr. Jacob Idler for the said sum of $70,520.11½, which shall be paid him in the manner and in the form that the supreme government may determine upon. And the said Idler shall apply for the payment of the said amount to the said supreme government, and file before it a copy of this decision.'

"And *on October 1, 1832*, the case being brought, in course, before the superior court, it, after reciting the foregoing judg-

ment and the action on which it was based, adjudged as follows:

"'Administering justice in the name of the republic and under the authority of law, it is hereby declared and adjudged that the decision of the treasury court (brought up in consultation) is approved of and affirmed.

"'Let the record be returned to the treasury court with the proper certificate.'

"Pursuant to the judgment Idler applied for payment. He was refused by the secretary of the treasury on the ground that the judgment was a nullity, the inferior courts having no jurisdiction of the case—only the supreme court of justice being vested under the constitution, with authority to try it.

"Under a system there prevailing, this question was taken before the supreme court of justice and decided adversely to the government, December 6, 1832. The court, on a review of the case from its inception, found and adjudged as follows:

"'The supreme court, therefore, considering the stage reached by this case of liquidation of accounts does hereby find and hold that the liquidation made *settles forever* this matter, and that there is no foundation of law upon which to base the plea of nullity for want of jurisdiction which has been set up, for the following reasons: First, because there has been no dispute about the validity of the contracts, which is the case in which, under No. 5, article 147 of the constitution, this supreme court could have exercised jurisdiction in the first instance; second, because both parties have consented to have the case settled as it was, without at any time having set up the plea of want of jurisdiction; and, third and last, because, under the said law of May 1st, article 86, the *juzgados de letras* have full and ample power to take cognizance of and decide all cases in which the treasury is interested either as plaintiff or defendant;

"'Whereupon, administering justice in the name of the republic and under the authority of the law, it is hereby declared and adjudged that the pleas of want of jurisdiction and nullity raised by the executive should be, as they are, overruled; and that the claimant has his right free to act as is proper in the condition of the case.'

"Resort by the treasury was then made to the council of government, an advisory executive body of nine members embracing the vice-president and members of the cabinet. On March 1, 1833, it adopted this resolution:

"'*Resolved by the council*, That the government be advised not to issue any warrant for the payment by the treasury of Venezuela of the sums which Mr. Jacob Idler has been adjudged to be entitled to recover, (but) to suspend the payment of the said sums, and to reserve the right of the said Jacob Idler to present his claim when the plenipotentiaries who are to be appointed to make the proper division or apportionment of the debt of Colombia shall have met and commenced their labors.'

"Again the case went before the supreme court of justice to test the validity of this action, when on the 25th of April 1833 it decreed that—

"'No attention should be paid to the resolution, * * * because otherwise the validity and strength given by law to the final decisions of the courts of justice of competent jurisdiction, upon full knowledge of the facts and the law of the case, and in faithful compliance with the precepts of law, would be weakened and destroyed.'

"Idler, still unable to secure payment, returned home after an absence of ten years, and applied to the President of the United States for relief.

"Then began the diplomatic history of the case, not necessary to be gone into. Suffice it to say, almost every, if not every, administration from Jackson's to Grant's contributed to it, under the almost constant stress of urgency by the contractors or their descendants.

Process of Restitutio in Integrum.

"Pending the representations of the American *chargé d'affaires* at Caracas, the Venezuelan Government applied, January 14, 1836, through a fiscal, specially appointed in the place of the regular fiscal for the occasion, to the supreme court of justice for the benefit of the ancient remedy of *restitutio in integrum* in the Idler case—that is, for an order to annul the judgment and proceedings referred to so far as should be deemed beneficial to the government. It is proper to note that in 1834–35, the government, through its council of government and treasury, had, without notice to Idler, addressed communications to the supreme court of justice on the subject, in criticism of the judicial action had, and in rediscussion of the questions involved and decided in the case. In one of these letters covering 67 foolscap pages, dated June 27, 1834, but not, it seems, transmitted till September, the court is told that its final decision of December 6, 1832, affirming the jurisdiction of the treasury court, 'only proves that it never entered into the examination of the documents, nor gave due attention to so important a case.' In another place: 'In view of the result reached * * * no one could fail to attribute the lack of success to inattention or lightness of mind of the courts.' Of this communication the fiscal *ad hoc* in his application to the court says:

"'The analysis of the proceedings, which is found in the report of the council of government, transmitted to your most excellent court on September 18th, 1834, was made upon examination of the judicial record, and of all other documents referred to by it, and it is so extensive, so correct, so methodic, and so enlightened in everything regarding the facts that the undersigned feels himself relieved from the necessity to report the results of the examination which he made by himself.'

"Two of the four judges of the court excused themselves from sitting in the hearing of the application—one because

of his former action, the other for cause not stated. The two remaining judges filled their places by appointment from the Caracas bar for this case, February 1–5, 1836. The tribunal so constituted, on the 27th February 1836, issued this order:

"'Considering that, as it appears from the statement of the attorney *fiscal* applying for the benefit of *restitutio in integrum* against the sentence of September 18, 1832, confirmed by that of October 1st of the same year, in virtue of which a balance is found in favor of said Jacob Idler against the State, it appearing from the proceedings that he is absent from the country, without anything having been said as to his earliest return, and that the resort appealed to constitutes a *new* action or instance in which he must be heard, let him be summoned through the *Gazette* in order that, within sixty days, he may appear in person, or by proxy under instructions or retainer, subject to the orders which may be called forth; and, without prejudice of what has been said, and not to delay the course of this business, Dr. Felipe Fermin de Paul is appointed temporarily to act as attorney for him, keeping in mind that it appears from the record of the proceedings that this latter has counseled and assisted him in the *preceding* instance.'

"June 7, 1837, the supreme court for the case issued letters rogatory, so called, to the United States district court at Philadelphia,

"'Requesting that notice be given to a certain Jacob Idler, residing in the city of Philadelphia (the son of Jacob Idler), that he be and appear by himself or by his attorney before the said *supreme court* of Venezuela at the city of Caracas, within seventy days, in *a certain suit* instituted or promoted against him by the fiscal attorney of the said republic for the reversal or *restitution in integro* of a sentence or decree given in his favor and against the treasury of Venezuela.'

"The notice actually reached Idler only twelve days before the expiration of the time limited for his appearance, when there were no means of reaching Venezuela in time. He did not appear, or authorize anyone to appear for him in the case.

"The supreme court for the case rendered a decision November 4, 1837, on said application, denying its allowance for want of original jurisdiction to grant the remedy. It held: * * *

"'This supreme court has therefore reached the conclusion that the *right and power* to grant the remedy of *restitutio in integrum*, in the first instance, *does not belong to it.* Law 3, tit. 25, *Partida Third*, provides that the action by which the nullification of a judicial decision through the remedy of *restitutio in integrum* is sought for must be brought before the same judge who rendered the judgment. The *juez de letras* of this city was the one who rendered the decision against which the remedy of *restitutio in integrum* is now invoked, and the superior court was the court which approved that judgment.

* * * * * * *

"'Whereupon, administering justice in the name of the republic and under the authority of the law, it is hereby decided that the jurisdiction over this new action or incidence of *restitutio in integrum*, invoked by the lawyer acting as fiscal, belongs to the courts which rendered the decisions against which the remedy has been invoked (*corresponde á los tribunals que han librado las determinaciones que causan el reclamo*); and therefore let the record be returned to the superior court of the second district, a copy of this decision being left here, and let the proper notice be given to the executive.'

"Following this, the superior court of Caracas, if the opinion of the supreme court for the case can be looked to by us under the circumstances as establishing the fact, rendered a decision—

"'Granting the remedy of *restitutio in integrum* against the decisions of September 18th and October 1st, restoring the whole subject to the condition in which it was on the *31st of August 1830*, and condemning Idler to pay the judicial tax and a portion of the costs.'

"On appeal, the opinion recites, from this judgment of the superior court, taken by the attorney so appointed and joined in by the acting *fiscal*, the supreme court, on consideration, affirmed the judgment in these terms:

"'In consideration of the above, administering justice, and under the authority of the law, it is hereby adjudged and decreed that the decision against which this appeal was taken is affirmed in every respect.

"'Let the record be sent back to the court below after a certified copy of the present decision is made and filed in the chancellor's office.'

"No record of the decision or proceedings of the superior court in this behalf has been presented to the commission; nor has there been any showing or allegation of its loss.

"It is said outside the record that the superior court rendered its judgment December 20, 1838.

"Twelve days after the action of the supreme court the council of government, 'in compliance,' to use its own language, 'with this decree [that of August 31, 1830, before quoted], to the date of which the case has been restored,' sent the case to the Colombian commission sitting at Bogota, under the treaty of 1834 between Venezuela and New Grenada, for the adjustment of their affairs made necessary by separation.

"The commission returned it with the statement formulated by resolution and hereinafter quoted, adopted April 17, 1839, to the effect that it had no jurisdiction, and that nothing remained to Idler but to pay what he owed.

"So ended the proceedings relative to the claim of Jacob Idler and associates before the Venezuelan courts, to be resumed in the high court of diplomacy, where the case had received comparatively little attention since 1836."

Arguments of Counsel.

The case was argued on behalf of Venezuela by Mr. S. F. Phillips.

It was argued on the part of the United States by Mr. Ashton, who submitted two printed briefs, and by Mr. Crammond Kennedy, private counsel.

A special brief for the claimant, on the process of *restitutio in integrum*, was submitted by Mr. J. I. Rodriguez.

Opinion of Commissioner Little.

The opinion of the commission, as delivered by Mr. Little, was as follows:

"The case presents a number of questions which have been exhaustively and ably argued on both sides. Among them are:

"How far are these judgments to be accepted as binding in the proceedings before us?

"Was the court organized for the Idler case in 1836 a legal body; if not, were its judgments valid?

"Did the remedy of *restitutio in integrum* pertain to Venezuela as to the Idler case? If so, did the proper court obtain jurisdiction in the premises?

"Was the general effect of the proceedings in 1836–1839 a denial of justice? If so, should the judgment of 1832 be allowed to stand; or is it affected with fatal infirmities?

"These questions will now be considered.

Question as to Finality of Judgments.

"A state undeniably has the right to determine for itself through its own chosen media what its laws shall be, and what they are, and to administer justice within its own territory (subject, perhaps, to certain humanitarian principles not at all involved here); and its action is entitled to the respect of other states.

"The supreme court of justice, being vested with the judicial power of Venezuela, had and has the right to determine the jurisdiction, including its own, of the courts of that country and the state of the law pertaining to matters brought within their cognizance. And its decisions duly and regularly made are binding upon parties and privies, although citizens of another country.

"A judgment duly and regularly made implies jurisdiction of the subject-matter and of the parties, and does not in a government of law involve a denial of justice, technically so called. But it does not follow that one state will always enforce or give effect to the judicial decisions of another. Mr. Wheaton says:

"'The most eminent public jurists concur in asserting the principle that a final judgment, rendered in a personal action, in the courts *of competent jurisdiction* of one state, ought to have the conclusive effect of a *res adjudicata* in every other state, whenever it is pleaded in lieu of another action for the same cause.

"'But no sovereign is bound, unless by special compact, to

execute within his dominions a judgment rendered by the tribunals of another state; and if execution be sought by suit upon the judgment *or otherwise*, the tribunal in which the suit is brought or from which execution is sought is, on principle, at liberty to examine into the merits of such judgment, and give effect to it or not, as may be found just and equitable. * * * A foreign judgment is *prima facie* evidence where the party claiming the benefit of it applies to the English courts to enforce it, and it lies on the defendant to impeach the justice of it, or to show that *it was irregularly* obtained. If this is not shown, it is received as evidence of a debt for which a new judgment is rendered in the English court and execution awarded. But if it appears by the record of the proceedings, on which the original judgment was founded, that it was *unjustly* or fraudulently obtained, without *actual personal notice* to the party affected by it; or if it be clearly and unequivocally shown by extrinsic evidence that the judgment has manifestly proceeded upon false premises, or inadequate reasons, or upon a palpable mistake of a local or foreign law, it will not be enforced by the English tribunals. The same jurisprudence prevails in the United States of America in respect to judgments and decrees rendered by tribunals of a state foreign to the Union.' (Elements Int. Law, 205.)

"Vattel lays down the rule that—

"'When once a cause in which foreigners are interested has been decided in form the sovereign of the defendants can not hear their complaints. To undertake to examine the justice of a definitive sentence is an attack on the jurisdiction of him who has passed it. The prince, therefore,' adds the author, by way of qualification, 'ought not to interfere in the causes of subjects in foreign countries, and grant them his protection, *excepting in cases* where justice is refused, or palpable and evident injustice done, or rules and forms openly violated, or, finally, an odious distinction made to the prejudice of his subjects, or of foreigners in general. * * * In consequence of these rights of jurisdiction the decisions made by the judge of the place within the extent of his power ought to be respected and to take effect even in foreign countries.' (Law of Nations, bk. 2, § 84.)

"His editor, the eminent Mr. Chitty, thought it proper to add a note to this passage, as follows:

"'This principle appears to be now settled by the law and practice of nations, *but, nevertheless, subject* to certain general wholesome rules, essential to be adhered to in order to prevent the effect of partial and unjust sentences and decisions.'

"An international tribunal, it is believed, should give the full measure of respect and consideration to judicial decisions in the states establishing it that each would give, under the public law, to those of the other.

"Bearing these principles in mind, let us turn to the record of 1836–1839.

"The first thing that engages attention is the organization of the court. That there is a facility of substitution as to judges in civil law courts not found in countries where the jury system prevails may be true. But such change is believed to be always regulated by law. We have not learned of any law authorizing the substitution of two members of the bar for two out of the four judges of the supreme court of justice, made February 1–5, 1836, to try the Idler case. Why any change at all was necessary is not apparent. It is true one of the judges excused himself because of his former action in the old Idler case. But this particular question had not been before the court, either in the old case, or, it would seem, in any other, and of course the court had not acted upon it. And even if it had, that would seem to be a reason why the judges should sit here rather than decline. They were so much the better advised. What, if any, opinion they expressed in answer to the communications by the government, in 1834–35, on the subject does not appear. But it can not be that a preconceived opinion of the law worked a disqualification in a judge in Venezuela, even as early in her judicial development as 1836.

"The constitution of 1830, then in force, provided for the appointment of supreme judges and the filling of vacancies, as follows:

"'ART. 146. The judges of the supreme court shall be nominated by the President of the republic to the house of representatives, three names being submitted for each place. The house shall reduce this number to two, and shall present the number thus reduced to the senate, which body shall name those who are to compose the court. The same order shall be followed in filling vacancies; but if the Congress is not in session, the executive power, in concert with the council of government, shall temporarily fill the places until a selection is made in said form.'

"There was no other provision relative to their appointment or substitution.

"On the 18th of May 1836, *three months and a half after the change in the personnel of the court had been made*, a law was enacted by the Venezuelan Congress providing:

"'ART. 14. Whenever any judges are absent, co-judges shall be appointed for each case or business by the remaining judges or judge, if the absence is accidental, and the selection shall be made from among the skillful members of the legal profession that may be in the place, and, in default of them, from among the persons living in the locality who possess the qualifications of representatives in Congress; and where there is a regular vacancy, the selection shall be made by the executive power, and until the appointment of a regular incumbent.'

"But no appointment in the Idler case was made under this law, and none could have been had it been in force in February, as the regular judges were not 'absent.'

"But to go back a little. On the 14th of October 1830 the constituent congress, which formed the constitution of Venezuela, resolved that—

"'The laws and decrees issued by the Congress of Colombia that have been in force up to the present time, and which may not be contrary to the constitution or laws sanctioned by this constituent congress, shall continue to be observed in the judicial order.'

"The law of Colombia then in force in 'the judicial order' on this subject appears to have been embodied in the following parts of the judiciary act passed by the Colombian Congress, April 13, 1825, to wit:

"'CHAPTER IV.

"'*Of the Judges of the High Court and of the Superior Courts of Justice.*

"'ART. 34. When, on account of death, resignation, removal, or any other cause, there should be a vacancy among the numbers of the High Court, the Court shall immediately apply to the Executive Power through its President, in order that the vacancy may be temporarily or permanently filled pursuant to the Constitution. In the first case, the Executive Power will fill the vacancy within not more than six days.

"'§ 1. In the cases of this article regarding the Superior Courts, these will immediately advise the Executive Power, through its President, that he may fill the vacancy temporarily, and the High Court, in order that it may propose to the Executive Power for a permanent appointment.

"'ART. 35. *The Executive Power* will appoint temporarily those who are to act as substitutes of the judges and attorneys-general; not only in the cases of the preceding article, but also in those of sickness or absence exceeding fifteen days, and in those of suspension.

"'§ 1. *These temporary and alternate appointments shall never be made in behalf of permanent fiscals'* (*attys.-general*).

"'CHAPTER VI.

"'*Provisions common to the High Court and the Superior Courts of Justice.*

"'ART. 87. In the cases of disqualification, of disagreement of opinion among the judges, and in those of a challenge (of a judge) to complete the required number of judges, if there should be no magistrate qualified to act, associate judges will be appointed *by absolute majority of votes.*

"'ART. 175. * * * The High Court and Superior Courts, the presidents of these tribunals, and the Superior judges shall not exercise other powers than those which are assigned to them, and the jurisdiction of these courts and tribunals shall be limited to the cases prescribed by this law.'

"It occurs to us to observe in respect of this act:

"If it was in force in Venezuela in 1836–37, under the resolution quoted, as seems to have been the case, the action of the government in appointing (as was done) a temporary *fiscal* for the Idler case in the supreme court in place of the permanent *fiscal* was illegal, being in violation of the last clause of article 35.

"The provision relating to the filling of places on the bench by *judges* required for an appointment the concurrence of an '*absolute majority of votes.*' In the Venezuelan court a majority was *three*, whereas *two* made the appointments in the Idler case. As the supreme court for the case was not therefore constituted under this act, it is unnecessary to consider whether its provisions extended to such a case. It will be seen that under the Colombian law where the judges appointed, the integrity of the regularly constituted court could not be disturbed. Under the action had, it was otherwise. The law therefore was not only not followed, but its principle was violated.

"The act of May 18, 1836, was amended by an act of May 2, 1838, and that again March 23, 1841, and the cases in which substitutions might be made on the bench were defined with particularity. This fact is stated, in connection with the provisions referred to, in support of the belief that the courts in every detail of organization and for every contingency were regarded, and were, in fact the creatures of positive law, both in Colombia and Venezuela. And how could it be otherwise in a government of law? If courts can be constituted unauthorizedly, so can the executive; so can the legislature. Constitutional government would thus be speedily ended.

"Counsel for Venezuela, not asserting legislative authority for the appointments, seems, if understood, to regard this method of procedure as not new in common-law countries even, and instances the courts of assize under the statute of Edward I. But with high respect, it seems to us the analogy is wanting. The assizes, more nearly analogous to masters in chancery appointed for special purposes, sort of aids, as it were, to the courts at Westminster for collection of facts in cases pending before them and for other subordinate purposes, *were established by law*, not a law decreed for a particular case, but by a general law of the realm for all cases.

"The difficulty is not that the court at Caracas was filled by members from the bar for this case, or that two judges made the appointments. But *that this was done without the authority of law.* If such a proceeding has a parallel in common-law jurisprudence it has escaped our notice.

"Venezuela could, of course, constitute her courts as she desired, but having established them, it was Idler's right, if his affairs were drawn in litigation there, to have them adjudicated by the *courts constituted under the forms of law.* There are instances where the action of tribunals presided over by *de*

facto judges, acting under color of authority, has been upheld upon satisfactory grounds, but we think the doctrine would not apply in such a case as this. If the Colombian law of 1830 was in force when the court was organized for the Idler case, as seems to have been the fact, the judges were prohibited from exercising any '*other powers than those which are assigned to them*,' and as the power of appointment was not among those assigned *to the minority of the court*, the acts of the two judges in appointing the other two *ad hoc*, were not only not under color of law, but in violation of its express provisions. A body so constituted could not have legal validity. Its acts could not bind absent parties. They would be utterly void. Had Idler appeared, and consented to the jurisdiction of the improvised tribunal, a different aspect would be presented, and perhaps a different question.

"But, for the purposes of this discussion, let us assume the legality of the court, without, however, subscribing to the doctrine that '*natural justice* has nothing to say against tribunals thus constituted.'

Restitutio in Integrum.

"Venezuela, to avoid the judgment in favor of Idler for $70,520.11½ in 1832, asserted, in 1836, her right, by succession from the Spanish King, to the ancient remedy of *restitutio in integrum*, and the supreme court sustained the assertion, so far as it had jurisdiction of the case.

"By the Roman law a right was given persons during minority and for four years thereafter, on due application and hearing, to avoid contracts and transactions to which they became parties, or with which they were connected during their minority, and to be restored to all things lost thereby, when restoration was shown to be for their benefit. The right, taking its name, it would seem, from that of the writ under which it was enforced, and which succinctly defines its own meaning, was called *restitutio in integrum*. It seems not to have been a right attaching merely to the person, but one inhering in the contract or transaction itself. It was assignable and descendible. It extended to judgments in civil and criminal cases. But we have not observed that it pertained to a judgment unless, also, to the cause of action on which it was based.

"This right or benefit was at length extended to corporations, the church, and the king. But in all such cases application for its enforcement had to be made to the proper authority in due form within four years of the transaction to be avoided. There was one unvarying exception or bar to the enforcement of the right by one recently a minor, namely: 'When, after having become of age, he either expressly or tacitly approved of the transaction.' And it is believed the principle was of universal application wherever the right prevailed. An assent to the transaction once completed by a person enjoying the right and competent to assent was a bar to

the remedy. (See Mackeldey's Roman Law, § 228 *et seq.* and authorities cited.)

"For centuries after the Roman Empire the right was recognized in civil-law countries, among them Spain.

"It was this minor's right or remedy which the Venezuelan Government sought wherewith to defeat the Idler judgment.

"Were it our province and necessary to determine whether that royal prerogative passed from the Spanish king to the Venezuelan Republic, the very lucid arguments of learned counsel would, not improbably, render the task a comparatively easy one. But we do not feel called on to enter so comprehensive a field of inquiry. The question here is not so broad. Let it be conceded, for the argument, the right succeeded generally to Venezuela; it does not follow that Idler was affected.

"A moment's reflection will show the benefit was not universally applicable to Venezuela's contracts, and that her courts were powerless to make them so. A contract or transaction subject to the right had implied in it a condition of defeasance and restoration at the option of the privileged party. It was as though it had written in the body thereof that the minor, or king, or other favored person reserved the option to disaffirm and annul it partially or altogether, and have restored him all things lost or parted with on account thereof. Could such a right in Venezuela, however fully possessed by succession, affect her contractual or other obligations with other states? Had her treaties implied in them any such condition? And was the case in any wise different as to contracts with citizens of such states made therein, where the right was not in vogue?

"These were North American contracts, made at Philadelphia, where the right did not obtain. When Venezuela, so to say, came there to enter into them, she came, as would Great Britain or any other person competent to contract, with not a privilege less, not one more. Her right of *restitutio* she left behind her. The Philadelphia contracts had no condition of defeasance implied in them. When sent to Venezuela for execution, none were added. No power there, judicial or other, could engraft it on them. Therefore, as to those contracts themselves, it is perfectly clear Venezuela had not the right of *restitutio in integrum*. Unless, consequently, the law was that the right pertained to judgments when it did not to their bases, these legal proceedings can not be upheld, even if otherwise valid.

"To assert such to be the state of the law is to say that Venezuela, as to the contracts, was an adult, full grown and stalwart, but as to their enforcement, a—minor! Such a condition, under the ancient Roman law, would seem to have been an impossibility. While the minor's right might pertain to contracts and not to judgments upon them, it is not perceived how the converse could be. If the contract itself were

for any cause without the scope of the law's operation, as, for instance, if it had been affirmed after majority, or the period had elapsed within which it could be assailed, of course a judgment then upon it must necessarily have been also without that scope. To hold that when the minor's right was extended to the king a different rule applied, would be to affirm that in its transmission it received an important addition—underwent a material change in principle. The *onus* is upon him who asserts this to prove it. No intimation of the like from any authority or source has met our notice, unless the supreme court must be regarded as an exception.

"But looking 'through the gauze of mere words' to the substance of its decision interpreted in the light of practical results, it not only held that Venezuela possessed the royal remedy as to the former judgments, but as to the contracts on which they were based also; for, as we shall presently point out, its practical operation was to defeat both.

Question as to Jurisdiction of the Courts.

"Had the courts jurisdiction as to subject-matter, *and* as to Idler, to render the judgments in controversy? If not, they were inoperative and void.[1]

"If the proceeding was an 'action upon the record,' and not an independent suit, *inter partes*, the right of Venezuela (assuming her entitled to the ancient remedy) to institute the proceeding within the time limited can not, we think, be gainsaid. It could not be defeated by Idler's absence. Any reasonable mode of notice in that case would be sufficient. The modes adopted would, in our judgment, be all that justice required.

"But if the action was a separate and distinct one, its subject being merely a judgment instead of a contract or other particular transaction, then it is just as clear to our minds that the service on Idler being beyond the jurisdiction of Venezuela was not sufficient to obtain jurisdiction of his person, and any judgment rendered against him in that case would be void.[2]

"Says Wharton, Law of Ev. 3d edition, § 803:

"'A foreign judgment, as we have seen, is always impeachable for want of jurisdiction; and hence, for want of personal service, *within the jurisdiction*, on the defendant, *this being internationally essential* to jurisdiction in all cases in which the defendant was not domiciled in the state entering the judgment.'

[1] **Schibsby** v. Westenholz, L. R. 6 Q. B. c. 155; Novelli v. Rossi, 2 B. & Ad. 757; **Carleton** v. Bickford, 13 Gray, 591; Kerr v. Kerr, 41 N. Y. 272. See also **Furguson** v. Mahon, 11 Ad. & E. 179; Cavan v. Stewart, 1 Stark, 525; **Vallee** v. Dumergue, 4 Ex. 289.

[2] **Bischoff** v. Wethered, 9 Wall. 812; Pennoyer v. Neff, 95 U. S. 714; Hoffman v. Hoffman, 46 N. Y. 30; Davidson v. Sharpe, 6 Ired. L. 14; Board of P. W. v. Columbia College *et al.*, 17 Wall. 521.

"Whether, in this case, jurisdiction might have been obtained as to the *rem* by some process of attachment or garnishment, need not be discussed, for nothing of the kind was resorted to.

"There is some doubt from the language of the court, February 27, 1836, just what its view was on this point. It said the 'claim now made' was a '*new* action or instance' (*un nuevo juicio o instancia*). And it deemed the case of such a character as that Idler 'must be heard,' and directed him summoned.

"The authorities seem to regard *restitutio* as a 'new action.'

"Colquhoun, who may be taken as representative, says:

"'Restitution must be prayed and a formal suit commenced in that behalf.' (Roman Civil Law, § 1865.)

"Again—

"'Restitution may be sought by action or *by plea*, and *in the latter case* every judge is competent who has cognizance of the principal matter in dispute, whether he be commissary or umpire; in the *former case*, however, application must be made to the judge who is competent *in respect of the defendant*.' *Ib.* (See Savigney, Private Int. L. 320; Bar, Int. L. 213–216.)

"In the view taken, it may be parenthetically remarked that if *restitutio* would not lie as against the Idler contracts themselves, their annulment could not have been accomplished by *plea* in the old case pending its conclusion; and this fact is an additional argument against a judgment on *such* contracts being assailable by this means.

"The Spanish law and the civil law authorities cited by counsel for the United States, and not necessary to be quoted here, leave little doubt that with some exceptional cases—wholly variant from this one—where, 'irrefragable cause being shown,' the judge may *ex parte*, even *mero motu*, grant the relief, the action had always been regarded and treated as an original one *inter partes*, to be brought and conducted as any other ordinary suit. And such indeed may be fairly inferred from the process and opinions of the supreme court to have been its view.

"Assuming the proceeding to have been an 'action on the record,' and the notice sufficient for all it purported to be, there remains the other question, namely: *Whether the action was brought in the proper court in time.* It is conceded all round, the supreme court expressly saying, that it must have been brought within four years from October 1, 1832. The supreme court had no jurisdiction of the case in the first instance, as it decided when it returned the record to the superior court, November 4, 1837. There is some confusion arising from the decision as to whether the treasury court or superior court was held to be the one of original jurisdiction. But as no action was ever taken in the former, let us also assume the latter was the proper one. Was the suit begun there within the time limited? In other words, was the case of the fiscal attorney of the republic against Jacob Idler brought and pending in the superior

court of justice of the second district on the 1st day of October 1836? If not, there was no jurisdiction of the subject-matter. What evidence is there that such was the fact?

"As stated before, there is no record of this proceeding from that court among our files, and no cause shown for its absence if it ever existed. There are full records from it in the earlier case. Why not also in this later one? The existence of this record is challenged by counsel for the United States. How must it then be shown? In municipal tribunals a high character of proof is required for this purpose.

"Foreign judgments, says the Supreme Court of the United States, referring to the law, 'are authenticated (1) by an exemplification under the great seal; (2) by a copy proved to be a true copy; (3) by the certificate of an officer authorized by law, which certificate must itself be properly authenticated.' (Church *v.* Hubbart, 2 Cranch, 187.)

"In the same case it was held:

"'A judgment certified under the private seal of one styling himself to be secretary of state for foreign affairs is not evidence; also, that a translation of a foreign judgment certified by a consul, but not under oath, could not be received in proof of the judgment.'

"But 'where the original judgment record was destroyed by fire, a copy of a judgment duly certified by the clerk of the court by whom the judgment was rendered is proper evidence. (Nash *v.* Williams (Cornet *v.* Williams) 20 Wall. 226.)

"It would not be contended by anyone, we suppose, that the recitals of a record in one court would be received in a municipal tribunal to prove the existence and contents of a record not shown to have been lost or destroyed of another court.

"It seems to us, in a case like this, the best evidence reasonably attainable should be required before an international tribunal.

"The recitals of the supreme court do not come up to the mark, nor does the following, in its final opinion, February 22, 1839:

"'A comparative study of the dates in which the judicial decisions herein referred to were rendered, and of the date of the petition of the counsel for the state asking for the writ of *restitutio*, will show that the remedy was resorted to, in due time, within the four years provided for by the 10th law, title 19, part 6.'

"Had the court given dates so that a 'study' of them could now be made, the difficulty would still remain, even though they disclosed jurisdiction in the superior court. They are not the best evidence. That is the record (unless shown to have been lost). If there never was a record, then, in contemplation of law, the court did not act. It is elementary that a court of record (and this was one) speaks *only* through its

record. *And even where that is produced*, showing on its face jurisdiction, and the jurisdictional facts stated are denied, it has been held they may be inquired into and disproved.

"The Supreme Court of the United States, in Thompson *v.* Whitman, 18 Wall. 457, held:

"'The record of a judgment rendered in another State may be contradicted *as to the facts necessary to give the court jurisdiction;* and if it be shown that such facts did not exist, the record will be a nullity, *notwithstanding that it may recite that they did exist.*'

"In Pennywhit *v.* Foot, 27 Ohio St. 98, the court said:

"'From a careful review of the numerous cases, we find the rule now well settled that neither the constitutional provisions that full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State, nor the act of Congress passed in pursuance thereof, prevents any inquiry into the jurisdiction of the court in which a judgment offered in evidence was rendered, and such a judgment may be contradicted *as to the facts necessary to give the court jurisdiction;* and if it be shown that such facts did not exist, *the record will be a nullity, notwithstanding it may recite that they did exist*, and this is true *either as to the subject-matter or the person, or in proceedings* in rem, *as to the thing.*'

"Such is the law in the United States, and, we believe, generally.

"If a court's findings in favor of its own jurisdiction were conclusive in cases coming under consideration before international or other tribunals, the question of jurisdiction could never be raised, for its acting at all is equivalent to finding jurisdiction to act.

"'An alleged judgment,' says Dr. Wharton (Evidence, § 796), 'is open to attack for want of jurisdiction; for it is a *petitio principii* to say that it is unimpeachable because it is a judgment, and that it is a judgment because it is unimpeachable.'

"The evidence satisfies us that the *restitutio* suit was not in the superior court till after November 4, 1837, when the supreme court 'returned' *its* record in that regard thereto. The suggestion—for contention would be too strong a term—that the bringing of the suit in the supreme court, which was without jurisdiction to entertain it, was its commencement in the superior court for the purposes of avoiding a bar, can not be entertained. It is sufficient to say that before allowing an effect so extraordinary we should require to see the enactment providing for it, and none has been called to our attention or by us found. The supreme court makes no intimation that such is the law, unless the passage quoted can be regarded as such. But constructions involving results violative of familiar principles and courses of procedure are to be avoided, and we can not so regard the finding. The fact that the supreme court of its own motion sent the record down to the superior court

does not help the matter, for it is immaterial whether the suit was begun there at its instance or not. The question is when and whether it was *therein* instituted.

"The objection to this record is by no means technical. No notice, legal or other, was received or sent to Jacob Idler about the suit in the superior court, the only court having jurisdiction to entertain it in the first instance (unless it be the treasury court, where it never was), as is conceded on all hands. The letters rogatory directed him to appear in the *supreme court* in a suit instituted *there*. If the summons was legal it only gave him notice of what that court *in that* case—not in another instituted in an inferior tribunal and subsequently appealed to it—might lawfully adjudge. The notice directing him, away in a distant land, to appear in one court when the business affecting his interests was to be done in another, was worse than none at all, for it was misleading. Even if no notice had been required, and one had nevertheless been given, whose tendency was thus to mislead, we are inclined to think the act, from the standpoint of justice, would vitiate the whole proceedings. Receiving the notice in 1837, at Philadelphia, that a suit had been begun against him in *restitutio* in the supreme court of Venezuela in June 1836, he—charged at most with a knowledge of the law as it was declared to be—could well have said to himself, 'I shall not undertake the hazards of a journey or incur the expense to appear. The court has no jurisdiction and can not grant the prayer of the government, and it is now too late to bring the suit in the court which had jurisdiction.'

Denial of Justice.

"But, conceding jurisdiction of subject-matter and of the defendant, was the alleged judgment of the superior court (for what followed is inconsequential except as a consummation of a wrong begun, if wrong it was) binding?

"The purpose and effect of the judgment may be judged by results. It set aside and annulled the old record back to the prefect's order of August 31, 1830, before quoted, leaving that to stand in force. That order authorized (whether lawfully or not is now unimportant) the papers and record in the Idler case to be sent to the old commission at Bogota, in order that '*said commission* may *again* liquidate the accounts of Messrs. Jacob Idler and his associates.' The government at once sent the case away to a (now) foreign jurisdiction, to a new commission sitting at Bogota under a treaty between Venezuela and New Granada, of 1834, to adjust matters pertaining to the separation. Of course *it* was not the 'said commission' which could 'again' liquidate the claim. It shortly answered, through the Venezuelan member, Mr. Michelena, by resolution, to wit:

"'That the time within which Idler could have submitted his claim to the commission of liquidation *had expired on the 6th of August 1829*, and that as the tribunals of Venezuela had no

jurisdiction to make the said liquidation, the commission considers itself without jurisdiction to take cognizance now of this matter, and that the last judicial action taken in Venezuela (*restitutio*) *can not have other effect than to cause Idler to restore to the Venezuelan treasury what he unjustly received under the Colombian Government.*' [Report of meeting of council of government, Oct. 8, 1839.]

"The effects the government attributed to the judgments are stated by its representative, Mr. Romero, to the American minister at Caracas, July 8, 1840, reaching practically the same end, as follows:

"'According to the last recent sentences of the superior and supreme courts, dated December 20, 1839 [1838], and February 22d of this present [past] year, the matter has gone back to the condition it was in on the 31st of August 1830; that is to say, to the state of the new liquidation ordered by the intendants Mendoza and Briceno [before August 31st], because it was at that stage that the judge of first jurisdiction [*juez de letras*] unduly retained for the first time [August 25, 1831] the expediente and *converted into a judicial and litigious proceeding, what* up to that time was treated as an *administrative and economic* question of the government.[1]

"'Therefore, the government of the republic is *disposed* to instruct the general treasury and the tribunal of accounts to proceed *to the pending new liquidation*, which may be attended by Messrs. Idler and company in person, or by their attorneys, within the time which will be assigned to them.'

"The government thus interpreted the judgments as taking the case out of the hands of the courts, to be proceeded with in a nonjudicial—*i. e.*, 'administrative and economic'—manner before its own accounting officers of the treasury, as it might be disposed to direct. That is, in effect, the government proposed to decide the Idler case itself!

"*The litigation before the courts was put an end to*, and thereby the contracts, in so far as they remained unfulfilled (if there were any), were for all practical purposes annulled; for the government's action and reiterated opinion left no room for question what it would do.

"We have seen *restitutio* could not reach these contracts. It is believed it never contemplated such results as to judgments.

"The supreme court for the case knew—must have known—that the order of August 31 was impossible of execution, and had been from the very day of its entry nearly ten years before. Its affirmance of the alleged superior court judgment annulling proceedings back to that order, leaving it to stand, could have had but one purpose—to switch the case from the lines of judicial determination; in short, to dismiss it. We have no hesi-

[1] "It may be noted that this view of the law and character of the earlier proceedings was not entertained by the supreme court of justice on appeal."

tation in saying the *effect* of these judgments was a denial of justice.

"One reviewing this record, considering the communications about the Idler case addressed by the council of government and treasury department to the supreme court of justice, before the application for *restitutio* was made, asserting the existence of the extraordinary remedy in behalf of the government, notwithstanding its assent to the Cadenas award; the reorganization of the court so as to change its *personnel*, and the substitution of a temporary *fiscal* for the regular officer, for this one case, both, too, in violation of the Colombian statute extended still to Venezuela; the fact that this was the first and the last time the republic in its own behalf ever claimed a right to the ancient remedy, asserted in the right of succession from the Spanish King, when Spain had abolished it more than two hundred years before, except in a few cases among which the Idler case could not by possibility be classed; the final decree exactly in accordance with the prayer of the treasurers, in their report of May 2, 1829, and the wishes of the government; and the practical outcome, namely, *the ending of the litigation* and virtual extinction of the contracts so far as they were not yet satisfied; one considering these things can not, as seems to us, well escape the conviction that it was the voice of Idler's opponents which found expression in the judgments of 1838 and 1839, and not that either of justice or of the supreme court of justice.

"A foreign citizen in litigation with a sovereign before his own courts is entitled to no special favors; but even-handed, or, as Phillimore puts it, 'ordinary justice,' is his right in the eye of the public law. This Idler did not get. The 'justice' attempted to be meted out to him, whatever else could be said of it, was certainly not '*ordinary* justice.'

"Our conclusion is, from the foregoing considerations, that the proceedings *in restitutio* were, as against Idler, and are, as against the claimants, a nullity. This is the best we can say of them.

"The judgment of October 1, 1832, standing as it does unaffected by the subsequent proceedings, will under the doctrine above quoted be upheld unless manifestly wrong.

"But it is assailed. Grave charges are made against Idler and associates, which, if true, would disturb its basis. We have deemed it our duty to look into them with care, so far as the record here enables us to do so, as well as to examine the objections otherwise urged against the judgment. The supreme court for the case, repeating in substance what the counsel of government alleged, said in its final opinion:

"'The most singular thing to be noticed in all that has been done in this case is the manner in which Mr. Idler himself has acted. Good faith, sincerity, and purity can never allow any creditor *to liquidate his accounts with two debtors at the same time*, even if the accounts recognize the double origin, unless the

credits are divided. In the present case, Idler, *through his attorneys, liquidated his accounts at Bogota, and concealed the true and lawful price to be paid for the muskets.*

"'As some of his claims were disallowed there he came personally to this city and endeavored to liquidate again his accounts before the courts, and recover here what was denied him at Bogota.'

"*As to the double liquidation:*

"The occasion for the two settlements was evidently a difference between Idler and his associates, dating back of 1823.

"Duane, speaking of his failure to get the money on his liquidation, says:

"'To my surprise, on presenting myself at the treasury, I was informed there was some difficulty. It was not precisely explained, and perhaps it was a false delicacy which prevented them informing me what I subsequently was told—that Messrs. Kneeland, the partners of Mr. Idler, had sent out a Mr. Elsworth with powers which so far rendered my agency inoperative. * * * It is not for me to narrate the scandalous intrigues and bad faith of Messrs. Bogart & Kneeland. This mission of Mr. Elsworth produced the effect of arresting the whole transaction and preventing my obtaining the whole amount of the liquidation. * * *

"'It has been mentioned to me by Mr. Idler that the other parties in the transactions have alleged that I had been instructed by Mr. Idler to remit more than his share of money or assets had I received them, and he requests me to state the facts, which I cheerfully do. During the whole of the intercourse between Mr. Idler and myself, in conversation and in writing, he uniformly directed me to see remitted his own proportional part to him direct, and the rest to the associates in New York.' (Document 86.)

"This shows a difficulty and its cause.

"In May 1823 Idler went to Caracas to effect a liquidation with the intendant. And afterward (date not given) the associates sent Ogden to Bogota. These were unmistakably independent movements. The power of attorney to Ogden did not purport to give any authority whatever to deal with Idler's interests.

"The evidence leaves no doubt upon our minds that he had nothing to do with Ogden's mission till the liquidation was made; and it is altogether probable that neither Ogden nor his clients knew just what Idler was doing at Caracas. The facts intrinsically support this view.

"That they were all alike interested to get the last cent due on the contracts allowed, goes without saying. What motive, then, could the associates have had in presenting, or he in desiring or suffering them to present, a smaller claim at Bogota than he himself was urging at Caracas? If there were to be two presentations every interest conspired to make them alike, and up to the last dollar covered by the accounts under liqui-

dation. That they were not alike is evidence of nonintercourse, of independence of action.

"That such was known to be the relation and situation between Idler and his associates is shown by the address of the council of government sent the supreme court of justice in September 1834. On pages 51–2 of that document is the following:

"'Said liquidator [Cadenas] ought not to have confounded with the account of Idler that of his ancient associates. From the 16th of March 1822, the date of his cited instructions, he gave the order to his attorneys to separate his interest from that of his associates. These agreed likewise to the same (fol. 51 and over [not before the commission]), in consequence of which Bogart and Kneeland named as their special attorney Henry Ogden, and Jacob Idler, William Duane [this is a mistake, for Duane went out as the agent of *all* parties, Bogart and Kneeland paying him $300 in cash toward his expenses (see letter to intendant, November 5, 1822, and Document 86)], next Isaac Powles, and finally, Santos Michelena. *Each one and all acted independently.*'

"It may be inquired how there could be a difference in the accounts, both parties getting their information from a common source—the contracts or books? In this way: Idler was the chief business man in the concern. He had the making of the contracts and supervision of the business. Naturally, he would have an intimate knowledge of detail surpassing theirs. It was this knowledge that enabled him reasonably to preserve to the firm what the others would have lost, and what would not always readily find its way upon the books. Take, for instance, the charge item of duty drafts in No. 4, Idler's liquidation, $24,340.54. He knew the discount should be 25 per cent, and procured the liquidation accordingly. The associates, through their attorney, took them at a 20 per cent cut. Here he saved the firm $1,217. So with the item of 553 bales of tobacco in No. 2, he procured the liquidation at $5,419.42, when the government had charged and probably the Bogota liquidators allowed (though there is some uncertainty about it) $8,921. If our surmise be correct, he here saved over $3,500 to the firm. Then, again, his familiarity with the business would enable him to exclude unjust charges. In this way it is easy to see how the liquidations involving unsettled items, *made without concert*, one with a thoroughly informed party participating, and the other without this advantage, would necessarily vary. Only where there was collusion or concert of action would there be sameness.

"But counsel for Venezuela undertakes to show that Idler's accounts liquidated at Caracas, November 21, are substantially those of Ogden settled at Bogota, December 31, 1824, barring a difference in discount and interest. It will be remembered the balance found due the contractors in the former was $164,763.89, and in the latter, as paid, $157,458.56; difference, $7,305.33.

"There are four accounts in Idler's liquidation, the *Elena*, the *Wilmot*, and the two *Endymion* invoices. In Ogden's there are two; that is, his No. 1 contains Idler's No. 1 and parts of his Nos. 2 and 3. Idler's No. 4 and Ogden's No. 2 are the same, except a slight variance as to interest. So that the difference between the two aggregates, as is apparent on inspection of the liquidations, pertains to Idler's Nos. 2 and 3.

"The learned counsel has apparently accounted for this difference, and established the identity of the accounts liquidated at the two places (brief, page 39).

"His calculation shows the aggregate indebtedness according to the Idler accounts, shorn of errors of discount and interest, to be $157,465.39, while those of Ogden stand at $157,458.57—only $6.82 between them, which is unimportant, as he says, '*De minimis lex non curat!*' But in Idler's liquidation, account No. 3, there are two items of credit to the government, August 16, 1823, one of $1,465.56 and one of $12,385.33, amounting together to $13,848.89, and one charge item of $6,336, May 20, 1821, not to speak of others, not found in the Ogden settlement, which are entirely overlooked in, and left out of, his calculations and process of identification!

"How Ogden's liquidation was made up in detail can not be determined from the evidence sent us, because his No. 1 was formed, as expressly appears from the accounts, by resuming Duane's liquidation where it had reached the aggregate indebtedness of $92,702.93, without giving the items constituting such aggregate, and adding two, and only two sums, aside from interest thereto, namely, one for $291.20 paid Lemon in cocoa, and the other for $7,077.62 allowed for *Elena* loss (Idler's No. 1.) The demurrage item ($6,336), as appears from Duane's statement, was not included in his settlement, and the accounts on their face show the two credits ($13,848.89) were not considered at Bogota. So that no inference to support the charge of double presentation based upon the substantial identity of the accounts can be drawn.

"*As to concealment of price of muskets.*

"It is charged that Idler in the liquidation at Bogota '*concealed* the true and lawful price of the muskets,' thereby being allowed $12 each therefor instead of $7.

"This seems a strange accusation. How Idler, even if he had to do with the Ogden liquidation, which he had not, could be supposed to have *concealed* from the government the knowledge of a transaction had with that government itself and at its *demand*, is difficult to understand. The musket account was of more than three years' standing. For the government to have it at all would be to have it with the reduction in price noted, that having occurred at the receipt of the arms in Venezuela, the Vice-President Soublette himself representing the government in the matter.

"But it is unnecessary to speculate. The proof is direct and

unmistakable that the board of liquidation knew of this business two years before.

"Duane, speaking of the progress he had made in securing a partial liquidation and a certificate therefor, says [document 86]:

"'I was proceeding to negotiate for the muskets, seeing the strong ground upon which I stood, and was assured by the *president of the board of liquidation* that no difficulty presented itself to my settling the *muskets and demurrage damage accounts.*'

"That charge is the merest gratuity.

"*As to Idler's conduct before the courts at Caracas:*

"It is charged that Idler, failing at Bogota to have some of his claims allowed, went to Caracas and endeavored to liquidate *again* his accounts before the courts, and to recover there what was denied him at the former place. It would be difficult to put more error in as few words.

"Idler's items in contention, except perhaps the single one of $291.20, a charge-back of an alleged error, so far as not allowed by them, appear not to have been before the Bogota liquidators at all. In February 1825 he endeavored to have them brought before the board, but it was too late and it was not done. As for going to Caracas 'to liquidate again his accounts before the courts,' the fact was otherwise; we might say oppressively so.

"It was not Idler, but the public authorities who instituted the liquidation before the courts at Caracas. They *compelled* it. The counsel of government, in the very communication sent the court, 1834, before referred to, say (page 6) on this subject:

"'The affair was reputed concluded not only by the government but likewise by all the associates, when, at the commencement of the year 1828, the intendancy of Venezuela observed that the liquidation which had been made at Bogota * * * was, on the one hand, that Idler and associates were unjustly credited, and upon the other not debited or charged for various sums which had been received at the custom-house of La Guayra. *It was for this powerful reason that said intendancy opened the subject to a continuation.*'

"After the subject had thus, by the government, been opened up 'to a continuation,' Idler did not object to going to Bogota. On the contrary, as has been seen, he wanted to go. The same communication says, page 11:

"'Nor did Idler himself make any opposition at first that the documents should pass to the government of Bogota, so that in his writing (folio 78) he only asks that this measure should be delayed until he could present other observations and documents which he solicited for the purpose. So that the *only objection made was his refusing to give the security which was demanded of him* that he might leave this city to make a new arrangement of his accounts at that capital.'

"What was the security required? Either that he give '*bonds for the $37,795.22 for the balance now standing against him*,' or that he '*file the original bills of exchange drawn in his favor against the English loan.*' The bills he had sold, and he had been sued on them as indorser in Bogota. Their deposit was an impossibility to him. To have given bonds in a strange land for the payment of that sum of money was probably equally out of the question.

"The order was practical prohibition to him. It has already been seen that before this, direction had been sent to Bogota by the intendant stopping the liquidation there.

"It seems from the same communication that he, being compelled to go into the subject—for the government itself was attacking the Bogota liquidation—desired '*that this operation should be made anew*,' and the *public authorities assented.*

"Under the circumstances, how the complaint under consideration could have been made against Idler on any hypothesis of intelligence and just purpose, passes our understanding. The only alternative left him, short of suffering what he manifestly regarded gross injustice, was to liquidate and litigate the best he could in the Venezuelan courts

"It is said he received at Bogota sums that had been paid him at Caracas. It is a sufficient answer to this to say that every dollar paid at Bogota was credited on his account, which was adjudicated.

"There is this appearance, however, of truth in the charges of concealment and double payment that should be mentioned. There were two liquidations in fact. There were credits on Idler's that were not on Ogden's. Idler and the associates took, through their attorneys, all that was found due on the latter liquidation without deducting such credits. But it must be remembered that Idler rejected the accounting as incorrect and unauthorized. He evidently received the amount found in his favor as so much on account; and it may be reasonably supposed that when the associates learned of the considerable amount still claimed to be due not included in the liquidation and not known to them at the time, they received their payments as on account also. The government could not be hurt if it received credit for all that was paid, as it did, especially as it did not regard itself bound by the liquidation, but consented 'to have the case settled as it was.'

"It is charged that these later items were an afterthought; that had they been honest they would have been earlier presented. Not necessarily so. There had been long and vexatious delay about the payment of a substantially uncontested account current, with results of great hardship.

"One can easily see that business prudence, under the circumstances, might have suggested the delay for a season of a claim for damages entirely well founded, so as not to be the occasion for further procrastination. The more probable reason for delay as to the Barinas tobacco claim is, that Idler

hoped all along to get the tobacco. In fact, promises were made to him to that effect as late as 1824. Had they been fulfilled, of course there would have been no claim on this score. There is evidence, however, of an endeavor to procure the adjustment of these items before the payment of the Bogota liquidation, but it is unnecessary to pursue the matter.

"It is sufficient, in fine, to say the evidence before us does not support the charges referred to against Jacob Idler.

"There is another matter that should not go, perhaps, unmentioned. The Venezuelan Government said to the American minister, in 1840, that there was corruption connected with the Idler judgments. But it made no specific charges, called to account none of its officers, or furnished any proof. The record is silent otherwise on the subject. Under such circumstances, this charge, never intimated during the long, weary progress of the case, is entitled to no consideration.

"Turning now to the specific objections to the judgment:

"It is said in substance that the judgment or claim was against the wrong party; that if anyone was responsible to Idler it was Colombia and not Venezuela.

"Undoubtedly the action was begun by the Colombian authorities, and had the point been made at the separation, what the action of the courts would have been can only be conjectured; but it seems not to have been made. On the contrary, the evidence transmitted shows, as one letter puts it:

"'After their separation the Government of Venezuela went on with the suit more vigorously than ever.'

"It was too late after defeat, at the end of 1832, to make the question. It can not be overlooked, in this connection, that, when it was supposed in 1840 the *restitutio* proceedings had canceled Idler's judgment and restored in effect the treasury liquidation against him for $37,795.22, which then with interest amounted to over $60,000, Mr. Michelena, the Venezuelan plenipotentiary at Bogota, expressed the opinion, *in which the council of government concurred*, that the *whole sum*, when paid in, would belong to Venezuela. Nor is it to be passed by, that the firm with which the same Mr. Michelena was connected, the Brothers Michelena of Caracas, having obtained in due course of business one of the drafts of the Colombian Government for £2,000 on London, with which Idler had been paid at Bogota, and which were returned protested as before told, brought suit thereon in Caracas against the Government of Venezuela, and on the 19th of December 1831 obtained a judgment in the supreme court for $14,008, *which Venezuela promptly paid.*

"In the course of the proceedings the *fiscal* said:

"'When the state [which nominally was Colombia, but actually taken as Venezuela] or fisc enters into any agreement with private individuals, it is and must not be regarded as their superior, but as their equal, because a reciprocal contract equally binds all the parties according to the primitive and

constitutional law of every reasonable society'—a doctrine, had it been applied in 1836–1839, that would have saved this controversy.

"It will be noted that Venezuela herein, through its courts and treasury, not only, as it would appear in effect, recognized her individual obligations in these transactions by discharging a bill growing out of them to which on its face she was not a party, but that in her refusal to pay Idler's judgment rendered less than a year later, made a discrimination as against a foreign citizen in favor of her own, a thing prohibited by the public law.

"The reason given by the government for this action, to wit, because, 'when Venezuela made her last political transformation [1830] it [the bill] had been *radicated* in the custom-house by the special order of the Government of Colombia, issued since the 26th of July 1829,' does not seem to us satisfactory, nor was it the ground on which a recovery was sought, nor that of the judgment of the court.

"The suit was brought and the judgment and payment occurred after Venezuela's separation from the rest of Colombia, and before the adjustment of the latter's debt among the constituent States.

"It has been held that conditions attached to a grant of land even by a prior sovereign, and which are inconsistent with the policy of an after-acquiring state, will not be enforced by such state. (United States *v.* Vaca, 18 Howard, 556.) It is not perceived upon what principle, in the absence of contract, an order of the Colombian Government to pay certain of its indebtedness from the revenues of a particular one of its ports would be operative *after* that port had passed into the hands of another state.

Question as to State Continuity in Venezuela.

"But waiving all these considerations and not insisting now on the doctrine laid down by Dana in his notes to Wheaton (sec. 30, note 18), to wit, That where a state is divided each new state becomes liable for all the debts of the old one, as in case of union of states the consolidated community becomes responsible for the obligations of each constituent—was Venezuela liable as upon contract made by herself? She was not if her political existence became extinct December 17, 1819.

"Let us look at this for a moment:

"On the 15th of February 1819 the Congress of Venezuela, convoked by Bolivar, was installed at Angostura. There were thirty deputies in the body, 'nominated by the free part of Venezuela,' twenty-six of whom convened and proceeded to organization and business.

"On the 17th of December ensuing '*the Sovereign Congress of Venezuela*, to whose authority,' using the language of the preamble, 'the towns and people of New Granada, recently liberated by the arms of the republic, have voluntarily agreed to subject themselves,' adopted the 'fundamental law of the Re-

public of Colombia,' so called, providing a scheme of government or constitution for the proposed state. Among its provisions were the following:

"'1. The republics of Venezuela and New Granada from this day are united in one single state under the glorious title of the Republic of Colombia.

* * * * * * *

"'4. The executive power of the republic shall be exercised by a president, and in his absence by a vice-president, both named, *ad interim*, by the present Congress.

"'9. The constitution of the Republic of Colombia shall be formed by the General Congress, to which shall be presented, *in the light of a project*, the one decreed by the present Congress, and which, together with the laws promulgated by the the same, shall immediately be put into execution, "*by way of an essay.*"'

"General Bolivar, who had resigned to this Congress his assumed dictatorship of Venezuela, and become, as he expressed it, 'nothing more than a simple citizen,' was designated by the body as President *ad interim* of Colombia and continued in the chieftainship of the military forces.

"Francisco A. Zea, the president of Congress, by its authority, in promulgating 'the fundamental law,' January 20, 1820, issued a manifesto to the 'people of Colombia,' from which these extracts are taken:

"'This work [that of union] so deservedly merited by you is already finished; your political concentration is verified and the fundamental law conferring it, and which, through me, Congress *offers* for *your supreme action*, will fulfil all your desires, will promote the interests of all, will cement upon an immense and lasting basis your independence, will establish that of South America, and make you a power both strong and solid.'

"Having portrayed in glowing terms the many advantages and possibilities of Colombia, he exclaims:

"'But, alas! from what fatality, what cruel destiny is it that this country, the first in the physical world, not only is not the first, *but does not even so much as exist in the political world. It is because you have not willed it; will it, and it is done.* Say: "Be it Colombia, and Colombia it shall be."'

"The recital in the preamble of the act that 'the towns and people of New Granada * * * have voluntarily agreed to subject themselves' to Congress, must be received as expressive of an anticipation rather than of a fact. In his report to General Santander, vice-president and the chief civil magistrate of New Granada, December 31, 1820, the commissioner of the office of the interior and justice, speaking of the 'fundamental law' of December 17, said:

"'When this arrangement was communicated to Your Excellency, you immediately perceived the advantages and bene-

fits accruing from it. Your Excellency foresaw that a union of forces, an accumulation of resources, must render us formidable at home and respectable abroad; *but you would not, however, risk a decree of obedience till you had consulted with the general authorities of the department.* * * * This caution was very just and fitting for the consolidation of the association, which, as it contained a solemn fact, *required the free, express, and formal consent of all the contracting parties.*'

"The representatives of the provinces, elected pursuant to the call of December 17, so published by Zea, met at Cucuta in May 1821. To them at once General Bolivar resigned the executive authority that had been conferred on him at Angostura, saying that 'he held the presidency *ad interim from the Venezuelan Congress only*, and the Congress then assembled being that of Colombia, he considered his executive powers at an end.'

"On the 12th of July this Congress adopted the 'fundamental law of the union of the peoples of Colombia,' parts of which are the following:

"'We, the representatives of the *peoples of New Granada and Venezuela*, assembled in General Congress, having examined attentively the fundamental law of the Republic of Colombia passed by the Congress of Venezuela in the city of St. Thomas de Angostura on the 17th day of December 1819, and considering: 1. That united in one republic the provinces of Venezuela and New Granada have all the proportions and means of elevating themselves to the highest degree of power and prosperity. * * * 3. That profoundly impressed with these advantages all men of superior talents and patriotism have urged the governments of *the two republics to agree* to their union. * * * In the name and under the auspices of the Supreme Being, we have just decreed, and we do decree, the solemn ratification of the fundamental law of the Republic of Colombia, just mentioned, in the following terms:

" 'ART. 1. The *peoples* of New Granada and Venezuela are united in a single national body under the express compact that its government shall be henceforth and forever a popular representative one.

" 'ART. 2. This new nation shall be known and denominated under the title of the Republic of Colombia.

" 'ART. 8. The debts which the *two peoples have contracted separately* are recognized *in solidum* as the national debt of Colombia; and all the property of the republic is responsible for its satisfaction.'

"The constitution for the new republic, adopted August 30, differed radically from that proposed at Angostura.

"This simple recital, we think, warrants and impels the conclusion that the act of December 17, 1819, while in its phraseology declaring Colombia then formed, was intended and understood to be, and from want of authority in the Venezuela Congress, could be no more than, a proposition (with tentative

provisions) of union, between Venezuela and New Granada, which was duly accepted by *both* provinces July 12, 1821, and the union consummated. Before this latter date, by whatever laws governed and in whatever name acting, each province preserved its legal autonomy and contractual powers. We are not saying that, for certain purposes or even generally, Colombia's existence might not be held to relate back. But we do say that for the purpose or with the result of defeating contracts with either province made before the consummated union in 1821, the political extinction of such province will not be held to relate back also.

"On the question of fact whether Torres acted as the agent of Venezuela we see no good reason for finding differently from the courts. He signed himself, in his introductory communication with Idler, July 28, 1820, as the 'agent of the Government of Venezuela.' His powers were quite evidently in continuation of those of Clemente. He seemed to recognize that Idler had certain existing rights because of what had been done by his predecessor. For instance, without other allusion to the subject, he said in that letter:

" 'As the tobacco of Barinas is one of the most productive resources of the Government of Colombia, and the merchants of Holland are the best judges of this important branch of commerce, *I recommend to you* the Holland merchants as the best disposed to enter into the views of my government.'

"Why should he recommend to Idler something about a particular kind of tobacco, unless by some existing arrangement Idler had to deal with it?

"This, taken in connection with what Clemente said when the case was before the courts, August 12, 1830, becomes entirely intelligible, to wit:

" 'The contracts made and entered into between Idler and myself were as follows: First. To pay him for each musket twenty hard dollars, which was the price paid him for them at Montevideo. But afterward we agreed to reduce it to only twelve hard dollars, if the government should give him the monopoly of the Barinas tobacco until full payment of the contracts.'

"Otherwise it is obscure and apparently out of place. Before the passage quoted he says:

" 'On the other hand you are perfectly acquainted with the resources *as well as the present situation of the Republic of Colombia.*'

"It was probably because of 'the present situation' of Colombia that he signed as the 'agent of the Government of Venezuela;' and also because of that 'situation' that Idler would require the contracts to be made with Venèzuela, although under the name of 'Colombia.' There was no doubt of *its* power to contract. The right of Colombia to do so was then contingent on what might occur at Cucuta.

"While it was natural to point to the resources of Colombia

as the probable paymaster (for the union was expected to take place in January after, less than a year), it was altogether businesslike to conduct the transactions in the name of one unquestionably competent to contract. We think that Torres, therefore, did not subscribe himself as he did by inadvertence. He did it advised, and well advised, at last.

"All things considered, we think the objection to the judgment on the score that it was Colombia's debt, if anyone's, is not here tenable. Nevertheless, under the Colombian act of assumption of debts aforesaid, and under the general public law, Colombia became unquestionably liable for Venezuela's contracts. This did not free the latter, however, beyond the pleasure of her creditors. The making out and presenting of the accounts against Colombia is not important. There was no other government, then, to present them against.

"It is said the associates were not made parties, and are not entitled to share in the judgment. This, at least, is a technical objection. If the debt was owing, it seems of little importance before the bar of international justice in whose name the suit was conducted, so the right ones get the proceeds. Had the associates been made parties, we can not see that the result for that reason would have varied. Idler always recognized their interest in the claims and judgment, and it is not apparent how the question now is material.

"At any rate, objection comes too late. As said by the supreme court of justice December 1832, 'both parties have consented to have the case settled as it was,' and questions as to forms of procedure are of little moment. Moreover, of the near $38,000 alleged overpayment at Bogota, Idler's share was only about $9,000; yet he was sued individually for the whole sum. He answered, recovering over $70,000. Venezuela is not now in a position to allege that the suit was wrongly cast. Had she stood by the Ogden liquidation there would be more reason for this claim, but she did not. She repudiated it. She can not now hold the associates thereto. It was alleged in argument, supported by references to the record, that the contracts were all, in fact, in the name of Idler. But they are not before us, and we predicate nothing on this ground.

"The contest in the case finally narrowed down to some five or six items, four of which formed the basis for nearly the whole of the judgment, and these only shall we notice.

"The government objected to the allowance of the loss on account of the *Elena*.

"The circumstances connected with this loss are not revealed by the evidence submitted to us. The council of government said in their communication of 1834 that it was occasioned by seizure of the vessel by the United States Government at the instance of Spanish authorities for violation of neutrality laws. Informal inquiry at the State and Naval Departments has failed to elicit any facts on the subject. The statements before

us are to the effect that the loss was occasioned by the Venezuelan agent, General Clemente, and that the government, recognizing its obligation to make it good, agreed with Idler to the amount in 1820. These statements stand uncontradicted, and we see no good cause to differ with the courts in respect thereto.

"The council of government fell into a singular error of fact in supposing this claim was not liquidated and allowed at Bogota. It will be found by reference to the liquidations in Ogden's No. 1, the original amount agreed upon being $7,087.62.

"The item may be regarded in the light of one agreed to and paid.

"The charge of $6,336 for the detention of the *Endymion*, at Angostura, for 198 days from November 3, 1820, was resisted. There does not appear to have been objection to the rate of charge, $32 per day, nor question as to the date the schooner got into port, or as to the time she remained unloaded. The controversy seemed to turn—though the matter is involved in much uncertainty—upon the meaning of the term 'arrival' in the contract. The referee said:

"'Arrival of the vessel has never meant anything else than the moment of the vessel's having entered the port. If the arrival of the vessel would or could mean the same as ability to make the delivery of the cargo, as the Secretary of the Treasury understood, the claim might be made also that it means the day in which the delivery of the cargo was completed. Nothing of this is correct. The day agreed upon was the day of arrival, and whatever is said for the purpose of changing the date is in violation of the contract.'

"The contract is not here, nor is any evidence preserved, if taken, as to the matter. There is nothing before us upon which we could base a dissent from the view the courts took.

"The issue about the musket item of $21,285 arose in this way: The 4,360 French muskets, being the last shipment under the contracts, were objected to after arrival at La Guayra as not being according to contract.

"The agents of the contractors, Lemon & Forsyth, agreed with the vice-president to allow all to go at the reduced price of $7 each, except 103, which were to be paid for at the usual figure of $12.

"The Bogota commission allowed $12 each for all.

"The question turned upon the authority of Lemon & Forsyth to agree to a reduction from $12 to $7. Idler denied their authority, asserting they were, as their power of attorney known to the government showed, mere receiving and delivering agents, and claimed the agreement was that all goods were to be inspected and accepted in the United States before shipment.

"The 'diploma' above quoted from contained this provision:

"'It being understood that we [Venezuela] shall abide lit-

erally by whatever they [agents] may have agreed to, without entering into any inquiry or examination, or making any remarks or objections on or to the contracts made by them.'

"General Clemente's certificate, in testimony, contains this statement:

"'The contracts made and entered into between Idler and myself were as follows: * * * Second. That the conditions of the diploma under which I and my successor acted were that all the contracts for supplies made by us in the United States should be finally ended and admitted and liquidated there, and that no alteration or reduction of these terms should ever be made by any authority of the Venezuelan Government, it being understood that the articles and effects to be shipped by us were to be examined and received there by us to our satisfaction, as so indeed they were examined and received.'

"It fairly appears that Lemon and Forsyth were only receiving and delivering agents.

"There is also evidence to the effect that these muskets, at the instance of the Venezuelan agent, were examined by a French officer in the United States and pronounced good arms and were accepted, though of different sizes and secondhand in part. It is historically true that at this time the republic was in great need of firearms. Agents were dispatched to other countries for them. The slaves had been given their freedom and were being armed. So scarce were guns that soldiers sometimes went into battle armed only with pikes. It is not improbable under such circumstances that Torres would accept almost any character of arms rather than get none.

"The statement that the arms were to be inspected and accepted in the United States bears the impress of truth in itself.

"The idea that a business man of Philadelphia would send military supplies by the cargo to the seat of war in that country, there to be inspected and perchance thrown upon his hands, borders upon the absurd.

"The facts above stated were not contradicted in the evidence, so far as disclosed here. If we were required to find upon the same question, we should, with the evidence before us, find with the board of liquidation and the courts that the agreement for reduction from $12 to $7, each musket, was unauthorized on the part of Lemon and Forsyth, and that the liquidation should be made at the former figure.

"There remains to be considered the Barinas tobacco item of $49,160.00 as finally allowed. Idler claimed his original contract provided for the payment of $20 each for muskets; but that subsequently the agreement was reached to reduce the price to $12, in consideration of the government giving him the monopoly of the tobacco grown in the province of Barinas, and known as an article of superior quality, until full payment should be made for all the goods bought; and that it failed and refused

to carry out this contract—selling others the tobacco while he remained unpaid, to his damage, $53,781.63. Remembering that indigo, cotton, cocoa, tobacco, etc., produced in Venezuela, were sold or disposed of by the government, and formed a part of its 'resources' at that time, we call attention to these sentences in the diploma:

"'All of the said contracts which the said agents or commissioners may make or enter into are beforehand approved of by us as made and entered into in use of the full unrestricted powers and faculties given them by us, faculties and powers which authorize them to deal and stipulate in the name and in behalf of the republic, *and to mortgage her property and her revenues and resources.* The said property, revenue, and resources *shall be pledged with absolute preference to the payment of the debts contracted by virtue of this authority.*'

"Also to this clause in the 'instructions:'

"'*Fourth.* They are empowered to grant the contractors who may take to our ports the above-said elements of war all the advantages that may be deemed just, relative either to preference in the payment *or to the choice of the particular kind of articles produced in the country*, or to the amount being credited to set off customs duties.'

"It will bear repeating, in this connection, that General Clemente, in the certificate referred to, says the contracts made between Idler and himself provided:

"'First. To pay him for *each musket twenty hard dollars*, which was the price paid him for them at Montevideo. But afterward we agreed to reduce it to only twelve hard dollars, *if the government should give him the monopoly of the Barinas tobacco until full payment of the contracts*, * * * and that the amount to be paid Mr. Jacob Idler was to be paid in Venezuela *with preference to any other debt*, and in hard dollars, *if there was no Barinas tobacco.*'

"In the part of the evidence which was before the courts transmitted us (and it would seem to be but a small part), there is corroboration of Clemente's evidence and no contradiction thereof. The contracts themselves as to particular lots not being here, we are unable to say whether they contain any modifying provisions. The council of government in its said communication of 1834 expressed the opinion that the delivery of such tobacco under the four several contracts 'never was considered as absolutely necessary,' and enter into an argument, quoting brief portions from the contracts in support of that opinion.

"But a careful examination of the argument fails to discover to us the correctness of its conclusion. For instance, with respect to the first contract considered, it says (italics ours):

"'With respect to the amount of the contract by the brig *Meta* [*Elena*], according to folio 32, *articles 3 and 5 are decisive.*

"'The first of these articles says: The government *offers* to

pay the balance (all it owed) of 7,067.62 Spanish dollars at the expiration of six months, in ready money or in whatever property of the republic the creditor (in default of money) should prefer it. The other article, fifth, says: The government *wishes* and *permits* that the sum which is in virtue of the article 3d, of this contract, if it is declared due, can be received as payment made for export and import duties.'

"Even from these fragmentary portions of the contract (and it gives no other), it would seem that if the *offer* in article 3 was accepted, Idler, 'in default of money'—and there was default—had the right to select the product of payment, which, of course, would have been the Barinas tobacco as being the most desirable.

"Article 5 is merely permissory in its terms and effect, and so far from being, in connection with article 3, 'decisive' of the question at issue as the council supposes, it is as we view it irrelevant. The rest of the argument, even upon its assumption of facts, seems to us with all due respect equally inconclusive.

"Now, that the government had the Barinas tobacco to dispose of every year from 1820 on, the evidence leaves no room to doubt; and that it refused to let Idler have the crops is equally free from question.

"The truth is, that after pledging the crop to Idler, it pledged it in London to secure government loans there, as letters from London brokers of that time among the papers show.

"The Congress of Colombia by an act of 1822, expressly pledged the 'resources' of the republic to the payment of the foreign loan authorized by it, in preference to all other debts, and a subsequent act on this subject, 1823, specially named tobacco as among the resources so pledged; both in derogation of the obligations to Idler under the 'diploma' and 'instructions.' So that he was effectually cut off from realizing under his contract, although hopes were still held out to him for the 'next crop' by the intendants.

"There was then a plain breach of contract on the part of the government, so far as the evidence before us discloses.

"What was the measure of damages? Idler claimed $8 a musket, the amount of reduction, would, in strictnesss, be his due. There were over 11,000 muskets in the last three shipments. His claim would thus exceed $88,000. That was not allowed him. Some half dozen merchants were called on for their estimates. They computed his losses at about the sum allowed, perhaps a little over. There is no other testimony on the subject. The government offered none, so far as appears. While this sum seems to us large, yet we are unable to say its allowance was manifestly wrong.

"It had passed the judgment of two referees, amply authorized to take testimony, and therefore presumably thoroughly advised, and had received the sanction of the treasury judge

and the superior court; besides having the concurrence of the government itself, through its fiscal's written consent to Cadenas's award, through the failure of the treasurers to appeal, and by the direct approval of Bolivar himself.

"We have carefully examined the other contested items—comparatively small—going to make up the judgment, and fail to see in any of them a satisfactory reason for refusing its recognition as an entirety.

"It will be observed that the decision of the treasury court, which under the law properly dates from its confirmation, Oct. 1, 1832, is:

"'That the public treasury is responsible to Mr. Jacob Idler for said sum of $70,520.11½, which shall be paid him in the manner and in the form that the supreme government may determine upon.'

"There is no allowance of interest from June 30, 1825, the date to which the referees computed it. There was a considerable sum of compound interest in the award. It may have been for this reason interest after 1825 was not included in the judgment. At any rate, such is the judgment, and we are unable to say it is palpably wrong, either for what it contains or may seem to omit.

"We have carefully considered the arguments in favor of computing interest up to the date of the former award, and then allowing interest on the amount from such date. There is much force in the views presented where former awards are re-found. But we feel that course may not be warranted by the interest provision of the treaty, which reads:

"'And in the event of interest being allowed for any cause and embraced in such award, the rate thereof and *the* period for which it is to be computed shall be fixed, which period shall not extend beyond the close of the commission.'

"But one period here appears to be contemplated, ending at some time before the close of the commission. To constitute *two* periods, thereby augmenting the interest, would at least be of doubtful authorization. The failure to embody in the treaty Mr. Frelinghuysen's understanding is rather an argument against the view urged than in its favor. Treaties are prepared with deliberation and care. Neither the omission nor insertion of material matter can be ascribed to inattention. (*The Nereide*, 9 Cranch, 419.)

"An entry can be prepared allowing the claimants the amount of the judgment of the superior court, $70,520, omitting the odd cents, with 6 per cent interest, that being the rate named in the contracts, from its date, October 1, 1832, to September 2, 1890, inclusive, less the deductions provided by the treaty on account of payments made on the old award, the same to be distributed as per the agreement on file dated March 17, 1868, subject to mesne transfers of certificates according to intervening petitions filed in this case.

Idler's Liquidation at Caracas, November 21, 1824.

No. 1.

The Government of Colombia in current account with Jacob Idler and his associates.

DEBTOR.

1820.		
Mar. 5.	To value of invoices for certain war supplies furnished under contract entered into with General Lino de Clemente, at Philadelphia, and shipped on board the brig *Elena*, then transferred to the brig *Eugene*, afterward called the *Meta*, a transaction which was finally consummated at Angostura on the 5th of March 1820 on the one side by Juan Bautista Della Costa, as attorney for Mr. Jacob Idler, a merchant of the city of Philadelphia, in the United States, and on the other side by José Rafael Revenga, secretary of the treasury, payment to be made according to the contract..	$8,457.62
	Sum.....	8,457.62

CREDITOR.

1820.		
Mar. 5.	Cash paid Juan Bautista Della Costa in partial payment of certain merchandise delivered to the government, said Della Costa being Mr. Idler's attorney.....	$1,380.00
	Balance	7,077.62
	Sum.....	8,457.62
Mar. 5.	Balance due	7,077.62
1824.		
Nov. 21.	Interest on the above from September 5, 1820, to November 21, 1824—4 years 2 months 16 days—at 6 per cent per annum, according to the contract.....	1,788.29
Nov. 21.	Amount due to date.....	8,865.91

Errors or omissions excepted.

JACOB IDLER.

CARACAS, *November 21, 1824.*

No. 2.

The Government of Colombia in current account with Mr. Jacob Idler and his associates.

DEBTOR.

1820.		
May 22.	To value of invoice of certain war articles shipped on board the brig *Wilmot*, delivered this day at Angostura under contract entered into on the one side by Jacob Idler, of the United States, and on the other by Manuel Torres, the agent of the government in the United States, dated in Philadelphia, April 6, 1820, to the payment of which the Barinas tobacco was pledged, and the government binding itself to pay in *round* coin (hard dollars) if there was no tobacco, as it appears from the contract No. 5.....	$63,071.50
	Sum.....	63,071.50

1821.			
Oct.	4.	Interest on $38,933.50 from March 11, 1821, to October 4, 1821—six months twenty-three days—at 6 per 100 per annum	$1,317.07
Oct.	4.	Interest on $2,000, as per item on creditor's side, from March 11, 1821, to October 4, 1821	67.70
1822.			
Oct.	1.	To interest on balance due October 4, 1821, $33,022.60, until October 1, 1822, eleven months twenty-seven days	1,964.83
		Sum	66,421.10

CREDITOR.

1820.			
June	11.	Cash paid on account of the cargo of the brig *Wilmot*	$22,136.00
1821.			
May	1.	Cash received to-day, balance of receipt given at Angostura June 19, 1820	2,000.00
May	1.	Cash which ought to have been paid with the first installment	2.00
July	4.	To 553 bales of tobacco, of inferior quality, received at La Guayra, gross weight 50,180 pounds, at $10.80 per *quintal*	5,419.42
July	4.	To 24 bales of Barinas tobacco, of inferior quality, gross weight 2,234 pounds, at $22 per *quintal*	491.49
1822.			
July	1.	Balance	36,372.20
		Sum	66,421.10
1822.			
Oct.	1.	Balance of foregoing account	36,372.20
1824.			
Nov.	21.	Interest on the above from October 1, 1822, to November 21, 1824—two years one month and twenty-days—at 6 per 100 per annum	4,667.78
		Balance	41,039.98

Errors or omissions excepted.

JACOB IDLER.

CARACAS, *November 21, 1824.*

No. 3.

The Government of Colombia in current account with Jacob Idler and his associates.

DEBTOR.

1820.			
Nov.	3.	To value of cargo sent by the *Endymion* to Angostura under contract made by Jacob Idler, of Philadelphia, on the one side, and Manuel Torres, agent of the Government of Colombia, on the other side, at the city of Philadelphia, on August 18, 1820, to be paid as follows: Exclusively in Barinas tobacco, but if there is none, in hard dollars, as per contract	$72,639.93
1822.			
Oct.	1.	Interest on half of the above sum, or $36,319.96, from November 3, 1820, to this date, or 23 months 1 day, at 6 per 100 per annum	4,182.85
Oct.	1.	Interest on the second half of the same sum from May 3, 1821, to October 1, 1822, or 17 months. On this date—that is, October 1, 1822—the present account was presented to General Soublette, and pronounced by him correct	3,087.20

1821.			
May 20.	Demurrages of the schooner *Endymion* at Angostura from November 3, 1820, to May 20, 1821—that is 198 days, at the rate of $32 per day—as per account presented		$6,336.00
1822.			
Oct. 1.	Interest on the above from May 20, 1821, to October 1, 1822, or 16 months and 13 days		520.61
			86,766.59
Oct. 1.	Amount due on this date		86,766.59
1823.			
Aug. 16.	Interest on the above sum of $86,766.59 from October 1, 1822, to August 16, 1823, or 10 months and 15 days at 6 per 100 per annum		4,555.23
	Sum		91,321.82

CREDITOR.

1822.			
Oct. 1.	Balance due on this date, as per account presented to His Excellency General Soublette and found by him correct		86,766.59
1823.			
Aug. 16.	To 60 bales Barinas tobacco, received from General Soublette, amounting in clipped coin to 1,674.93, which, being reduced to hard dollars at 12½ per 100 discount, make		1,465.56
Aug. 16.	To amount received from the intendant in drafts on the La Guayra custom-house	$18,050.00	
	To discount of 15 per cent in place of 35 per cent, allowed on $7,000 to equalize that amount with *macuquina*	1,050.00	
		17,000.00	
	To 18¼ per cent on $7,000, to make the aforesaid *macuquina* equal to hard dollars	$1,283.33	
	To 33⅓ per cent on $10,000 for loss upon the drafts and *macuquina*	3,333.33	
		4,616.66	
			12,383.33
1823.			
Aug. 16.	Balance due on this date		77,472.93
	Total		91,321.82
Aug. 16.	To balance due this date		77,472.93
1824.			
Nov. 21.	Interest on the above from August 16, 1823, to November 21, 1824—15 months and 5 days		5,875.02
	Balance due to date		83,347.95

JACOB IDLER.

CARACAS, *November 21, 1824.*

No. 4.

The Government of Colombia in current account with Jacob Idler and his associates.

DEBTOR.

1821.			
Oct. 4.	To 4,360 French muskets, arrived on this date at La Guayra under contract of September 21, 1820, to be paid half of the amount 30 days after this date and the other half 6 months after this date, with interest at 6 per 100 per annum, at $12 per musket		$52,320.00

CREDITOR.

1821.			
Oct. 20.	To 428 *fanegas*, 6 pounds, of cocoa, received on account, at $16 per *fanega*, in clipped coin	$6,848.96	
	Do., do., in drafts, to be used to pay a fourth part of duties on imports in the La Guayra custom-house	24,340.54	
		31,189.50	
	Less 25 per 100 of loss or depreciation in the drafts and difference between clipped coin and hard dollars	6,085.13	
			25,104.37
1821.			
Nov. 4.	Balance due		27,215.63
			52,320.00
Nov. 4.	Balance due on this date		27,215.63
1824.			
Nov. 21.	To interest from April 4, 1822, to November 21, 1824, on the above balance of $27,215.63—two years, seven months, and 17 days—at 6 per 100 per annum		4,294.42
Nov. 21.	Total balance due to date		31,510.05

Errors and omissions excepted.

JACOB IDLER.

CARACAS, *November 21, 1824.*

I, Juan de Escalona, of the Order of the Liberators, a brigadier-general, and the intendant of this department, do hereby certify that I have examined the foregoing account of the Government of Colombia with Mr. Jacob Idler for 4,360 French muskets, and I have found that its charges agree with the prices and terms of the original contract I have had before my eyes, and that the items on the credit side also agree with the certificates issued by the respective officers, which I have also had before me. For these reasons I judge the said account to be correct, just, and well made; and, at the request of Mr. Jacob Idler, I have issued the present certificate, at Caracas, this 7th day of February 1825.

J. DE ESCALONA.

[NOTE.—A like certificate of the Intendant Escalona is appended to each of the other three accounts, with the possible exception of the first.]

Ogden's liquidation at Bogota, December 31, 1824.

(No. 1.)

BOGOTA, *December 31, 1824.*

This commission having seen and examined the documents presented as to the amount which Mr. Henry Ogden, agent of Messrs. Bogert & Kneeland, demands as what belongs to them for *three-fourths* of the account liquidated in *Expediente* No. 6, for Mr. William Duane, agent of Mr. Jacob Idler, upon contracts which he made with Mr. Manuel Torres, agent of the republic, for himself and in the name of his associates, the gentlemen before named, it declares that the following items result in favor of said gentlemen against the republic:

	Interest from January 1, 1822, to December 31, 1824.	Interest to end of December, 1821.	Principal.
For 92,411.73 pesos charged by the party interested as balance of 92,702.93 pesos resulting from the liquidation heretofore made for Mr. William Duane as agent for Mr. Idler, deducting 291.20 pesos for 18 fanegas and 26 pounds of cocoa, at 16 pesos, which Mr. W. P. Lemon admits that he had received over and above the 428 fanegas 6 pounds charged to him by the custom-house at La Guayra, the whole of which amount proceeds from articles of war delivered at Angostura; and it having been provided by the supreme government that this commission shall make the liquidation and distribution of the proportion which belongs to the gentlemen associated with Idler, whom Mr. Ogden represents, being three-fourths part, there results in behalf of the said gentlemen an item of 69,308 pesos 7⅛ reals, and on account of Mr. Idler 23,102.77 [pesos]			69,308. 7⅛
For 4,448 pesos 7¾ reals, three-fourths part of the interest at 6 per cent, as expressly stipulated, running from their respective dates to December 31, 1821, belonging to the said associates, and to Idler 1,496 pesos 2¼ reals		4,488. 7⅛	
For 12,610 pesos 1 real for the three-fourths part of interest due to the said gentlemen from January 1, 1822, to December 31, 1824, because of 6 per cent annually arising to the party interested from 1822 by the liquidation for Duane, in addition to the above	12,610. 1		
For the item of 7,077.62 pesos, which represent the 8,847 pesos sencillos acknowledged by the commissioners at Angostura in favor of Mr. Jacob Idler for materials of war which he sold to the government, as appears by the *vale* signed by Mr. Henry Ogden, agent of Messrs. Bogert & Kneeland, to whom belong, as their three-fourths part, 5,308 pesos 16⅛ reals, and to Idler 1,769 pesos 3¾ reals			5,308. 1⅛
For the three-fourths of interest at 6 per cent, as agreed on, belonging to said gentlemen, accrued from September 5, 1820, to the end of December, 1821, 420 pesos 4¾ reals		420. 4¾	
For that incurred from January 1, 1822, to the last of December, 1824, 955 pesos 3 reals	955. 3		
For 2,238 pesos 4 reals, interest at 6 per cent on the amount, 74,617 pesos 1⅞ reals, to which foregoing items amount, from January 1, 1825, to June 30 of same year, as resolved by the government	2,238. 4		
By the foregoing adjudication and liquidation there result in favor of Messrs. Bogert & Kneeland the amount of items aforesaid			74,617. 1⅞
For interest to the end of December 1821, 4,909 pesos 4 reals			4,909. 4
Interest accrued from January 1, 1822, to June 30, 1825, 15,804 pesos 5½ reals			15,804
Which items added amount in all to 95,330 pesos 5½ reals			95,330. 5½

(Signed)

(No. 2.)

BOGOTA, *December 31, 1824.*

This commission having seen and examined the documents presented by Mr. Henry Ogden, showing the amount which, as agent of Messrs. Bogert & Kneeland, he demands from the republic for their part of the total value of the guns sent from North America for the use of Colombia, under the contract between Manuel Torres, agent of that government, and Mr. Jacob Idler, for himself and in the name of his associates, it declares that the following items result in favor of said gentlemen against the republic:

	Interest to the 31st of December, 1824.	Principal.
For 52,320 pesos, value of 4,360 guns delivered at La Guayra October 14, 1821, at the price of 12 pesos, in virtue of the contract above referred to, made September 21, 1820, upon which amount have been credited the following sums: 6,848.96 pesos fuertes for 428 fanegas 6 pounds cocoa, at 16 pesos fuertes, and 24,340.54 pesos in *vales* for one-fourth of the duties, which, being *macuquina* money, when reduced to fuertes are 19,472.44 pesos, and make in all 26,321.40 pesos; which, deducted from the charge of 52,320 pesos, leaves of the principal 25,998 pesos 4½ reals, to be divided between Messrs. Idler and his associates in the proportion of five twenty-fourths for Idler and nineteen twenty-fourths for his associates, Bogert & Kneeland, in accordance with which there is due to these the amount of 20,582 pesos 2½ reals, and to Idler that of 5,416 pesos 2 reals, all being proved by the documents in the *expediente*		20, 582. 2½
For 4,235 pesos 1½ reals of interest accrued from October 14, 1822, six months after the delivery of the guns, as expressly stipulated for, at 6 per cent as agreed upon, until December 31, 1824, which amount being divisible between Messrs. Idler and his associates, there belongs to these for their nineteen twenty-fourth parts, 3,352 pesos 7⅛ reals, and to Idler 882 pesos 2⅛ reals	3, 352. 7⅛	
By the foregoing adjudication and liquidation there results in favor of Messrs. Bogert & Kneeland on account of the above item of 20,582 pesos 2½ reals		20. 582. 2½
Interest to the end of 1824, 3,352 pesos 7⅛ reals		3, 352. 7⅛
Which items being added amount to 23,935 pesos 1⅜ reals		23, 935. 1⅜

(Signed)

Michelena's settlement.

BOGOTA, *June 30, 1825.*

This commission having seen and examined the documents presented and filed in the archives of the liquidated foreign debt, Nos. 39 and 42, it thence determines the part belonging to Mr. Jacob Idler, now demanded from the republic by Mr. Santos Michelena, as agent for the said Idler, and declares that as adjudicated and liquidated the following items result:

	Interest from January 1, 1822, to December 31, 1824.	Interest to the end of December, 1821.	Principal.
1. Value of 4,360 guns sold to the government, amounting to 53,220 pesos, from which sum being deducted 26,321.40 pesos, received by the parties interested, in a *vale* for discount of duties, and 428 fanegas 6 pounds of cocoa, there remained 25,998 pesos 4½ reals that was liquidated, of which belonged to Messrs. Bogert & Kneeland, as appears by *Expediente* No. 39, nineteen twenty-fourth parts, and so is left for this liquidation to Mr. Jacob Idler, for his five twenty-fourth parts, 5,416 pesos 2 reals, as appears from the said *expediente*			5, 416. 2

	Interest from January 1, 1822, to December 31, 1824.	Interest to the end of December, 1821.	Principal.
For 1,044 pesos 6 reals of interest incurred from April 4, 1822, six months after the delivery of the guns, under the express stipulation of 6 per cent, to June 30, 1825...	1,044. 6		
2. For balance resulting from the liquidation in *Expediente* No. 42, amounting to 92,702.93 pesos, from which amount having been deducted 291.20 (value of 18 fanegas 26 pounds of cocoa received by the parties in interest over and above the 428 fanegas 6 pounds above mentioned, in La Guayra) remain 92,411.73 pesos, of which amount a liquidation has been made as to the three fourth parts belonging to Messrs. Bogert & Kneeland, so that there remain, for the one-fourth part of Mr. Jacob Idler, 23,102 pesos 6 reals, all of which appears from *Expediente* No. 42, above cited			23,102. 6
Interest on the last amount at 6 per cent, as stipulated, from the respective dates that appear in the *Expediente* No. 6 of William Duane, to December 31, 1821, 1,496 pesos 2¾ reals		1,496. 2¾	
That accrued from January 1, 1822, up to June 30, 1825, 4,851 pesos 4 reals	4,851. 4		
3. For 8,847 pesos sencillos, value of various war material sold to the government, as acknowledged by the commission at Angostura, in favor of Mr. Idler, as is shown by the *vale* that appears in *Expediente* No. 42, which being reduced to pesos fuertes make the sum of 7,077.62 pesos, of which three-fourths belonged to Messrs. Bogert & Kneeland, leaving for this liquidation in favor of Mr. Idler 1,769 pesos 3¼ reals			1,759. 3¼
Interest at 6 per cent, as expressly agreed upon, from September 5, 1820, to December 31, 1821, 140 pesos 1⅜ reals		140. 1⅜	
That accrued from January 1, 1822, to June 30, 1825, 371 pesos 4⅜ reals	371. 4⅜		
By the foregoing adjudication and liquidation, results in favor of Mr. Jacob Idler against the republic for the said particulars, 30,288 pesos 3⅜ reals			30,288. 3⅜
Interest to end of December, 1821, amounts to 1,636 pesos 3⅜ reals			1,636. 3⅜
Same accrued from January 1, 1822, to June 30, 1825, 6,267 pesos 6⅜ reals			6,267. 6⅜
Which items, being added together, amount in all to 38,192 pesos 5⅜ reals			38,192. 5⅜

(Signed)

Dissenting Opinion.

Mr. Andrade, Venezuelan commissioner, delivered the following dissenting opinion:

"In two essential points I regret to dissent from the opinion of my learned colleagues: (1) In regard to their conception of the character of this court and their mode of understanding and applying in relation thereto the principle of the validity and authority of foreign judgments; and (2) with respect to their views of the responsibility of Venezuela in consequence of the liquidation, which was the primary cause of this claim.

"1. As to the first point, it will suffice to read the passages in Vattel and Wheaton cited in support of their opinion and the reflections preceding these to perceive that my colleagues treat this commission as a domestic court of the United States or of England, and as if the two Venezuelan judgments appearing as evidence in this case were foreign

judgments. According to my apprehension, the commission *is what it is* (*id quod est*), an international court of arbitration of the United States of America and the United States of Venezuela! There would be little propriety in saying that before such a court Venezuelan judgments are foreign judgments.

"There is a substantial difference between a domestic court instituted by a sovereign for the purpose of distributing justice within his territorial jurisdiction and a court of arbitration especially instituted by two sovereigns for the settlement of certain matters in dispute between them. The one springs from domestic power, and has exclusive right of jurisdiction within its own territory; the other springs out of the autonomy and free will of both contracting parties, and its jurisdiction may be said to extend to the territory of both. The former in adjudging performs an act of national jurisdiction; the latter an act of international jurisdiction. The municipal court of a state can not but consider as *foreign* the judgments of the municipal courts of another state, and in virtue of the principle of national independence has the right to subject the recognition of their validity and authority to rules more or less restrictive. To a court of arbitration created by two states judgments of one of them can not be *foreign*, and the confidence voluntarily put by both in its impartiality and prudence should bind it to apply openly and frankly to the judgments of both the general principle of the law of nations, *res judicata pro veritate accipitur*.

"Moreover, here two judgments are treated of, both rendered by Venezuelan courts; one in support of the claim, the other denying it. My colleagues have applied to the first the principle of the law of nations adverted to, and to the second the doctrine of the exclusive national jurisdiction, thus establishing a distinction which has not seemed to me perfectly conformable to justice, as I understand it. Justice would put both judgments upon the same footing. In regard to the former, the Government of Venezuela had contended that the court which rendered it had not jurisdiction over the cause. If, then, preference, perhaps undue, were to be given to *municipal* doctrines and the course of *revision* were to be adopted, the power which that court professed to have of taking jurisdiction ought also to be looked into, because if it had not that power its judgment was a mere nullity not entitled to any respect. It is of no use to say that the question of jurisdiction over that cause was in the last resort decided against the government by the supreme court, for under the course adopted that decision itself was also reexaminable.

"But to prefer such course without proper means to pursue it (inasmuch as serious doubts may be entertained whether the commission has the means) was probably to run risk of error and injustice. 'Some of the witnesses may be since dead; some of the vouchers may be lost or destroyed. The merits of the case as formerly before the court upon the whole evidence may have been decidedly in favor of a judgment; upon a partial possession of the original evidence they may now appear otherwise. * * * Or is the court to review the former decision, like a court of appeal, upon the old evidence? In a case of covenant, or of debt, or of a breach of contract, are all the circumstances to be reexamined anew? If they are, by what laws and rules of evidence and principles of justice is the validity of

the original judgment to be tried? Is the court to open the judgment and to proceed *ex æquo et bono*? Or is it to administer strict law and stand to the doctrines of the local administration of justice? Is it to act upon the rules of evidence acknowledged in its own jurisprudence or upon those of the foreign jurisprudence? These and many more questions might be put to show the intrinsic difficulties of the subject.' (Story, *On the conflict of laws*, § 607.)

"Besides, for me, that which the commission was to decide was not the merits of the Venezuelan judgments, but the real justice of the claim itself, viz, that which was submitted to Sprotto in January 1830, arising out of the differences between the liquidation made by the treasurers, and that by Idler. To examine *de novo* the original accounts, upon which those two liquidations were made, was, in the actual state of things, the only right way to establish whether the Ogden liquidation contained 'undue rebatements and substantial errors' by consequence of which Idler had been overpaid $37,000 at Bogota; or whether if, on the contrary, some items of charge against the government had been omitted therein which Idler had the right to add afterward to his account, and by reason of which he became creditor of the public treasury for the amount of $70,520.11½, which the treasury court ordered to be paid to him in October 1832; in short, the only correct method to make evident the rights of the parties and the genuine justice of the claim.

"2. As to the other point of disagreement, I can not entertain any doubt that the political existence of Colombia definitively dated from the 17th of December 1819. The law of that date, by virtue of which the said republic was declared to be constituted, positively says:

"'ART. 1. The republics of Venezuela and New Grenada *remain from this day united as an individual one* under the glorious name of *Republic of Colombia*.'

"'ART. 13. *The Republic of Colombia shall be solemnly proclaimed* in the towns and in the armies, with public festivals and rejoicings, which shall be done at this capital *on the 25th of the present December*, in commemoration of the birth of the Saviour of the world, under whose patronage *this longed-for reunion*, by which the state is to be regenerated, *has been attained*.

"'ART. 14-2. *The present fundamental law of the Republic of Colombia* shall be solemnly promulgated in the towns and in the armies, *entered in all the public records, and deposited in all the archives of the chapters, municipalities, and corporations, both ecclesiastical and secular*.

"'The arguments of Bolivar,' as stated by General O'Leary, in his Memoirs, 'prevailed, and he had the good fortune to see his noble efforts meet with victory. *The fundamental law constituting the Republic of Colombia was sanctioned at Angostura on the 17th of December 1819*, a memorable date in the annals of the country, for two reasons: because it was the day of the birth of the great republic, and of its founder's death.'

"'Meanwhile the Congress of Angostura elected the chief magistrates *the same day in which it decreed the Republic of Colombia*. Bolivar was elected president.

"'In the short period of two weeks of unceasing labor and diligence, *Bolivar laid down the foundations of a great republic*, and dictated measures appropriated to insure its progress at home, and to establish its credit abroad. To this end he appointed Don Francisco Antonio Zea, in whose

ability and clear intelligence he had the greatest confidence, as special commissioner. Zea carried with him instructions *to examine all pending claims, to consolidate the debt, and to negotiate a loan. He ought also to solicit the recognition of the Republic of Colombia, and to conclude treaties with those nations wishing to do so.'*

"General Francisco E. Gomez addresses himself to *His Excellency the President of Colombia, in writing to Bolivar,* from the city of Asunción, February 14, 1820.

"General Santander, Vice-President of Cundinamarca, writes from Bogota, February 15, 1820, to *His Excellency the President of Colombia,* General Simon Bolivar, acknowledging the receipt *of the fundamental law of the Republic of Colombia.*

"'On no occasion like the present one,' adds General Santander, 'does Your Excellency so justly deserve the glorious title of *Father of the Republic.* Your Excellency has liberated her from her tyrants, *has reunited her,* and will also present her, before the eyes of the whole world, *as free, independent, and organized.'*

"Observe also how Bolivar himself speaks in his proclamation of March 3, 1820, the day of his entrance in Bogota, returning from Angostura:

"'*Colombians! The Republic of Colombia proclaimed by the General Congress* (of Angostura) *and sanctioned by the free people of Venezuela and Cundinamarca* is the seal of your independence, prosperity, and national glory. The foreign powers, on presenting yourselves before them, *constituted upon solid bases.* * * * Spain herself, on seeing you standing up over the immense ruins, which she has heaped up within the boundaries *of Colombia.* * * *

"'*Colombians!* The twilights of the day of peace already illuminate the sphere *of Colombia.*

"'Cundinamarcans! I wanted to be convinced that you still wished to be *Colombians.* You answered to me, "Yes," and I call you *Colombians.*

"'Venezuelans! You have always shown the ardent interest to belong *to the great Republic of Colombia,* and your wishes are fulfilled. The aim of my life has been one: *the creation of the free and independent Republic of Colombia* between two brotherly peoples. *I have succeeded! Long live the God of Colombia!'*

"So Bolivar's reply to Morillo, who proposes an armistice, on April 21, 1820:

"'*The Republic of Colombia* congratulates itself to see the rising up of the day in which Liberty extends her blessed hand over the unhappy Spain, and to see her ancient mother country follow her on the pathway of reason.

"'*The people of Colombia* being determined * * * I take the liberty to hand Your Excellency the fundamental law herewith inclosed (that of Angostura) which establishes the only basis on which *the Government of Colombia* can treat with the Spanish Government.

"'A single cry resounds throughout *Colombia.*' (See the treaty of armistice.)

"Letter of Bolivar to Brigadier Torres, Spanish governor of Carthagena, Turbaco, August 26, 1820:

"'It is the summit of madness, and more yet, of ridiculousness, to propose to the *Republic of Colombia* her submission to Spain.'

"Another time, Bolivar, writing to Morillo, in regard to the armistice, from San Fernando, October 26, 1820, says:

"'I will give Your Excellency an idea of the bases that I propose for the armistice, in order that, should they be acceptable, Your Excellency may send his delegates to negotiate and conclude it at my headquarters.

"'An armistice will be maintained during four or six months, *in all the departments of Colombia.*'

"Finally, there is not one function of the domestic or external life of Venezuela and New Granada, subsequent to December 17, 1819, which does not appear to have been accomplished in the name *of the Republic of Colombia* and by authority of the constitution of that date. Thereafter, there is not a single act of Bolivar or of the vice-presidents of Venezuela and New Granada, or the permanent commission of the Congress of Angostura, or the municipalities and courts of justice, which does not bear testimony to the fact that a new state, *de facto et de jure*, started into existence on the 17th of December 1819, and that a new sovereignty was established in the world for all the effects of political and civil life under the name of *Republic of Colombia*. This is a fact well recognized thenceforward by history and international law, which is not permitted to-day to be put in doubt.

"'Venezuela,' says Calvo, 'took part in the war of independence in 1811, *and was united in* 1819 to Ecuador and New Granada *to form the Republic of Colombia.*'

"When Idler sold to Torres, in 1820, the three invoices of flints, firelocks, and muskets, he knew very well that he sold them to Colombia and not to Venezuela, which was already incorporated in the former; he knew it because his accounts for those invoices were made out against Colombia, and he always dealt with Colombia in regard to the liquidation and settlement of the same. This is a proof of fact beyond all question. Therefore, when, in 1830, Venezuela was again severed from Colombia, he had no other right against her, if anything were still due to him, on account of the above mentioned invoices, than that which was left to him by the agreement concerning the partition of the general debt of Colombia between the three sections which had constituted the said republic. When a state is divided the law of nations only requires that its obligations be proportionately distributed among the new states into which the former has been divided.

"For the same reason the responsibility of Venezuela in this case could never be extended beyond the 28½ units of the debt of Colombia assigned to her by virtue of the aforesaid agreement; and I believe that this commission can not in justice impose upon her a larger one. Nothing done or said to the contrary by her own government or courts, or by the Board of Liquidation of Bogota, can have had for effect to make her obligation to Idler either better or worse. In order to change the right of the one, or the obligation of the other, it was necessary, previously, to change the facts which had produced them; and the facts that Idler contracted with Colombia, and that Venezuela only accepted the obligation of paying 28½ per cent of the debt of the former, have not been altered.

"Such is my opinion."

Sale of Provisions: Allowance of Interest: Cases of Donnell's Executor, and of Hollins & McBlair.

In the latter part of April 1812 there arrived at La Guayra, Venezuela, from Baltimore, in the United States, two cargoes of flour belonging to merchants of Baltimore, citizens of the United States, and consigned to Gerardo Patrullo. Patrullo, as agent of the owners, sold the flour to Pedro Eduardo, agent of the Venezuelan Government, agreeing to receive in payment a certain quantity of coffee. Only a part of the coffee was delivered, and as to the undelivered part Patrullo, on July 25, 1812, entered a protest, in which he also claimed demurrage apparently paid by him to the vessels while they were waiting for the undelivered coffee. After his return to the United States he had some correspondence with his principals in Baltimore, and the claim then disappeared till 1835, when one of the interested parties in Baltimore submitted it to Mr. Forsyth, then Secretary of State. By the correspondence of Patrullo with his principals in 1814 it appeared that the Spanish loyalist government, which regained its ascendancy in Venezuela a few days after he made his protest, and into the hands of which the flour had fallen, paid him off with a deposit of Venezuelan paper money, of little or no value. Patrullo, in the correspondence in question, took the ground that this could not be considered as payment, for the reason that coffee was to be given for the flour, and that the paper money was, as he said, to be received back by Venezuela.

The claim was presented to Venezuela. That government replied that Patrullo had received full payment for the flour in a custom-house credit allowed him by the Spanish authorities, and that this credit, in a long course of dealings, from 1812 to 1820, had been extinguished by debits which he passed through the custom-house when it was under the control of the Spanish loyalists. Did this transaction discharge Venezuela?

It was argued on the part of Venezuela (1) that the law of Spain, which was alleged to have been in force at the time of Patrullo's dealings with the Spanish authorities, permitted one person to pay the debt of another, even against the latter's will; and (2) that the law in force in Venezuela at the time when the contract was made treated a foreign factor as to third parties as a principal.

As to what was the law in force in Venezuela at the different periods in question, there were opinions of counsel but no

proof in the form usually observed in proving foreign laws. The commission therefore pronounced no definitive opinion on the question, but adopted, as "the most sensible and enlightened rule," the doctrine that the relations of the parties to a contract are to be deduced "not from a fixed presumption of law, but from their intention, as an inference to be drawn from the facts in each particular case." (Citing *Green* v. *Kapke*, 36 Eng. Law and Eq. 396, 399; *Oelricks* v. *Ford*, 23 Howard, 49–65.) Applying this rule, it appeared upon the face of the proofs that it was understood that Patrullo was acting not for himself but merely as the agent of another, and that the theory of payment really rested upon an alleged fraud by Patrullo, which the Spanish authorities, strangers to the original contract, enabled him to perpetrate. It appeared that it was not till January 15, 1813, that Patrullo applied to the Spanish authorities for a custom-house credit for the balance due on the flour, and that a credit was allowed him in the following April to the amount of 8,964.3 reals. On what basis this allowance was made it was impossible from the proofs to say. Counsel for the claimants contended that it was for a lot of flour in which Patrullo was individually interested. The commission allowed, as principal on one cargo, $6,364.32, and on the other, $7,041.80, each being the amount of Venezuelan paper deposited by the Spanish authorities on the respective cargoes.

Interest was allowed on these sums at the rate of 5 per cent from May 14, 1868. The commission (Mr. Findlay delivering the opinion) said that the case was one that called for "the rigid application of the doctrine that interest is the indemnification which the law allows for detaining money unjustly." The claim was not presented to the United States till 1835. In 1838 the diplomatic correspondence ceased with the apparent acceptance by the United States minister at Caracas, though under protest, of the defense of payment by the Spaniards. The claim then ceased to be prosecuted till 1868, when it was revived before the commission under the convention of 1866. In this relation Mr. Findlay said:

"There is nothing that we can perceive in the origin and history of such a claim which calls for an allowance of interest such as would be proper and just in any ordinary case where money lawfully due has been unjustly detained by the debtor without any excuse, legal or equitable, for its nonpayment. It has been contended that the conduct of the Venezuelan

authorities in setting up the contradictory defenses of payment to Patrullo by the Spaniards and of payment by the deposit made by him in paper money shows insincerity and double dealing, and a deliberate design to escape from performance of a plain obligation.

"When it is remembered, however, that a period of twenty-five years had elapsed before the claim was originally presented, and that in the mean time the community represented by the political entity which goes by the name of Venezuela, had first been patriot and then Spanish, then patriot and Spanish again, and then patriot; and had besides been merged in another sovereignty for a period of ten years included in this interval, the whole period being marked by a continued struggle for existence, frequent changes in administration, and all the uncertainty and confusion in the orderly administration of government and in the keeping of regular accounts, which such a dislocated and revolutionary career involves, it is no cause for injurious criticism that her officials, when called upon to explain a transaction as antiquated and obscure as this, should have taken the course complained of, but it is rather matter of surprise that they succeeded in rescuing as much as they did from the confused rubbish at hand upon which to construct any defense at all. At all events, we do not think that it would be either a wise or a just exercise of the discretion vested in us to allow interest prior to the date of the Caracas Commission."

John Donnell's executor v. *Venezuela*, No. 3, and *Hollins & McBlair* v. *Venezuela*, No. 4, United States and Venezuelan Claims Commission, convention of December 5, 1885.

Mr. Andrade, the Venezuelan commissioner, contended (1) that "the payment made by Spain for Venezuela was law and released the latter of her obligation, at least, granting that Patrullo was the legal person entitled to receive the payment," and (2) that Patrullo, by the law in force in Venezuela, was such person.

Mr. Little, in a separate opinion, said:

"The salient facts appear to be:

"(1) The claimants bartered their flour to Venezuela for coffee—a barrel of the former for two quintals of the latter.

"(2) Venezuela received all the flour, 1,020 barrels.

"(3) They in return received only a part of the coffee.

"(4) There was a balance due them which *they* never received from any source, and which *she* never delivered or accounted for to anybody.

"The defense is, that Patrullo, their agent in the transaction, after the Spaniards obtained control, secured from them a credit on his own account on the custom-house books of La Guayra for the value of this balance due, and that that canceled the obligation.

"I think not. There is no evidence of any authority from the claimants to him to deal with that balance on his own account, or otherwise than to receive and forward the produce. I am not prepared to say that an agent thus beyond the reach of his principals might not, under some conceiva-

ble circumstances, deal with their credits outside of the scope of his general authority, without their express consent. It may be that if Venezuela, as a political entity, had become irretrievably extinguished, and that fact had been generally known and acknowledged when Patrullo got the credit, the law would have presumed an assent on the part of his principals to the transaction, made in good faith, as the only hope of any return left to them.

"But such was not the situation at that time in Venezuela. The spirit of liberty was still abroad in the land. Its citizens were preparing for a renewal of the conflict, and had, in fact, an army in the field. The chances of payment to the principals were not gone, nor even, perhaps, desperate, in April 1813, when Patrullo got the credit. Under such circumstances their authority or affirmance would be necessary to bind them.

"Unquestionably the *lex loci contractus* entered into and formed a part of the contract of barter with Venezuela. But no law of that country has been cited, as I conceive, that would authorize a broker thus to deal with his principal's property.

"And I do not at all question the law quoted by Mr. Commissioner Andrade, to wit:

"'And not only is a person acquitted of what he owes by paying himself, but also by another paying in his name. And although he who owes such debt did not know that the other was paying for him, still he would be acquitted, and even if he knew it and opposed it.'

"The difficulty is in the application to the facts. Spain did not pay the balance for or *in the name* of Venezuela. There was no purpose to free her enemy from the obligation, either on her part or that of Patrullo. The latter, as the evidence shows, always regarded that obligation as continuing, and even, as it would seem, attempted to discharge it in worthless Venezuelan paper money, as pointed out by Mr. Commissioner Findlay.

"The claims were not presented to the Government of the United States in their true character, not from any purpose to deceive on the part of the claimants, but because of lack of full information from their agent. The demands were not therefore well understood by either government, and for that reason—visiting the penalty upon those necessarily to be charged with the fault—they should not bear interest prior to their full elucidation, which, it may be assumed, occurred before the former commission."

Immigration Contract: Question as to de facto Governments: Case of Beales, Nobles & Garrison.

"After several revolutions in Venezuela, continued at intervals of greater or less duration from 1848, leaving the country in an unsettled and almost chaotic condition, General Paez assumed the dictatorship on the 29th of August 1861, and from that time to the ratification of the so-called treaty of Coche, on the 22d of May 1863, held possession of the capital at Caracas. During the period of his government, however, outside of the province of Caracas, the country was by no means pacified, but in one part or another of its extensive territory was embroiled in civil tumult and insurrection aimed against the ruling power, by

the faction which it had succeeded in displacing. This state of affairs was terminated by the treaty referred to, and in consequence of it General Falcon succeeded Paez, who abdicated his dictatorship, and became the President of the Republic on the —— day of July 1863, and was confirmed in his place by a constitutional convention which assembled on the 21st of December 1863. The United States refused to recognize the Paez government, and disavowed the act of its minister, Mr. Culver, in attempting to do so.

"This being the condition of the government and the country, a Colonel Nobles, in the winter and early spring of 1863, while on a visit to Caracas for the purpose, succeeded in obtaining, through the aid of his associate, Dr. Beales, a power of attorney from General Paez to Simon Camacho, then consul of Venezuela in New York, authorizing him to enter into contracts with the said Nobles and Beales for the establishment of a steamship service between New York and La Guayra, and also for the 'establishment of a constant current of immigration to the Republic of Venezuela.' To carry these enterprises into due effect, 'the said consul will act without any limitation,' so the power recites, 'only following as far as possible the instruction to be communicated to him by my secretary general.' For fear that this broad grant of power might be restrained or limited by some unforeseen construction, the general proceeds to add, 'and, to remove at once any objections which might be urged against the validity of the terms in which this authority is granted, I, José Antonio Paez, Supreme Chief of the Republic of Venezuela, hereby approve *now and for all times whatever may be contracted* for by Simon Camacho, consul of Venezuela in New York, with respect to the said contracts for the establishment of a line of steamships between New York and La Guayra, and the immigration and colonization scheme.'

"Under this power Camacho, on the 1st of May 1863, contracted for the establishment of the steamship line, by the terms of which the first steamer was to sail within one hundred days from the date of the contract, which time was afterward, on the 4th of June, extended to eight months in addition—that is, say, eleven months in all. And which extension, by the way, was contrary to the direction of the Secretary, and opposed to one of the principal objects of the scheme. Other steamers were to follow as they could be made ready, and they were to be suitable for carrying the mails, twenty-five passengers and

six hundred tons merchandise. Preference was to be given to the effects, articles, and properties of the Government of Venezuela over all other cargoes and passengers, to be paid for, however, at the usual rates charged to merchants or private individuals. Officers and troops of the government were to be carried at reduced rates. Two young men, to be selected by the government, were also to be carried free of expense, in order that they might receive practical instruction in navigation and the management of steam machinery. Other provisions were made for the carriage free of seeds, plants, etc., not exported for profit. For these services and some others Camacho agreed that Venezuela should pay $50,000 in gold coin of the United States yearly, payable in monthly instalments of $4,166.66, to be deducted from the 40 per cent duty belonging to the government on the *imports* and *exports carried* by the steamers, but this limitation was removed by the 12th article of the contract, which expressly stipulated that any deficiency on this account occurring during any month should be made good by the receipts of the next month, although the company was to bear the loss on any deficiency at the end of the year. The thirteenth article then provides that this payment of $50,000 shall continue for three years only from the date of the contract, after which time the sum of $30,000 shall be paid for the period of twenty-seven years, as provided in the fourteenth article.

"The eighteenth article then stipulates for submission to arbitration at Caracas: 'Any doubts, *differences*, *difficulties*, or misunderstandings that may arise from, or have any connection with, or in any *manner relate* to this contract, *directly* or *indirectly*,' and then, after providing that 'the opinion of the two arbitrators or the decision of the umpire, should there be one, shall be considered as a judgment,' etc., goes on to say, 'and, *therefore*, this contract shall *never*, *under any pretext or reason whatever*, *be cause for any international claims or demands*.' This provision is found in both contracts. It has already been observed that Messrs. Beales and Nobles, who alone sign this contract, put themselves under no pecuniary obligation whatever for the due performance of its stipulations, except an ineffectual and meaningless pledge of person and property; but it is now to be observed that these parties do not contract in behalf of themselves at all, but '*in behalf of the stock company to be formed* upon the following terms and conditions,' etc.

"Accordingly this imaginary company without a name, which appears only by reference to it as a body yet to be formed, is put forward by Beales and Nobles as the party agreeing to the terms of a contract which they in its behalf bind themselves and their successors to perform Beales and Nobles, except as becoming security in the way mentioned for the company, don't agree to anything. Each article in the contract begins with a recital that '*the company* agrees and binds itself'. It is too clear for argument that the contract was made by Beales and Nobles in behalf of a company which was yet to be created, and that, treating themselves as members of the said company, as if it had already been established, sign, as '*members* of *said* company, for themselves and their successors,' accompanying the signature with the pledge of their persons and properties before referred to. Treating it as a contract, however, in the absence of any bond for performance, Venezuela could only look in case of failure to Beales and Nobles. The company which had no existence certainly could not be responsible.

"This being the character of a contract which was to run for thirty years, made under a discretionary power of this kind, the question arises whether General Paez, as the lawful *de facto* authority of the state, had the right in its name to grant such a power. If he had, of course the contracts executed in pursuance of the power would be valid and binding upon any succeeding government, and any attempt to annul them, without compensation to the parties injured by the revocation, would be unjustifiable and illegal. In stating the proposition in this way it will be observed that we are assuming that the contracts are a lawful emanation of the power, although on careful analysis it will be perceived that, in the very conception of his authority, Mr. Camacho exceeded his power. His power was 'to contract with *either* Dr. J. C. Beales or Colonel W. H. Nobles, or with both, or with any other person or company of acknowledged responsibility.' He did neither or any of these things as far as the steamship contract is concerned. He entered into a contract, as we have before shown, with Beales and Nobles, not in behalf of themselves, but in behalf of a company yet to be organized. This was not a contract with either Beales or Nobles severally, or with both jointly, nor yet was it a contract with any other person or company of acknowledged responsibility. It was a contract in behalf of a company *in futuro*, the responsibility of which, of course, could

not be ascertained, and whose very existence was speculative and conjectural. But waiving this, and recurring to the question as to whether the Paez government had the right to grant the power to Camacho, it may be well enough to make one or two general observations on the subject of *de facto* governments.

"There is a well-recognized distinction between a state and a government or the governing body. The state is a person in law, and when once admitted into the family of states, preserves its identity as an international person, until it is lost by absorption in some other state, or by the continuance of anarchy so prolonged as to render reconstitution impossible or, in a very high degree, improbable. (Halleck's International Law, p. 29.) As a person invested with a will which is exerted through the government as the organ or instrument of society, it follows as a necessary consequence that mere internal changes which result in the displacement of any particular organ for the expression of this will, and the substitution of another, can not alter the relations of the society to the other members of the family of states as long as the state itself retains its personality. The state remains, although the governments may change; and international relations, if they are to have any permanency or stability, can only be established between states, and would rest upon a shifting foundation of sand if accidental forms of government were substituted as their basis. Idem enim est populus Romanus sub regibus, consulibus, imperatoribus, says Grotius, as an argument for the continued responsibility of the state, although the particular character of responsibility he is speaking of is an obligation to respect treaties. (Grotius, I. II. chap. ix., v. 8.) All leagues and treaties are national and will bind legal princes though made with usurpers. (Tindall on Law of Nations; 1 Phillimore, p. 174.) It is a clear position of the law of nations, says Kent, that treaties are not affected nor positive obligations of any kind with other powers or with creditors weakened by internal changes in the form of government. The body politic is the same although it may have a different organ of communication. (Kent, vol. 1, pp. 25–26.) A state is responsible for the wrongs done to the government or subjects of another state notwithstanding any intermediate change in the form of government or in the persons of its rulers. Treaties of amity, commerce, and real alliance remain in force; *public* debts, either to or from the state, are neither canceled nor affected. (Halleck, p. 77.)

"A state subject to periodical changes in the form of its government or in the persons of its rulers has a deeper interest, perhaps, in the maintenance of this doctrine than another more securely rooted in the principles of social order, but it is absolutely necessary to the whole family of states, as the only possible condition of intercourse between nations. If it was not the duty of a state to respect its international obligations, notwithstanding domestic changes, either in the form of the government or in the persons who exercise the governing power, it would be impossible for nations to deal with each other with any assurance that their agreements would be carried into effect, and the consequences would be disastrous on the peace and well-being of the world. It may also be stated, with great confidence, that a government *de facto*, when once invested with the powers which are necessary to give it that character, can bind the state to the same extent and with the same legal effect as what is styled a government *de jure*. Indeed, as Austin has pointed out, every government, properly so called, is a government *de facto*. A government *de jure* but not *de facto*, says he, is that which *was* a government, and which, according to the view of the speaker *ought* still to be a government, but, in point of fact, is not. (Austin, Juris. vol. 1, 336.)

"As to what constitutes a government *de facto* is a question that must necessarily depend somewhat upon the facts and circumstances in the particular case to which it is proposed to apply the principle. Austin speaks of it as a government which presumably commands the habitual respect and obedience of the bulk of the people. Halleck, when speaking of the power of a *de facto* government to dispose of the public domain or other property, describes it as a government submitted to by the *great* body of the people and *recognized* by other states. Both these conditions are essential to the lawful cession of the public domain of a state under the control of a *de facto* government. (Halleck, p. 127.) Sir Matthew Hale only consented to act as judge under a government established and *recognized* by other governments and in full possession, *de facto*, of the records and power of the kingdom, after Cromwell had declared he would rule by red gowns rather than by red coats. (Hale's Hist. Com. Law, p. 14.) It has been held in England, that the courts of that country will not take notice of a foreign government not recognized by the Government of Great Britain. (City of Berne *v.* The Bank of England,

9 Ves. 347.) The Supreme Court of the United States in noting the features by which a government *de facto* is to be discriminated, mentions as one of these recognition by a foreign power. (Thorington, *v.* Smith, 8 Wal. p. 9.) So by the same court it was held that a foreign government, in possession of a portion of the territory of the United States, over which it exercised undisputed dominion for the time being, was a government *de facto* as far as the place occupied was concerned, and entitled to demand and receive from the inhabitants local allegiance. (U. S. *v.* Price, 4 Wheat. p. 253.) A government *de facto*, said Justice Nelson, delivering the opinion of the court, is a government in the possession of the supreme power of the district of country over which its jurisdiction extends. (Mauran *v.* Ins. Co. 6 W. p. 137.) And this power has been elsewhere styled 'the ruling,' the 'supreme power' of the country. (Nesbitt *v.* Lushington, 4 Term. 763).

"While it has been uniformly held by all the writers upon this subject that the substitution of one form of government for another, or a mere change in the person of the ruling power, will not affect the validity of state action, the application of this rule seems to have been confined in the main to the maintenance of treaty obligations, and responsibility for wrongs and injuries, or torts, and where it has been extended to claims contractual in their character, appears to have been limited to public debts owing by one state to the citizens of another. It has been the uniform practice of the United States almost without exception to refuse intervention in behalf of its citizens claiming for breach of contract against the government of a foreign power, and wherever it has interfered, to restrict the character of its interference to good offices, which were defined by Secretary Fish as mere personal unofficial recommendations. (2 Whar. 233, p. 664.) While this has been the practice of Great Britain in similar cases, the Government of Her Majesty has been careful to maintain that the refusal to intervene has been largely governed by considerations of a domestic character, and not upon any notion that a breach of contract between a subject of that country and a foreign power, was not a wrong which might be redressed by diplomatic intervention whenever the government in its discretion saw fit to interfere. (Lord Palmerston's circular to British representatives in 1848. Hall's Note, p. 257.)

"It would be difficult, if not impossible, to assign a good reason why, on principles of abstract right and justice, an

injury to a citizen arising out of a refusal of a foreign power to keep its contractual engagements, did not impose an obligation upon the government of his allegiance to seek redress from the offending country, quite as binding as its recognized duty to interfere in cases involving wrongs to person and property. (Hall, p. 257.) The reasons assigned by our Secretaries of State for refusing any relief, except the mere tender of personal good offices, in cases of breach of contract, seem with some exceptions to be placed upon the broad ground that the government has no *right* to compel another power to perform its contracts made with citizens of the United States. (See Mr. Adams's instructions, April 29, 1823, cited 2 Whar. p. 644.) Mr. Fish, as late as 1870, declares that the reason of this policy is that claims based on contract are supposed to stand upon a very different footing from those which arise from injuries to person and property. (Whar. 2, p. 656.)

"But however this question may stand on principle it can not be doubted that if the present claim was valid in other respects it would be the duty of this commission, under the convention between the United States and Venezuela, to make an allowance of damages sufficient to compensate for the wrong, notwithstanding the fact that it originated in a breach of private contract between a citizen of one state and the government of another.

"Conceding now that a *de facto* government can bind the state in a matter of private contract between it and the citizens of another state, and that good faith as between nations binds the state as a personality to fulfill the terms of its private contracts, or pay damages for their non-fulfillment, notwithstanding any subsequent change in the ruling powers, the question first to be determined here is whether the government of Paez was such a government. Before answering the question, however, it is proper that we should state some of the provisions of the second contract relating to the colonization scheme and executed by Camacho under the same power given by Paez. By this contract Camacho cedes to the contracting parties, their associates and assigns, those public lands which until now have not been ceded, in the parts of the republic which they may select and in the quantities hereinafter explained. The second article provides that 'the cession shall be made of 1,000 English acres for each person in them during the first year of the cession, the contractors being obliged to have for each 1,000 acres two persons in the second

year, three in the third, four in the fourth, and so successively one person for each year up to the number of ten in the space of ten years, so that for each 1,000 acres there shall be ten persons within ten years from this date' (date of contract 5th of May 1863). To enable the contractors to carry out this provision they are given 'the right every year to select in the part of the republic where they may see fit 100,000 square acres of land, either in one parcel or in divided portions * * * provided that within two years from the date of such selection of lands the contractors shall have placed two colonists for each 1,000 square acres.'

"By the tenth article it is stipulated that the mines which may be found in the lands ceded to this colonization enterprise shall belong in fee to the contractors, and in the generic term mines are to be included, not only those of metal but also those of petroleum, asphaltum, marble, coal, and others. Lawful possession of the lands occupied is provided for, and provision is also made for the selected lands. 'The titles shall be given in favor of the contractors the day the colonists arrive at a Venezuelan port,' while the colonists, who are to acquire in no case more than fifty acres each, must wait a year before they receive a conveyance of title. If at the end of ten years the contractors shall not have introduced the required number of colonists to entitle them to the number of acres of land as to which they have already received the initial right of selection, the privilege of purchasing the vacant lands within the limits of the cession, at the rate of fifty cents an acre, is granted, on the single condition that the contractors pay the expenses of the survey.

"The eleventh article further provided that if within the limits ceded to the colony, and before the introduction of the colonists in the number and manner stipulated, the contractors desire to buy the vacant lands, 'they shall have the choice to do so, being previously measured by the surveyors of the government, paying half a dollar Venezuelan currency per acre, the expense of the measurements of the lands to be paid by the contractors.' By this contract then there was a deed of cession of a large portion of the territory of Venezuela, to be increased indefinitely, at the rate of 100 acres for every immigrant, good, bad, or indifferent, introduced into the country, along with the conveyance, of what is usually reserved in such donations, of a fee-simple title to all the mines within the limits of the ces-

sion, including therein everything of value that attaches to or is found in the soil, with no obligation whatever on the contractors to supply a single immigrant, and with the right to purchase vacant lands within the limits of the cession at fifty cents per acre.

"Drawn up in solemn form, acknowledged before a notary, and sealed, too, this instrument has all the exterior legal requisites, both at the civil and common law, to protect it from criticism and assault for want of consideration, but it is in fact no contract mutually binding upon the parties; but the concession of a privilege by Venezuela to be availed of or not, and when or never, as Messrs. Beales and Nobles in their discretion saw fit.

"Such being the character of this immigration contract, it is to be observed that the commissioner, Mr. Camacho, exceeded his power in this case as well as in the execution of the steamship contract. Under the power he had authority to contract for the establishment of a *constant current* of immigration into Venezuela, and he had no right to contract for anything else. For the first year of the cession it will be remembered that the planting of one colonist entitled the contractors to one thousand acres of land for the first colonist settled, two thousand for the second, and so on. If at the end of two years they had succeeded in planting two colonists they were then entitled to select one hundred thousand acres of land, mines, and all as defined by the contract; and if at the end of ten years, they had not furnished ten emigrants, but only the half of that number they were at liberty to buy, at the rate of fifty cents an acre, the excess of land remaining over and above the number of emigrants agreed to be supplied. Not only so, but if they saw fit to introduce no emigrants at all; if they believed that the purchase of all the lands within the limits ceded to the colony at a half dollar an acre in Venezuelan currency, would pay them better than the turning of a 'constant stream of immigration' into Venezuela, they were at liberty to abandon the colonization scheme altogether, and turn the contract into a land speculation pure and simple.

"It is obvious from this statement that the contract did not *provide* for *a constant current* of immigration, and even if that result had been an accidental consequence of what was provided for the terms of the power would not have been gratified.

It was not its intention to leave anything to accident or to a

choice between two lines of conduct, as the one or the other might seem best designed to promote the interests of the contractors, but to impose upon Camacho an imperative and absolute obligation, to exact compliance with this condition, as the sole and paramount object of the power. Failure in this, whatever else may have been accomplished, is failure in everything.

"Recurring now to the question of the lawfulness of the power it may be more than doubted whether Paez, if he had been supreme chief, both *de facto* and *de jure*, could have granted such a power. It appears that the constitution of the 31st of December 1858, was in force when he assumed this character. Title IX. of this constitution concerns the power of *congress*, and among these powers, as prescribed in article 64, is the power to decree what may be convenient for the administration, preservation, and alienation of national property, to assist in the immigration and colonization of foreigners, and to encourage by means of legislation and by contracts the navigation and canalization of rivers, the opening of roads, and other works, provided they be of national utility (sections 13, 16, 30). This is a clear devolution of the authority exercised by Paez upon the legislative department of the government, and unless we assume that the supreme chief for the time being in the possession of the capital and of the province of Caracas, had supplanted completely the constitution, and could exercise in his own person the functions of the executive as well as the legislative department, it is very clear that the authority granted to Camacho was an excess of power in itself as to both contracts.

"We have already, in a general way, referred to the distracted condition of affairs at the time he assumed control of the government, and now as a matter of more historical than legal interest, perhaps, it may not be out of place to quote the preamble of the decree of the 10th of September 1861, under which he took possession of the government as supreme chief of Venezuela:

"'The people of *Caracas*, to whom entire liberty was left to deliberate in the use of their sovereignty, spontaneously ratified this vote (that of the defenders of society within the *province* of Caracas), and appointed me civil and military chief of the republic, with full power to pacify and reconstruct it under the popular republican form. At La Victoria I was met by the commission sent to present me the vote of the capital (Cara-

cas) and to request my acceptance. But I feel satisfied, fully satisfied, with the uniformity of the vote of Caracas and of this province (Caracas). I am still ignorant of the will of the republic. National opinion is, and has always been, the guide of my conduct.'

"Venezuela at that time was composed of twenty-one provinces, Caracas, of course, being the principal one, as the seat of the capital, but there is no inference to be drawn from the mere possession of the capital as to the established character of a government *de facto* claiming to be such. One faction may have possession of the capital to-day, another to-morrow, while the authority of neither is recognized and established as the supreme power of the country over which its jurisdiction extends, or rather over the district [over which] each is attempting to extend its jurisdiction. This government lasted about twenty months, and was succeeded by the Falcon administration, which was also in possession of the capital when the contracts were annulled. How much of the habitual respect of the bulk of the people outside of the province of Caracas it managed to acquire before its overthrow we have no means of knowing, but, if the preamble of the decree just quoted affords any reliable evidence of the condition of affairs at that time, there is not much ground for believing that the Paez government was founded on any tenure more reliable than the ability to maintain its authority for a limited period within a circumscribed district of the country.

"Such being the internal condition of the country and the war of factions with varying success, the United States, while maintaining relations of intercourse with the state itself, through whatever organ of government might, for the time being, have the ascendancy and occupy the capital, refused to recognize the government of Paez as the *de facto* government of the state, rebuked its minister for attempting to do so, and promptly repudiated his act. This treatment of the Paez government was in strict accordance with the settled policy of the United States from the organization of the government. All questions, said President Jackson, relative to the government of foreign nations, whether of the Old or New World, have been treated by the United States as questions of *fact* only, and they have continuously abstained from deciding on them until the clearest evidence was in their possession to enable them to decide correctly. (Message to Congress, 21st Decem-

ber, 1836. Repeated by Mr. Forsyth in his answer to the Texan Envoy in 1837.)

"It is a rule of our courts that the judicial department of the government in such cases is bound by the action of the political or executive department, the same rule which was laid down by the Lord Chancellor of Great Britain in the case of the City of Berne *v.* The Bank of England, before cited. When a civil war, says Chief Justice Marshall, rages in a foreign nation, one part of which separates itself from the old established government, the courts of the Union must view such newly constituted government as it is viewed by the legislative and executive departments of the Government of the United States. (U. S. *v.* Palmer, 3 Wheat. p. 644; Rose *v.* Himely, 4 C. p. 272.) Besides the case of the City of Berne, this doctrine has been recognized in England in several cases directly growing out of transactions with the South American republics. In the case of Jones *v.* Garcia del Rio, where a bill had been filed by subscribers to a Peruvian loan for an account, the answer to which admitted that no such government as the Peruvian Government had been recognized by His Majesty's government, Lord Eldon said, 'What right have I as the king's judge to interfere upon the subject of a contract with a country which he does not recognize?' (Turn. and Rus. 1, p. 299; Taylor *v.* Barclay, 2 Sim. p. 213; The Colombian Government *v.* Rothschild, 1 Sim. p. 100; 3 Bing. p. 432.)

"But if it be replied to this that the question of a *de facto* government in its relations to recognition by other governments is a large question to be determined on considerations of grave public policy, and without straining analogy can not be associated with the narrower question of private contractual obligations, entered into by a government purporting to be such, as they come for adjudication before an international tribunal like this, which is not bound by the rule of policy referred to, it may nevertheless be answered, that the question of fact involved in the determination of the lawfulness of such a government when its authority is disputed, is a question absolutely necessary to be established before a correct judgment as to the law can be pronounced. While the failure or refusal of the United States to recognize the government of Paez is not binding upon us as a court in determining the question whether that government was a government *de facto* or not, the necessity of determining that question, in some way

as an essential prerequisite absolutely vital to the correct determination of the main issue involved, is just as binding and imperative, as it would be upon any other tribunal empowered to adjudicate the question. In the absence of presumptions, which, in the condition the country was at the time, can not be made in favor of the lawfulness of the government, resort must be had to evidence to establish its true character, as any other fact in doubt is required to be proved, and on this question of *fact* the failure of the United States to recognize the Paez government is a fact which can not be ignored.

"The argument of the learned counsel for the United States and the claimants was addressed largely to establishing the proposition that a government *de facto* was invested with the same authority to conclude binding contracts as a government *de jure*, and having succeeded in this, then proceeded upon the pure assumption of the petition that the Government of Venezuela was a government *de facto*, when this power was granted; but this, it is not necessary to say, is not only the very question at issue, but the duty of establishing the affirmative rests upon the petitioner. Ordinarily the authority of the ruling power in a state, when the instrument of evidence is once duly authenticated, would not be drawn in question for the reason, as already given, that states are immortal, and in the course of time, according to varying degrees of stability, acquire a fixed personal status like that of an individual, with a capability of binding themselves with a like freedom from question and suspicion. No one would question an authority given under the great seal of Great Britain or the United States, and no one would question the lawfulness of a power emanating from the United States of Venezuela under the happier conditions of government which now prevail in that country. But in a case like this, where no assistance can be derived from presumptions, the petition must be treated as if it had averred in terms that the power, in virtue of which these contracts were executed, was itself a deed, not only duly authenticated, as an instrument passing from the hands of its apparent maker, but also as the medium through which the undisputed authority of the state was conveyed, and by which it was bound. A man claiming under a deed must prove it, and if there is any question as to the power of the grantor to do the deed he must establish that also. The mere fact of execution is a matter of formal evidence, but the right to do

the act, of which the paper instrument usually called the deed supplies the proof, is the essential issue in controversies of this character. Treating this petition, then, as setting up not merely the paper power to Camacho, but as asserting the actual authority of Paez to issue such a power, as the foundation stone on which this claim is erected, we are confronted by the general denial which Venezuela has interposed to the petition, and which, under our rules, puts in issue every essential constituent of the petitioner's claim. The question is thus raised whether, conceding that a *de facto* government, according to Austin's definition, has the same authority to bind the state as a government *de jure*, the Paez government can lay claim to such a character, and on this question the burden of proof is on the claimants.

"It would be enough to say that they have not discharged this obligation, but from the references we have made to the origin and character of this government it would seem reasonably clear that if the claimants had assumed to carry such a burden they must have failed in the undertaking.

"But, passing this, it is further to be observed that the clause in both of the contracts providing for arbitration at Caracas clearly shows that neither of them, on any pretext, was ever to be made cause for an international claim. It is true that it has been urged in answer to this, that both contracts were struck down by the decrees annuling them, and that the arbitral clause fell with them. But that argument is more specious than real. It is conceded, of course, that one party to a contract can not break it at his pleasure and without the consent of the other, but when both parties agree, as in this case, that any doubts, differences, difficulties, or misunderstandings of any class or nature whatever that may arise from, or have any connection with, or in any manner relate to the contract shall be referred to arbitration, and one of the parties declares that he is not bound by the contract and attempts to annul it, then the attempt to revoke, of necessity, if language has any meaning, being a 'difficulty' relative to the contract, must be one of the questions agreed to be submitted. If these contracts had been good and valid in other respects, and the Messrs. Beales and Nobles had demanded that the 'difficulty' growing out of their annulment should be referred to arbitration as provided, and the government at Caracas had refused its assent to the submission, then a ques-

tion might have arisen whether there was not such a denial of justice on the part of that government as would have warranted the interposition of the good offices of the United States in behalf of the injured parties. No such demand appears to have been made, but the case was submitted to the old commission under the convention of 1866, and was decided by the umpire upon the assumption just stated, that the decrees annulled the provision as to arbitration, and thus produced the very result of converting into cause for an international claim a difficulty relating to the contract which by its terms expressed in the most solemn manner was never to be made such on any *pretext* whatever. A distinction was made in argument between a reference of differences or misunderstandings arising out of the construction of the contracts, and a difficulty as to the existence of the contract itself, it being admitted that a controversy of the first kind was legitimate matter for arbitration, but the second was not, or rather could not be made so, because when the contract was annulled there was no longer any provision for arbitration. But that assumes the right to annul without making the revocation a subject of arbitral decision, and such assumption can not be made without the further assumption that a difficulty *relative* to the contract does not and was not intended to include a question as to whether there was such a contract. The case seems to us too clear for doubt, and on this ground alone, if there was no other, we should reject the claim.

"1. On the whole our conclusions are that by the constitution of Venezuela the lawful and undisputed government of that country could not, by its executive department alone, have granted the power in question, and therefore the grant by Paez was without lawful authority, even if the *de facto* character of his government had been established, as to which there is not only a failure of proof but the evidence seems the other way.

"2. That both the contracts purporting to have been made in pursuance of the power contain provisions and stipulations clearly in excess of its terms, and where drawn within the limitations of the power have failed to conform to the prescribed requirements as to the parties with whom the contracts were authorized.

"3. That the contracts provide a mode of settlement by arbitration for any differences or difficulties that may arise as

to their legal validity which is inconsistent with any attempt to make them cause for an international claim on any pretext whatever.

"4. That there is no evidence satisfactory to us that the petitioners' testator was interested to the extent of one-third of the claim for the damages alleged to have been suffered by the annulment of the said contracts, or that he ever expended any money or incurred any liability, or did anything in execution of the said contracts; and, treating the petitioners representing their testator as original claimants, we can discover no ground on which to base an award in their favor.

"5. That the evidence seems to indicate very strongly that the petitioners' testator came into possession of a single certificate, which was found among his papers, by purchase, hypothecation, or some other channel than his interest in the original claim, and if the petitioners are to be regarded as claiming derivatively in the right of *bona fide* holders for value under the 9th section of the treaty, the claim must be rejected, because for the reasons stated the original claim itself is without merit, and falls therefore within the purview of the first article of the supplementary convention. The claim is accordingly disallowed, and the petition dismissed."

Findlay, commissioner, for the commission, *Melville E. Day and David E. Garrison, as surviving executors of Cornelius K. Garrison* v. *Venezuela*, No. 38, United States and Venezuelan Claims Commission, convention of December 5, 1885.

Mr. Little delivered the following separate opinion:

"I am constrained, with high respect, to dissent from the third conclusion. The declaration of annulment of the contracts by the Venezuelan Executive was tantamount to a refusal to arbitrate. Declaring the *whole* of the contracts at an end, it, the company had a right to assume, would not countenance action under *any* of their provisions. The government under the contracts had a voice in the selection of arbitrators. Its action closed the door, therefore, to arbitration, and the failure to resort to that means of adjustment can not, in my judgment, be rightfully set up as a defense here in its behalf. Still, the contracts being invalid (if for no other reason because in excess of Camacho's authority, which, being of so high and extraordinary a character, should have been strictly construed and action confined clearly within its terms), neither the arbitration clauses nor the decrees of annulment are of moment, and I join in the decision."

Case of Flannagan, Bradley, Clark & Co.

A claim was made against Venezuela for breaches of a certain contract or concession. Among the provisions of the concession, there was one to the effect that nothing relating to the contract nor any decision upon matters growing out of it should

ever be made the subject of an international reclamation, but that all doubts and controversies of any kind whatsoever affecting the agreement should be referred to the judicial tribunals of Venezuela and there determined in the ordinary course of law.

Findlay, commissioner, speaking for a majority of the commission, said:

"The failure to pay the stock subscription, in our opinion, was a clear violation of the terms of the concession, but it is equally clear that Venezuela, either from experience or forecast, realized the importance of referring all questions which might arise in the prosecution of the enterprise to the jurisdiction of her own tribunals, and expressly excluded them from the sphere of international reclamations.

"Nothing could be clearer, more comprehensive, or specific than the language of the concession upon this point. Even when such questions were transferred for adjudication by her courts, such was her anxiety to avoid any possible international entanglement, that she resorted to the doubtful expedient, perhaps, of providing that the decision of her courts should not be drawn in question by foreign intervention. Whether a decision so made in palpable violation of the rights of the parties could be allowed to stand on a claim of denial of justice is a question not necessary for the decision of this case, but we should think it more than doubtful; but the insertion of such a provision shows how solicitous she was to withdraw the concession and the questions which might arise under it from every possible cognizance and jurisdiction except her own. This she certainly had a right to do, and the concessionaries, if we may adopt that term, had an equal right to decline the concession on such terms. When they made their contract they knew exactly what they were doing and with whom they were contracting. They knew that Venezuela had been in a constant state of war and civil commotion almost from her birth, and they knew that a reference of questions in which they were interested to the courts of that country, sitting in the midst of such confusion and anarchy, might mean practically a failure to have the questions adjudicated at all, or the risk of an adverse decision, prompted by prejudice or partisanship. But in spite of all this they agreed that their whole case, whatever it might be, growing out of the concession, should be finally disposed of by the domestic tribunals of that country.

"Have they any standing before this commission? A majority of its members answered this question in the negative in the case of Beales, Nobles, and Garrison, and they have learned nothing since which induces them to think that they were wrong in that conclusion.

"We have no right to make a contract which the parties themselves did not make, and we would surely be doing so if

we undertook to make that the subject of an international claim, to be adjudicated by this commission, in spite of their own voluntary undertaking that it was never to be made such, and should be determined in the municipal tribunals of the country with respect to which the controversy arose. Had the claimants resorted to the courts of Venezuela for relief and been refused in a case clearly showing that there was a denial of justice, a difficult question, as before observed, would have been presented as to how far a commission of this kind could afford redress, when the claimants had not only submitted themselves to the exclusive jurisdiction of another tribunal, but had also agreed that any decision of that tribunal should not be made the basis or occasion of an international claim. In point of fact, no effort appears to have been made to invoke the aid of the Venezuelan courts, but the claimants made their appeal directly to the executive department of the government. Whatever may have been the practical outcome of a resort to the courts for assistance, however abortive such an attempt may have proved, we have no right to assume the folly or futility of such a course in the face of the solemn stipulation of the parties that they would look to that quarter for relief and no other. It is to be presumed that they would not have made such a stipulation if the laws and courts of Venezuela were helpless in affording them a remedy; but whether they were or not, so they made their bed, and so they must lie in it."

Henry Woodruff and Flannagan, Bradley, Clark & Co. v. *Venezuela*, Nos. 20, 25, United States and Venezuela Claims Commission, convention of December 5, 1885.

Little, commissioner, dissenting, said:

"The majority of the commission express doubt whether that part of article 20 which binds the American concessionaries not to make a judgment, etc, the subject of an international claim is valid. I would go further, applying the objection to and holding invalid all that part inhibiting international reclamations. I do not believe a contract between a sovereign and a citizen of a foreign country not to make matters of difference or dispute, arising out of an agreement between them or out of anything else, the subject of an international claim, is consonant with sound public policy, or within their competence.

"It would involve *pro tanto* a modification or suspension of the public law, and enable the sovereign in that instance to disregard his duty towards the citizen's own government. If a state may do so in a single instance, it may in all cases. By this means it could easily avoid a most important part of its international obligations. It would only have to provide by law that all contracts made within its jurisdiction should be subject to such inhibitory condition. For such a law, if valid, would form the part of every contract therein made as fully as if expressed in terms upon its face. Thus we should have the spectacle of a state modifying the international law relative to itself! The statement of the proposition is its own refutation. The consent of the foreign citizens concerned can, in my belief, make no difference—confer no such authority.

Such language as is employed in article 20, contemplates the potential doing of that by the sovereign towards the foreign citizen for which an international reclamation may rightfully be made under ordinary circumstances. Whenever that situation arises, that is, whenever a wrong occurs of such a character as to justify diplomatic interference, the government of the citizen at once becomes a party concerned. Its rights and obligations in the premises cannot be affected by any precedent agreement to which it is not a party. Its obligation to protect its own citizen is inalienable. He, in my judgment, can no more contract against it than he can against municipal protection.

"A citizen may, no doubt, lawfully agree to settle his controversies with a foreign state in any reasonable mode or before any specified tribunal. But the agreement must not involve the exclusion of international reclamation. That question sovereigns only can deal with.

"So much of article 20 as refers to that subject I regard as a nullity, and therefore cannot, even if in harmony with my colleagues as to the comprehension of its terms, concur in the dismissal of the claims on that ground."

Diversion of Pledged Revenues: Computation of Interest: Walter's Case.

"Thomas U. Walter, a citizen and an eminent architect and civil engineer of the United States, in the year 1843 entered into a contract with the municipality of La Guayra, the Government of Venezuela lending its concurrence and endorsement, whereby he agreed, not later than the end of the year 1846, to construct a mole and breakwater with appurtenant works, at that port, for 275,000 pesos in coin or its equivalent in currency. The sum of 150,000 pesos was to be and was paid by the completion of the work, which occurred within the time limited. The residue was to be discharged from certain entrance fees or duties received at the custom-house of La Guayra, with interest at the rate of 5 per cent per annum, payments to begin two years after such completion, to occur quarterly or semiyearly, as said municipality might elect, and to equal 2 per cent of the then import duties.

"Payments and settlements were made by and with the government from time to time until June 30, 1858, when the balance was reduced to $24,956\frac{53}{100}$ pesos.

"Theretofore the government had diverted the revenues so set apart by agreement for the discharge of this debt, and stopped further payment in derogation of Mr. Walter's rights. Since then nothing has been paid, notwithstanding the justice of the claim has never been controverted. In 1865 the claim was presented to the Venezuelan Government through the American legation at Caracas. It comes within the purview of the present treaty.

"The only question made respecting it before us is as to the computation of interest.

"It is claimed on the one hand that interest should be computed with quarterly, or at least, with semiannual rests, as that mode had been adopted or sanctioned by the government during the continuance of the payments; and on the other, that only simple interest is allowable. We take the latter view. This was a Venezuelan contract where compound interest was prohibited by law. If the Government chose to allow it in disregard of the law, that does not authorize us to do so; nor are we called upon to review and rectify the action of the government in that regard.

"The allowance will be for $24{,}956\frac{53}{100}$ pesos with 5 per cent from June 30, 1858, to September 2, 1890, inclusive, expressed in gold coin of the United States.

"There are two *pesos* known to commerce, the *peso fuerte* and the *peso sencillo*. The former was the old Spanish silver dollar equal in value, until modern years, the world over, to 100 cents in gold. The latter is meant when the general term is used in transactions without the qualifying word. It has varied somewhat in value, from time to time. According to letters received by the commission from the director of the mint and other sources of information, we estimate its present value at 75 cents to the dollar, expressed in gold coin of the United States.

"The entry may, therefore, be for $18,826.40, gold coin of the United States of America, as of September 1, in favor of the claimant."

Little, commissioner, for the commission, *Amanda G. Walker, executrix*, v. *Venezuela*, United States and Venezuela Claims Commission, convention of December 5, 1885.

Quasi-contractual Claim: O'Dwyer's Case.

A claimant against Venezuela alleged as the basis of his demand that by prompt advice tendered to General Paez at a critical moment in the battle of Carabobo he saved the fortunes of the day and enabled Venezuela to establish her independence. Findlay, commissioner, delivering the opinion of the commission, said: "This is the kind of deed that usually calls for a monument, or some other testimonial of national gratitude; but as mere dispensers of justice we must disallow the claim and dismiss the petition."

Richard O'Dwyer v. *Venezuela*, No. 33, United States and Venezuela Commission, convention of December 5, 1885.

9. CONVENTION BETWEEN THE UNITED STATES AND CHILE OF AUGUST 7, 1892.

Authority of Diplomatic Agent: Trumbull's Case.

Claimant, a citizen of Chile, asked compensation for professional services to the United States before the Chilean courts in the extradition of William A. Bushnell, in 1889. He averred that Mr. Roberts, the United States minister at Santiago, requested him to represent the legation of the United States; that he complied, and, when he incidentally referred to his remuneration, was told that there were no "instructions as to expenses, but to have no concern in the matter, as he would be paid by the United States for his services;" that the case lasted more than six months, and was twice argued before the Supreme Court of Chile, which decided that the criminal should be extradited; that he presented his bill to Mr. Roberts, who forwarded it to the State Department; that on the 17th of September 1889 the Department returned it to Mr. Egan, then United States minister, with the declaration "that the Government of the United States assumed no responsibility in the premises;" that when the bill was again presented to the Government of the United States through Mr. Egan, Mr. Blaine, who had then become Secretary of State, returned it with the statement that it had been forwarded to the authorities of the State of New York, who had replied that, while claimant had rendered service in the case, he did so as attorney for the West Coast Telephone Company, which was interested in Bushnell's extradition. Claimant asked for $6,000 in United States gold.

The agent of the United States demurred to the claim on the ground (1) that by section 3732 of the Revised Statutes of the United States it was forbidden to make any contract or purchase on behalf of the United States except by authority of law, except in certain specified cases; (2) that a minister was not authorized to employ counsel in extradition cases (Moore on Extradition, I. 607); (3) that, as the offense charged was a violation of State law, only the State was responsible for the expenses (id. 604); (4) that claimant, if he could establish his contract, had a remedy against the United States in the courts (Revised Statutes, sec. 1068; Supplement to the Revised Statutes, I. 559, 560).

The agent of Chile maintained that the question whether

Mr. Roberts had authority from the Secretary of State to employ claimant was immaterial before the commission; that, Mr. Roberts being the representative of the United States, this question lay between him and his government; that as the United States was the demanding government, it should pay the expenses (Calvo, Droit Int. par. 400; Opinions of the Attorneys-General, VII. 612; Moore on Extradition, I. 599); that the fact that the courts of the United States might have jurisdiction of the claim, would deprive the commission of jurisdiction under the convention.

The commission rendered the following decision:

"In the opinion of the commission the sections of the Revised Statutes of the United States (sections 732 and 5278) upon which the respondent government bases its demurrer are not applicable to the relations that subsisted between the claimant and the honorable minister at Santiago.

"The first provision seems to have been enacted for the regulation of the officers of the United States in the performance of their duties, and the second as a rule for the settlement of expenses between the States and the National Government.

"By no rule or legal prescription was the memorialist bound to know the sections of the Revised Statutes or to act in conformity with them.

"On the contrary, he knew that the minister of the United States was instructed by his government to proceed in a matter of extradition, and that the proceedings before the Chilean court could only be conducted through an intermediary counsel. Mr. Trumbull was requested by the minister to act as counsel.

"He was justified in presuming that the minister of the United States acted in accordance with his instructions from the Secretary of State, and also pursuant to the rule that the expenses of extradition, including fees of counsel, are paid by the demanding State.

"He was right also in assuming that the minister was authorized to say to him, "to have no concern in the matter, as he (Trumbull) would be paid by the United States Government for his services."

"Whether the honorable minister of the United States at Santiago exceeded his authority in entering into the contract with Mr. Trumbull is a question that, for the purposes of the demurrer, is of no importance.

"As a representative of the United States he made, as is confessed by the demurrer, a promise in the name of his government, which, according to the rules of the responsibility of governments for acts performed by their agents in foreign countries, can not be repudiated. (Calvo, Dictionaire de Droit

International et Privé, vol. 11, p. 170. Also Calvo, Droit International, vol. 1, § 417.)

"As to the argument that the claimant has a complete remedy in the courts of the United States, it is to be said that the competency of this commission to take jurisdiction of this claim can not be denied under the authority to settle and adjust amicably all claims of citizens of Chile and of the United States against the government of either country.

"The demurrer filed by the agent of the respondent government is therefore overruled.

"The commissioner of Chile concurs with his honorable colleagues in the foregoing decision in so far as it establishes the responsibility of the government for the acts of its agents, but does not accept, without certain limitations, the last point in said decision."

Ricardo L. Trumbull v. *Chile*, No. 27, United States and Chilean Claims Commission, convention of August 7, 1892.

Hodgskin's Case: The Landreau Claim.

T. Ellet Hodgskin, a citizen of the United States, submitted to the mixed commission under the convention between the United States and Chile of August 7, 1892, a claim against the latter government based on the discovery in Peru of certain guano deposits by J. Theophile Landreau, a citizen of France. A similar claim was filed by J. C. Landreau, a naturalized citizen of the United States. Both claims were dismissed by the commission on demurrer, Mr. Goode, the United States commissioner, dissenting.

The opinion of the commission in the case of Hodgskin (No. 39) was as follows:

"T. Ellet Hodgskin, in his memorial, numbered 39, claims from the Government of Chile a sum equivalent to a third of the proceeds of certain guano beds situated in the territory of Peru, which, as he says, were received by the Government of Chile during the war with the Republic of Peru.

"The claimant declares that he deduces his right from a cession that J. Theophile Landreau, a French citizen and discoverer of those deposits of guano, made to his father, James B. Hodgskin, an American citizen.

"In behalf of his alleged right Hodgskin declares that J. Theophile Landreau, relying upon a decree appearing among the documents, marked 'Exhibit 1,' and on the public faith of the Government of Peru, dedicated himself for several years to the discovery of new deposits of guano, in the belief that the laws then in force and the aforementioned decree secured to him the third part of the minerals or other natural substances that he might discover, or a third of the value thereof; that said Landreau was fortunate in his efforts and succeeded

in discovering, between the years 1844 and 1856, valuable deposits of guano; that later on he aided Peru to raise its credit and to contract loans abroad; that in spite of the great advantages obtained by that republic from the discoveries made by J. Theophile Landreau and of the many millions of dollars received from the sale of said guano, neither said Landreau nor his successors or representatives, nor the present claimant, had received any compensation from the Government of Peru when, in 1879, the war with Chile broke out; that the Government of Peru rendered to the Government of Chile, as a war indemnity, certain territories in which the deposits of guano were located, and that the claimant had at that time, individually and as trustee, a just and legal claim against the Government of Peru in regard to the deposits of guano and its products, upon which he had a lien.

"The claimant adds that the documents on which his claim is based are to be found in 'Exhibit No. 1,' which accompanies the memorial, and he calls special attention to a decree promulgated by the President of the republic, which is, in his judgment, the basis of this controversy.

"From the documents in 'Exhibit 1' it is seen that in 1844 Jean Theophile Landreau, a French citizen, understanding that the Government of Peru had solemnly bound itself to reward in a specific manner any individual who should make a discovery that would increase the wealth of the country, determined to devote himself to a careful scientific exploration and examination of the territory of Peru, with a view to discover deposits of guano, the existence of which was unknown to the government.

"On the 30th of December, 1859, Landreau addressed the following petition to the minister of finance of Peru:

"'YOUR EXCELLENCY: Jean Theophile Landreau, a native of France and a resident of this city, with due respect presents himself before your excellency and states that he has discovered certain guano deposits on the coast of Peru and is ready to point out the location and bring samples of the guano immediately the government informs him what *his recompense will be;* soliciting, at the same time, a list of the deposits known to the government up to this date.

"'J. T. LANDREAU.'

"The minister of finance of Peru requested information from the *director jeneral de hacienda* (director-general of finance) with regard to the preceding petition, and this functionary, on the 5th of January 1860, set forth 'the necessity of proving that the deposits of guano mentioned in the petition were *bona fide* new discoveries. That the government was aware that the coast district of Peru abounded in deposits of guano, and that all of them belonged to the state; but, in case Landreau's petition referred to deposits that were new, then it would be but fair to agree to his receiving a share, as a discoverer; but that

the minister of finance was the only person who could designate the said share, there *being no law bearing on the case.*'

"The said petition was then referred to the attorney-general (M. Villaran), who, upon the 18th of January 1860, reported that he was of the same opinion as the director of finance, and suggested the necessity of ascertaining if it was a fact that Landreau's discoveries of deposits were positively new, as in that case he considered the minister of finance could accept Landreau's declaration and assign him one-third of the value of the guano that he had discovered, in accordance with the 6th paragraph of the vote of the council of state dated the 13th of February 1833, but insisting that a search should be made to decide whether the deposits mentioned by Landreau had ever been previously known, as no premium could be allotted to him if they were not newly discovered.

"The 6th paragraph of the decree to which Attorney-General Villaran refers is, as cited by claimant, as follows:

"'LIMA, *February 13, 1833.*

"'The council of state is of the opinion that the Executive be made acquainted with the following: That any one, within a year after the publication of these presents, who shall have discovered property belonging to any suppressed convents, or other property belonging to the state, shall have a right to a third part of said property.

"'Those who shall have been convicted of having kept secret the discovery of any property after the year has expired will be condemned to pay double the amount of its value.'

"Two years having elapsed without the Peruvian Government adopting a resolution regarding Landreau's petition, he renewed his application on the 2d of December 1862.

"This latter appeal was referred to the attorney-general (Ureta), who, on the 31st of October 1863, gave an opinion contradicting that of his predecessor, Attorney-General Villaran, as follows:

"'That Landreau, having asked *what the recompense* would be for his discoveries, was answered by Dr. Villaran on the 18th of January 1860, that, according to his opinion, he was entitled to one-third part of the value of the property discovered, this being the general practice and in accordance with the 6th paragraph of the vote of the council of state (February 13, 1883); but it must be borne in mind that *said premium* is only *meant* for those who should discover *national property* which is *unlawfully possessed*, for as soon as it becomes the domain of private right there is a possibility of having to run the risk of seeing said usurpation legitimized by a transfer to a *second person*, who, *receiving* it in *good faith*, *might*, *after a certain number of years*, *consider it as prescribed property*; furthermore, the risk run by the nation of losing said property is only too evident, should it not be discovered in due time, and in consequence the necessity of stimulating discoverers with a

heavy premium. Again, such *property as deposits of guano is not exposed to individual appropriation*, for it is held as *national property*, though it be unknown for years, and this fact destroys the cause for the allowance of the one-third in question; besides which there is not reason for holding out a premium whereby the nation loses a great share of its own property, the *integrity* of *which* is *preserved under all circumstances*, whilst the use of the same is not imperative at present, for the sale of guano is limited to the demand of the whole consumption, and for this reason there are, as yet, deposits that have not been worked.

"'If by the above reasons we come to the conclusion that the *one-third premium can not* be *applied in such an absolute manner*, it cannot, however, be *denied* that a *just recompense is due* to the *person who discovers property* the intrinsic value of which swells the wealth of the nation. Among the legal principles that might with less propriety be cited to cover the present case, though not pointing to an exact analogy, is the article 520 of the Civil Code, whereby the premium of 15 per cent is allotted to any person who finds property not his own in case of jettison or shipwreck. In this there is no usurpation, a true owner exists, and yet there is a discovery, although the cause that led to the placing of the property on the beach is different to that of placing the unknown deposits said to have been discovered by Landreau.

"'Now, then, if, notwithstanding the possibility of private appropriation in the case of jettison or shipwreck, the *premium* does not exceed 15 per cent, how much less must it be when the risk of such malappropriation does not exist.

"'From these remarks the attorney-general concludes that *the third part cannot* be *granted* to *Landreau*, nor even 15 per cent; and the only manner of bringing the point at issue to a conclusion is to come to a *private understanding with Landreau*, who, convinced by the above reasons, will, no doubt, enter into a *prudent arrangement*, which will always prove beneficial to him if the discovery is of the magnitude he describes, and for the preservation of which he had used neither efforts nor capital.'

"On the 24th of October the Government of Peru took formally into consideration the application of Landreau, represented at that time by Tomas Carlos Wright, and acknowledged, as Attorney-General Ureta had done, that it was just to give Landreau a proportionate reward for his services, under certain circumstances and conditions. And it issued the following decree:

"'LIMA, *October 21, 1865.*

"'This petition having been examined by the council of ministers, and considering that the deposits of guano to be found in the different localities of the territory of the republic constitute the principal part of the national wealth, and that the discovery of new beds will enhance the same, as well as the

financial credit of the nation; that Jean Theophile Landreau, represented to-day by Tomas Carlos Wright, says that there are deposits of guano entirely unknown, and offers to make the same known to the government, demanding for this service a proportionate recompense; that it is strictly just to accede to said *recompense* in case the deposits are altogether new, in accordance with the unanimous vote of the council and with the *report of the attorney-general of the supreme court;* the petition of the said Landreau is granted under the following conditions:

"'1. Landreau, immediately after accepting this decree, and a public contract of the same having been drawn up, will designate the deposits of which he calls himself discoverer, said designation being made with the greatest possible minuteness, it being well understood that no deposits known up to that date shall be named in the same.

"'2. The *premium* accorded to the discoverer is 10 per cent on the net proceeds of the guano discovered, if the number of tons is one million or less; 8 per cent on the tons exceeding one million and not reaching two millions; 6 per cent on the tons exceeding two millions and not reaching three millions; 4 per cent on the excess of three millions and not reaching four millions; 2 per cent on the excess of four millions of tons and not reaching five, it being well understood that for any number of tons above five millions there will be no recompense, the excess belonging exclusively to the nation.

"'3. Neither Landreau nor any person or persons representing him shall ever agitate any question growing out of the concession established in this decree before any other authorities or tribunals than those of the republic and in accordance with the laws of the same, renouncing expressly all diplomatic intervention, it being an expressed condition that, should he ever employ such means, that sole fact will destroy the effect of this resolution, and he will be unable to claim any *premium whatsoever.*

"'4. The discoverer or his attorneys are *forbidden*, *directly* or *indirectly*, to *interfere* in the *contracts* of sale or any other *contract* that the *Government* may be *pleased* to *make* regarding the *guanos* of the *new deposits*, for his *rights will* be *limited* to *asking* the *share which*, according to the percentage already mentioned, may fall to him.

"'5. The government will begin operations on the new guano deposits as soon as it will deem it convenient, the discoverer or his attorneys not having the option to demand when a start shall be made.

"'6. This concession will be void in case the government or any authority can plainly prove that they had official or any private report of the deposits said to have been discovered by Landreau.'

"Four days later, on the 28th of October 1865, a contract was signed between the minister of Peru and Don Tomas C[redacted]

Wright by which Landreau accepted the stipulations of the foregoing decree.

"A new decree from the government of Peru, dated December 12, 1868, and signed by President Balta and Minister Calderon, reads as follows:

"'The government, taking into consideration that the said contract can never be accepted on account of several defects that render it null; that the premium stipulated to be accorded to him is of such a great amount that it can never be given by the government; that it is convenient to examine the guano deposits discovered, so as to see if the same be of good quality and of any advantage to the national interests:

"'In virtue of these reasons it is hereby declared that the contract signed between the government and Landreau, Nov. 2, 1865, is null and void; whilst the discovering and the information of the same made by him are accepted, and it is hereby decreed that as a basis for a new contract said new guano deposits shall be examined by a special commission appointed for that purpose.

"'This commission is to proceed in company of the discoverer, Mr. Landreau, to the different places indicated by him and to measure the deposits of guano referred to in his declaration, taking from each a sample in order to have the necessary analysis made in view of testing the quality and value of the same.

"'Let Landreau be made acquainted with this resolution that he may name the recompense he asks for in the aforesaid declaration.

(Signed) "'BALTA.
"'CALDERON.'

"The claimant has cited also in behalf of his alleged right the following paragraph, taken from the VI Law, Book X. Chapter XXI. of the New Summary (*Nuera Recopilación*):

"'No. 3, law 6, book 10, title 22 of the New Spanish Compilation, still in force. Article 7. The case being terminated the tribunals declare by a sentence that all proclaimed property will be applied to the construction and preservation of roads, and it will be distributed as follows: Two-thirds will be applied to the above-mentioned end, and the remaining third to the discoverer. The same application shall be made with unknown property. And if the thing discovered is less than six thousand maravedis, the expenses will be deducted, and the balance will be divided in three parts, as mentioned; then the property will be sold at auction. As to vacant or doubtful property, the same procedure will be followed.'

"Has also invoked a decree of 1847 that reads as follows:

"'Agreeably to the papers and the report of the superior tribunal of accounts, and also that of the attorney-general of the supreme court, and considering that according to information received by the government it is probable that there is

much municipal and government property which produces nothing, because the state officers lack information and necessary knowledge on that subject, it is hereby declared that the revenue officers seek and discover said property in order to form the matriculation books; for those discoveries being considered as declarations, the said functionaries, or anyone else, will be allowed one-third of the capital discovered, and interest not discharged according to the 6th law, title 22, book 10 of the new compiliation and decree of February 13, 1833. Let this be circulated and published. Rubric of his excellency.

(Signed) "'RIO, *Minister of the Interior.*'

"The agent of the government of Chile interposed a demurrer to the memorial of T. Ellet Hodgskin, alleging that the claimant has no title to claim from Chile, because he had no real right to the guano of which he said that government had taken possession.

"The commission before giving a decision has requested and has taken into consideration the whole text of the decree of 13th of February 1833 and article 7 of the New Spanish Compilation (*Nueva Recopilación*), of which the preceding paragraphs, cited by the claimant, are a part. The decree reads as follows:

"'REPUBLIC OF PERU,
"'DEPARTMENT OF STATE AND FOREIGN AFFAIRS,
"'*Government House, Lima, 13th of February 1833.*

"'SIR: His excellency the President of the republic has approved the vote of the council of state, which I copy as follows:

"'The council, pursuant to the advice asked by the executive, through your excellency's ministry, in your note of the 15th of January last, as to whether he could carry into execution that part of the bill approved by Congress relating to the nationalization of the property of suppressed convents, has resolved, at its session of this date, as follows:

"'No law can be enforced which has not been enacted pursuant to the provisions of the constitution. Nevertheless, in the bill herein referred to there were only three almost unimportant sections upon which the two chambers failed to agree. It appears that the determining of priority of payment among the creditors of the state is a matter exclusively within the purview of the judicial power, whenever a party appears claiming the right of preference; and surely it was for this reason that the chamber of deputies rejected said sections. If the bill had passed through all its stages, and the executive had agreed with the senate, where the rejected sections originated, and it were to be resubmitted for discussion by the reviewing chamber, and the latter should remain inflexible, would it not be reserved for the next legislature just as though the objections should have agreed with the rejecting chamber? The council before giving its approval should study all of this,

and also what would become, during the session of the former, or in the mean time, of the property of suppressed convents.

"'Suppose that the (constitutional) convention meets this year, and that no change is made in the division of the chambers, owing to the benefits to be derived, as experience has demonstrated, and as harmonizes with the well-nigh general opinion of publicists, when will the first legislative congress convene? Should no impediment intervene to cause delay (and it is very unlikely that there will be none) it will be in the year 1834; and if in said session the chamber should still be inflexible, notwithstanding the objections of the executive, it can not be introduced in the succeeding legislature, which, should not the slightest impediment arise, will meet in the year 1835. And to what will the properties be reduced during all this time? To nothing; for the state has no funds to repair the estates—which consist mostly of houses—and although they should be well repaired, they would not then produce anything under direct management, not even enough to pay the employees, who, if they do not appropriate their incomes, would have to run the risk of the false returns of subaltern hands, who will report them as unproductive, and almost always empty or occupied by tenants unable to pay rent. So that the administrative books, in lieu of correct accounts, will contain the record of payments preferred to the claims of legitimate creditors; for the salaries of those engaged in the management, far from diminishing, will increase in proportion to the disorder in which the properties are, until by the very nature of things they will become the mere semblance of what they formerly were, and finally the state will have to satisfy all the encumbrances resting on the estates, because it failed to repair them in time and to make the opportune appropriations demanded by the conditions. If this could occur while the chambers continue in the order established by the constitution, what can be expected if the convention should make a complete change and leave the legislative power indivisible and vested in one body? Let it not be said that it can not do this because of the inconveniences which would result from the change when it has authority therefor. And in such an event how would the bill under consideration fare? As if it had never been introduced. And the property of suppressed convents? It seems as if the bare sight of the convents of San Ildefonso, Guadalupe, S. Pedro Nolasco, Guía, Belen, and others mutely replies. And would they then be worth what they formerly were? Would it not have been more beneficial and just had some of the nation's debts been paid with these estates than, through an illy advised delicacy or false zeal, to allow them to disappear?

"'If the estates in mortmain never increase, because of which sales thereto are prohibited, experience has proved that such as are managed at the expense of the state are instantly destroyed or annihilated; and this alone could have sufficed to

oblige congress to consider them, order their nationalization, and amortize the internal debt therewith. The national will is, therefore, manifest, since both chambers have agreed; but, even had no law been passed, would the preexisting laws declaring the temporal holdings of monastic orders nationalized have been derogated? The only difference existing between the properties now engaging the attention of the council of state is that the council determined their proceeds should be applied to works of charity. And was not the council of state the executive power? Its authority, according to its decree of organization, is it not the same as that vested in the President of the republic? Who suppressed the convents? The executive, in compliance with the law which provided that none should exist where the designated number of monks was lacking. Who has put them under direct management? The same executive who has disposed of many of the properties, increasing revenues to colleges, and distributing the proceeds among other charitable objects. Will he be denied this authority because he wishes to pay debts with such funds? Even though the distribution formerly made be the most beneficial, will it be said it is not just and holy to pay therewith some portion of what is owing? Is it not better to pay before giving alms, even though the latter be one of the most commendable virtues? The one thing the executive and Congress can not do is to derogate the encumbrances resting on said properties.

"'Had there been no bill, and under present circumstances an advisory vote had been asked of the council of state for the intended purpose, would it have been of opinion that it could not dispose of them, even though it recognized the existing necessity of diminishing the internal debt and the absolute ruin to which they would be reduced because of the failure to take the step? It seems not. And the national will that said properties should be nationalized and with them the internal debt be funded, will it hesitate a moment in giving its vote to this end?

"'Wherefore the judgment of the council of state is that the executive be informed:

"'*First.* The chambers having declared the *property* of *convents suppressed* and those that may hereafter be *suppressed* as national, save encumbrances resting thereon and the applications already made.

"'*Second.* That the amortization be made at public sale after *appraisement and advertisement for a period of thirty days to the highest bidder*, whose bid shall in no case be less than the full amount of the appraisement, and who shall pay the purchase price by personal or endorsed draft.

"'*Third.* That, in order to bring to the notice of all the inhabitants of the republic which are all the properties to be auctioned, he (the executive) shall cause to be made in each department a list of the estates therein situate which may not

have been previously applied, giving the respective valuation of each, arrived at by experts to be appointed by the finance board.

"'*Fourth.* That these lists be published in the newspapers of each department; that, in order to reach the notice of all, those published in the newspapers of one department shall be republished in those of the others.

"'*Fifth.* That four months after the publication of the lists the auctions of the estates shall take place at the capital of the department in which they are situated, and before the board of auctions, in the form prescribed by law.

"'*Sixth.* That whoever, after a year from the publication of the lists, shall discover property of suppressed convents, or other properties belonging to the state by any title, shall receive a third part thereof; and those who, after the year, are convicted of *concealing them shall be punished in double the value thereof*, should they have *property*.

"'*Seventh.* And that contracts of rent or emphyteutic sales shall continue in force until the expiration of the term stipulated in the respective instruments, and (the proceeds thereof) shall be applied, in the manner indicated, to the payment of the internal debt, excepting such as concern the (convent of) *Buenamuerte*, and the sites of the convents the state may need, in whole or in part, for courts, offices, educational institutions, and charity.

"'I transcribe it to your excellency in compliance with the resolution, subscribing myself your attentive and humble servant,

"'JOSÉ MARIÁ CORBACHO,
"'*Honorable Minister of State in the*
"' *Department of Government and Foreign Relations.*

"'And the necessary provisions for its enforcement having to be issued by Your Excellency, I have the honor to transcribe it to you, announcing that I shall opportunely transmit to Your Excellency a *statement of the real estate and rights of the suppressed convents which have been nationalized for the purposes set forth in the preceding vote.*

"' I renew to Your Excellency the assurances of the distinguished regard with which I am, your attentive and obedient servant,

"'JOSÉ MARIÁ PANDO.'

[1] (Cole. vol. 4, No. 15).

"Article 7 of the VI. law, Book X. Title XXII. of the new Spanish compilation (*Nueva Recopilación*), says as follows:

"'ARTICLE 7. Whenever any person shall die without making a will, and shall leave no known relatives within the fourth degree, the ordinary constable or constables of the subdelegation, or any other person to whom notice shall come, shall make the declaration before the subdelegate judges, and they shall take testimony as to how the deceased died without

making a will and leaving no relatives within the fourth degree, and said testimony once taken the judges shall cause three edicts to be posted and proclaimed, setting forth therein the fact that John Doe is dead and left no will; that if anyone has the right of succession *ex testamento rel ab intestato*, he shall appear before them within thirty days, or any other term suitable to the judges, provided it be not less than thirty days, and that if within such term any heirs shall appear and show their right, they shall be heard and their rights recognized, otherwise the property will be applied to the construction and maintenance of roads (5 and 6); and if within the three terms of the said edicts heirs shall appear, they shall aver the property restored to them, as provided in said edict; and, if said terms having expired, no heirs appear, the cause will be tried on proofs, notifying the halls of justice, and the witnesses of the preliminary proceedings will be reexamined and the case closed, and once closed they shall decree the said property to be set apart for the construction and maintenance of roads, and it shall be so applied in this way: Two-thirds thereof to go to the said object for which it is intended, and a third part to the declarer, cost of suit, and subdelegate, ministers, and judges for their work, and a like application shall *be made* in cases of *property of unknown owners;* and if the suit shall be of six thousand *maravedis* down, the costs shall be subtracted from the whole amount, and the remainder shall be divided into three parts, as provided, and the application made, the property will be sold at public sale in due form of law, adjudging it to the highest bidder.'

"The commission, having examined the documents produced by the party claimant, and those of which it could take judicial notice, has reached the conclusions following:

"*First.* That the decree of the 13th of February 1833, on which it is attempted to vest in Theophile Landreau a *jus in re* in one-third of the guano by him discovered, is not applicable to the present case for the reasons following:

"*a.* That the sections of the said decree and the dominating spirit thereof clearly show that it refers solely to the property of convents which a Peruvian law had just provided should be transferred to the state. In fact, the preamble to said decree is in these words:

"'The council, pursuant to the advice asked by the executive through your excellency's ministry, in your note of the 15th of January last, as to whether he could carry into execution that part of the bill approved by Congress relating to the *nationalization of the property of suppressed convents*, has resolved, at its session of this date, as follows:

"'The council, after adducing several reasons tending to demonstrate the injuries the state would suffer should the execution of the said law be deferred, owing to the ruinous condition of the convents of San Ildefonso, Guadalupe, San Pedro Nolasco, Guia, Belen, and others, resolved to submit to

the executive, among other conclusions, the two following: "1st. The Congress having declared the *property of convents suppressed and those that may hereafter be suppressed as national*, save the incumbrances resting thereon and the appropriations already made. 2d. That they be sold at public sale, after appraisement and advertisement for the period of thirty days, to the highest bidder, whose bid shall in no case be less than the full amount of the appraisement, and who shall pay the purchase price by personal or endorsed draft.'

"It is to be noted that in no part of said decree is mention made of, nor is there any allusion whatever to, discoveries of guano; and that if the Government of Peru had considered that it had any reference to deposits of guano it would have alienated them at public sale, in accordance with the provisions of the said decree, thirty days after their existence should have been made to Landreau—which was not done then nor afterwards, as is proven by the fact that they were occupied by Chile twenty years later.

"*b.* The foregoing argument is supported by the fact that (as appears from the exhibits of the claimant) Theophile Landreau never invoked, in support of his rights and expectations, the decree referred to; for in the communication which, on the 30th of December 1859, he addressed to the Government of Peru, informing it of certain discoveries of guano he had made, he limits himself to the statement that he would reveal the locality where such deposits existed, and would produce a sample of the guano so soon as the government would advise him *as to what his recompense would be.*

"*c.* The director-general of the treasury of Peru, of whom the government requested a report touching Landreau's petition, expressed the opinion that there was no law applicable thereto.

"*d.* Although the attorney-general of Peru, Señor Villarán, whose opinion was also consulted on the 18th of January 1860, gave it as his view that the government might assign to Landreau, under certain circumstances, a third of the value of the guano by him discovered, in accordance with the decree of the 3d of February 1833; said opinion was later on, October 31, 1863, counteracted by the attorney general, Señor Ureta, who held that the said decree was not applicable to the petition of Landreau because the reward therein offered referred only to the declaring of national property illegally held; for, as this might pass into private hands, it was feared that the holders in good faith might set up prescription, after the lapse of a certain number of years, and thus oust the state of its rights. Confronted by the fear of losing such property, the government thought it well to stimulate investigations and individual interest by offering to the declarers of such properties a third of the value thereof,—circumstances which could not attach to cases of guano discoveries, which in no way could become private property through simple possessory title.

"*e.* Whatever the opinions of the attorneys-general of Peru, Señores Villarán and Ureta, may have been, neither of them involves, according to the laws of Peru, a binding precedent, nor has it any legal force unless such opinion, which is merely explanatory, obtains the effective approval of the government.

"*f.* The Government of Peru disregarded the opinion of the Attorney-General Señor Villarán and followed that of the Attorney-General Señor Ureta, as appears from the decree of the 24th of October 1865, which occasioned the petition of Landreau under the conditions therein set forth.

"*g.* Landreau, upon accepting and subscribing the contract of October 28, 1865, with the Government of Peru, by this very fact accepted also the opinion of the attorney-general, Señor Ureta, which served as the basis of the decree of the 24th of October of the same year, and according to which the resolution of the council of state of the 13th of February 1833, did not apply to the discoveries of guano made by Landreau.

"*Second.* That the seventh paragraph of Law VI. Title XXII. Book X. of the *Nuera Recopilación* is also inapplicable to this claim, for the reason that this law refers solely to property left by persons dying intestate and without heirs within the fourth degree, and to certain property having no known owner, *res nullius.*

"*Third.* That the decree of 1847 was only a regulation, having for object the registration of all the properties referred to in the decree of 1833 and in the law in the *Neuva Recopilación*, before cited.

"*Fourth.* That by decree of the 12th of December 1868, the Government of Peru had declared invalid the contract of October 28, 1865, promising to later on give Landreau a moderate compensation for his services as discoverer.

"*Fifth.* That the legal standing of Landreau has been the same as that of any other claimant, having, according to conventional agreement, a personal claim against Peru.

"*Sixth.* That Chile took possession of the guano deposits existing in the territory of Peru in the year 1881, both republics being in a state of war.

"*Seventh.* That Theophile Landreau lacking all *jus in re* recognized by the Government of Peru, in the aforesaid guano deposits, and said deposits being at that time under the absolute control and possession of said government, that of Chile could legitimately take possession thereof as property of the enemy, in accordance with the laws of war. That Peru has ceded to Chile the territory mentioned in articles 2 and 3 of the treaty of peace of October 20, 1883, without other *onus* than those provided for in articles 4 to 10 of the said treaty of peace.

"*Eighth.* That (to leave nothing unsaid) Chile having agreed in the aforesaid treaty of peace with Peru, to deposit in the Bank of England 50 per cent of the product of guano already collected or which might later on be collected, to be applied to

the payment of debts due by Peru and secured by said guano, subject to the award to be made by an arbitrator to be named by the interested parties, and in default thereof by the Government of Chile; and the federal court of Switzerland having been named for this purpose in 1893, as is notorious, Landreau, if he considered he had a *jus in re* in said guano, could have taken advantage of the medium thus offered him to secure the full recognition of his alleged rights.

"That, besides the 50 per cent already referred to, Chile, to help Peru to the liquidation of her debt secured by the deposits of guano, ceded spontaneously to the latter and made a formal delivery on the 5th of December, 1892, of 80 per cent of the 50 per cent that by the treaty of peace had been reserved for herself since the 12th of February, 1882, as appears from the protocols subscribed between the minister of foreign relations of Chile and the diplomatic representative of Peru in Santiago on the 8th of January 1890 and of the 5th of December 1892 (Report of Foreign Relations, 1892, pages 50 and 156).

"That on the 23d of July 1892, a protocol, signed by the minister of foreign relations of Chile and the diplomatic representative of France in Santiago, Chile, also made a spontaneous cession of the remaing 20 per cent in favor of said French creditors whose titles should obtain a favorable decision from the federal court of Switzerland. Therefore Chile, by the transactions referred to, has returned in favor of Peru and of her creditors claiming a right to the guanos, all proceeds that had resulted from the sale of that article. (See Report of Foreign Relations, 1892, page 121.)

"That in conformity with the said protocol of December 5, 1892, the Government of Chile delivered to the Government of Peru on that date and for a period of eight years thereafter the guano beds that existed in the territory transferred to Chile by the treaty of peace, in order that they might be exploited and their proceeds used in the payment of the Peruvian debt guaranteed by that article. (See Report of Foreign Relations of Chile, 1892, page 156.)

"Finally, that the rights of T. Ellet Hodgskin being derived from those of Jean Theophile Landreau, all the foregoing considerations apply.

"In virtue of the foregoing statements the commission is of opinion that the present claim against the Government of Chile, under whatever aspect it may be considered, is inadmissible, and therefore decides that the demurrer filed by the honorable agent for the Republic of Chile is sustained, and the claim of T. Ellet Hodgskin is disallowed."

In the case of Landreau (No. 38) the opinion of the commission was as follows:

"John C. Landreau, in his memorial, numbered 38, substantially says:

"That he is a naturalized citizen of the United States and

the legitimate owner of one undivided tenth part of certain guano deposits situated in the Republic of Peru.

"That he derives title to said property from a transaction made by public instrument (*escritura pública*) on the 29th of October 1875 with his brother, J. Theophile Landreau, a French citizen, in which it was agreed that the claimant should have an interest of 30 per cent in the guano acquired by J. Theophile Landreau, and the latter was to retain the remaining 70 per cent.

"That the rights of Theophile Landreau grew out of certain discoveries of guano deposits made by him between the years 1844 and 1859, and which he reported to the Government of Peru in 1865.

"That by reason of said discoveries the said Jean Theophile Landreau became entitled, and had a right under the laws of Peru then in force, to one-third of the property discovered, as provided in § 6 of the resolution of the council of state (of Peru) of the 13th of February 1833, and contained in volume 4 of the Collection of Laws by Quiroz.

"The memorialist further states that on the 28th of October 1865 the said J. Theophile Landreau, representing both his interests and that of the claimant, and with the consent and acceptance of the latter, by way of compromise and with the view of facilitating the settlement of their interests, entered into a contract with the Government of Peru, by which they were to receive in compensation of their rights to one-third of the guano deposits discovered by J. Theophile Landreau a certain proportion of five million tons of guano to be removed from said deposits, and the claimant refers to said contract and annexes a copy of it, marked "Exhibit 6."

"That Peru refused, however, to carry out said contract, and formally repudiated and attempted to annul it by decree of the 12th of December 1868, whereby the memorialist and J. Theophile Landreau were restored to their original rights as they existed prior to the said 28th day of October 1865; that the Government of Chile, knowing well the places, titles, and rights so owned by the memorialist and J. Theophile Landreau, forcibly took possession, in 1881, of the said guano deposits, and has held them in its exclusive possession until the present time and has worked them, having extracted, according to the information received by the claimant, more than three million tons of guano, upon the selling price of which there would correspond to him a sum exceeding five million dollars, American gold, which sum the memorialist claims should be paid him by Chile plus an interest of 6 per cent from the 1st of January 1882.

"The agent for the Republic of Chile has filed a demurrer to this claim, alleging that John Theophile Landreau, not having had any *jus in re* to said deposits of guano, can not claim from the Government of Chile.

"The commission has examined this claim, which, by its

origin, nature, and judicial character, is analogous to the one of T. Ellet Hodgskin, No. 39, and decides that the same considerations adduced in said case are in general applicable to the present one.

"Therefore the commission decides that the demurrer interposed by the agent of Chile is sustained and that the claim of John C. Landreau is dismissed."[1]

Dissenting Opinion.

Mr. Goode, the United States commissioner, delivered the following dissenting opinion:

"In these two cases the same questions, substantially, are presented by the demurrer of the defendant. As a matter of convenience, I will consider the latter case.

"The following facts appear from the memorial:

"1. That the claimant is a native-born citizen of the United States and is the legal and equitable owner by assignment of all the right, title, and interest in and to the claim of J. Theophile Landreau against the Governments of Peru and Chile; that the justice and validity of said claim have been inquired into by the Government of Peru repeatedly and admitted to be just and valid.

"2. That a public decree and proclamation of the Government of Peru, as shown in 'Exhibit No. 1,' accompanying the memorial, is the basis of this controversy; that, confiding in said decree and proclamation and in the public faith of said government as therein pledged, said J. Theophile Landreau devoted years of labor, toil, and privation in prospecting for deposits of guano and other heretofore hidden and unknown natural resources of the lands of Peru, and expended large sums of money in and about the search for the same.

"3. That by the then existing laws of Peru and the expressed terms of the aforesaid decree said Landreau was entitled to receive either one-third of all the mineral or other natural resources discovered by him, or one-third of their value.

"4. That said J. Theophile Landreau was very successful in his labors as aforesaid, owing to his discoveries of large deposits of guano of the value of many millions of dollars, until then wholly unknown, and the value of the lands of Peru was very greatly increased.

"5. That the Government of Peru obtained every benefit of the discoveries made by said J. Theophile Landreau as aforesaid.

[1] The commission subsequently amended its order in the two cases, as follows:

"The honorable agent of the United States having submitted a motion to amend the judgments of the commission in cases Nos. 39, T. Ellet Hodgskin *v.* The Republic of Chile, and 38, John C. Landreau *v.* The Republic of Chile, by the addition of the words 'without prejudice,' we decide that the said judgments be amended to read as follows:

"No. 39. That the demurrer filed by the honorable agent of Chile is sustained, and the claim of T. Ellet Hodgskin *against the Republic of Chile* is disallowed.

"No. 38. That the demurrer interposed by the agent of Chile is sustained, and that the claim of John C. Landreau *against the Republic of Chile* is dismissed."

"6. That neither said J. Theophile Landreau nor his successors and representatives, nor the claimants, have ever received any compensation of any kind at any time from the Government of Peru, notwithstanding the result of said discoveries was to restore, extend, and sustain the credit of Peru in the financial markets of the world.

"7. That said claim has never been paid or satisfied in whole or in part by the said Government of Peru. Successive administrations of said government have declared that under the law, as set forth in 'Exhibit No. 1,' under which this claim is made, to make any just compensation to Landreau for his services it must of necessity be so great as to exceed the ability of said government to pay the same.

"8. That upon such report by its own officials said government entered into negotiations with said Landreau for the reduction of his claim to an amount within the power of said government to pay.

"9. That said Landreau, moved by said reasoning, offered to waive the strict legal rights to which he was entitled under the said law and the aforesaid decree, and to accept a smaller compensation than he was otherwise entitled to claim. Whereupon said government, on or about the 24th day of October, 1865, submitted to the said Landreau a basis of settlement, which was thereafter duly accepted by the said Landreau.

"10. That, notwithstanding its promises and agreements as aforesaid, said government thereafter neglected to carry out the settlement which it had submitted to said Landreau, and wholly disregarded the same and every part thereof, in violation and neglect of right and justice, and of its solemn agreements and covenants as aforesaid.

"11. That the Government of Peru, for the payment of a war indemnity, conveyed certain territories in which were located the deposits of guano aforesaid, to the Government of Chile, and the Government of Chile thereupon took and has ever since retained possession of the islands and mainland upon which said deposits of guano discovered by the said J. Theophile Landreau were situated.

"12. That at the time of the commission of the grievances in the memorial mentioned the claimant, individually and as such trustee, had a just and legal claim in and upon said deposits of guano and each of them, on account of the said claim against the Republic of Peru, to the full extent thereof, and that such claim was a valid and subsisting lien upon said deposits of guano and each of them at the time at which the Republic of Chile entered upon, seized, removed, and sold such deposits of guano and each of them, and converted the proceeds thereof to her own use; that such lien has ever since existed and now exists in favor of the claimant either against such deposits of guano or the proceeds thereof.

"13. That the Government of Chile was duly notified by the claimant's grantors before taking possession of said deposits of guano, both through the Secretary of State of the United States and by means of duly authenticated written documents on file in the government offices at Lima, Peru, that claimant's grantors had a valid legal claim upon the said deposits of guano, as owners of the claim of the said J. Theophile Landreau, and that he and his assigns would hold the said Government of Chile responsible for the share claimed by Landreau of any guano forming part of the deposits of the guano aforesaid which might be taken away and removed.

"14. That the Chilean Government, in disregard of such notices and in

violation of the rights of claimant and his grantors, took and removed large quantities of such guano, of the value of more than ten million dollars, and, as the claimant is informed and believes, sold the same and converted the proceeds of the sale to its own use and benefit, and has neither paid nor offered to pay the claimant or his grantors any sum whatever on account thereof.

"15. That by reason of the premises the claimant is justly entitled to have and receive from the said Government of Chile at least one-third of the value of all guano taken and removed by its orders and permission from the deposits of guano on said islands and the said mainland of Peru, discovered by the said Landreau.

"16. That claimant is not in a position to state with greater certainty the exact amount of guano taken and removed by the said Government of Chile as aforesaid, but is informed, and believes and thereupon avers, that the amount thereof exceeds in value $10,000,000.

"The remaining paragraphs of the memorial set forth the different steps that have been taken to confer title upon the claimant individually and as trustee.

"I am of opinion that the facts as stated in the memorial, and as admitted by the demurrer, are sufficient under the treaty and in law to entitle the claimant to maintain his claim. What was the contract between J. Theophile Landreau and the Government of Peru upon which this claim is based, and out of which this controversy has arisen? We find in 'Exhibit No. 1,' accompanying the memorial as a part thereof, the following decree and proclamation, taken from the compilation of Quiroz, vol. 4, p. 266:

[Here follows paragraph 6 of the decree.]

"The supreme decree of 1847, signed by Rio, minister of the interior, is as follows:

[Here follows the decree, above quoted.]

"The report of Attorney-General Villarán, dated January 18, 1860, reads as follows:

"'The attorney-general is of the same opinion as the director-general of France as to the fact of verifying whether the deposits of guano declared by Jean Theophile Landreau have or not been known up to this day; it is therefore necessary to make such a search, and in consequence this office is of the opinion that if, after having made the verification by means of the certificates and reports of the State Department, it should happen that the said deposits are unknown, your excellency will then be able to accept the declarations of Landreau, and notify him, as a reward, of the allowance of a third part of the guano discovered, conformably to the sixth paragraph of the decision of the council of state of February 13, 1833, vol. 4 of the Collection of Laws by Quiroz, and which, besides, is the general law applicable to this matter. Your excellency can therefore order a suitable verification to be made, and decide according to the contents of this report, or as your excellency will deem advisable.'

"It thus appears that by the express terms of the decree of 1833, based on the laws of Peru as interpreted by her attorney-general, Landreau was entitled to one-third of the guano deposits discovered by him. No contract can be of higher dignity or more binding in form than that which

exists under the supreme decree of a government based upon the laws of that government. The effect of the contract was to vest in J. Theophile Landreau an equitable title to one-third of the guano deposits discovered by him, which became a legal title when those discoveries were reported to and accepted by the government of Peru. He was to all intents and purposes the legal owner of one-third of the guano deposits in question. He was joint owner with Peru of this valuable property. His title to the one-third of the guano deposits discovered by him was as clear and indisputable as that of Peru to the remaining two-thirds, as soon as those discoveries were reported and accepted. Under these circumstances, Peru, being pressed by financial difficulties and sorely in need of money to sustain her waning credit, made to Landreau a proposition of compromise, thereby recognizing the justice and validity of his claim. The offer of compromise was accepted by Landreau, and the result was the formal contract of October 28, 1865, under which he was to receive a certain percentage of the net proceeds of the guano deposits discovered by him. That contract reads as follows:

"'LIMA, *28th October, 1865.*

"'The administrator signing at the foot in the name and as representative of the state, making use of the authority vested in him for this purpose, affirms by these presents that this concession guarantees Jean Theophile Landreau the terms named in the six conditions mentioned in the supreme decree of 24th of October, 1865, which said statement forms the true essence of this instrument, against which at no future time can there be any reclamation, in any manner whatsoever, unless the grantee or his attorney should not, either wholly or in part, comply with the supreme resolution approving the discovery made of the guano belonging to the nation, and if such be the case, the compliance with the stipulations of the sixth article of the supreme resolution aforesaid will be faithfully carried out, and if Landreau or his attorneys do faithfully fulfil every act demanded of him, the same faithfulness will be used towards him in carrying out the six principal conditions forming the basis of this contract.

"'JOSÉ FELIX GARCÍA.

"'TOMAS CARLOS WRIGHT.'

"If Peru had complied with this new contract and kept the faith thus solemnly plighted, this controversy would not have arisen, and this commission would not have been invoked to decide this claim according to 'public justice, law and equity.' It appears, however, that on December 12, 1868, at Lima, another decree was proclaimed by the ministry of commerce and finance, setting forth that the premium stipulated to be accorded to Landreau is of such a great amount that it can never be given by the government, and declaring that the contract signed between the government and Landreau is null and void, *whilst the discovering of the deposits and the information of the same made by him were accepted.*

"Notwithstanding the solemn declaration, embodied in a law of the Peruvian Congress, that 'the Executive will faithfully fulfil in all their parts the contracts made with parties, whether they be national citizens or foreigners, whatever be the time and government under which they have been made' Peru finds it convenient to declare the contract of October 1865 null and void. While accepting its benefits on her part, she deliber-

ately repudiates it so far as Landreau is concerned. What are the legal consequences of such a breach of faith and such a violation of the new contract? I am of the opinion that the legal effect is to remit the parties to their original status and to restore to Landreau his right to claim one-third of the guano deposits discovered by him, or one-third of their value if they have been converted and sold. It is a well-settled principle that when one party fails to perform his part of the contract, the other party may treat the contract as rescinded. If it be true that Landreau was the legal owner of one-third of the guano deposits discovered by him and that the Government of Peru in payment of a war indemnity has conveyed to the Republic of Chile the territory in which the said deposits are located, and Chile now holds possession of said territory, it follows that Chile is responsible for such deposits, or for their value if they have been converted and sold by her. Peru had no right to convey, and Chile had no right to receive, property that belonged to Landreau. When Peru conveyed the territory on which the guano deposits were located, Chile took it *cum onere*. She took it subject to all existing liens and incumbrances; she took such title to the guano as Peru had, and Peru had title only to two-thirds thereof. It is the very nature and essence of a lien that no matter into whose hands the property goes it passes *cum onere*. The lien of Landreau still exists and remains inseparably attached to the deposits of guano or to the proceeds of their sale.

"It appears that the Government of Chile was duly notified, before taking possession of said deposits of guano, that claimant's grantors had a valid legal claim upon the same, and that she would be held responsible for such deposits as might be taken away and removed.

"As to the second ground of the demurrer, that there was neither contract nor privity of contract between the Republic of Peru and these claimants, I deem it sufficient to say that, as I understand their claim, they do not base it upon any contract with Peru. They claim one-third of the guano deposits in question as assignees for valuable consideration from J. Theophile Landreau, who derived his title from Peru. The transaction between these individuals was one in which Peru had no concern. J. Theophile Landreau had the right to sell, and claimants had the right to purchase, this property without the consent of Peru. Any estate or interest in land is assignable. If J. Theophile Landreau was the legal owner, he had the absolute right to dispose of the property in whole or in part. The memorialists aver 'that in or about the year 1881 Chile, well knowing the premises and the right and title so held by them aforesaid, took possession of all the said guano deposits so discovered by J. Theophile Landreau and reported to the Peruvian Government, and has from thence until the present time held exclusive possession thereof, and has worked, or caused the same to be worked, and has removed from said deposits large quantities of guano.'

"In view of all the facts as stated in the memorial, I am of the opinion that Peru was responsible to the claimants for one-third of the guano deposits discovered by J. Theophile Landreau before the cession of that part of her territory on which the said deposits were located, and that Chile became responsible by the acquisition of the said territory and the appropriation to her own use of the said property.

"The demurrer should be overruled and the defendant required to answer."

CHAPTER LXIV.

BOND CASES.

Texas Bond Cases.

On the 24th of October 1838, a contract was entered into between James Holford, of London, and Messrs. Williams and Burnley, commissioners of Texas, who were authorized to negotiate a loan under the provisions of an act of the congress of Texas of May 16, 1838. By this contract Holford was to purchase for the Republic of Texas a steamer, then lying at Philadelphia, and provision and deliver her at Galveston, in Texas. This Holford did, and the contract was afterward approved by an act of the congress of Texas of January 10, 1839, and bonds were issued to Holford, dated July 1, 1839, for the payment of which the faith and revenues of the republic were solemnly pledged by acts of its congress of November 18, 1836, and May 15, 1838. Provision was also made by an act of January 22, 1839, that a certain portion of the sales of the public lands should be annually reserved, as a permanent and sinking fund for the payment of this debt, until the whole should be paid.

It was alleged that payment had not been made of either principal or interest on these bonds.

In 1845 Texas was admitted into the Union as one of the United States.

By the Constitution of the United States the general government has power "to regulate commerce," and "to lay and collect taxes, duties, imposts and excises;" and the several States are forbidden to "enter into any treaty, alliance, or confederation," or, "without the consent of the Congress," to "lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws."[1]

According to the terms agreed upon between the United States and the Republic of Texas, whereby the latter became

[1] Art. I. secs. 8, 10.

one of the United States of America, the vacant and unappropriated lands within its limits were to be retained by the State and "applied to the payment of the debts and liabilities of the Republic of Texas; and the residue of the lands, after discharging the debts and liabilities, were to be disposed of as the State might direct, but in no event were said debts and liabilities to become a charge upon the Government of the United States."[1]

Subsequently, in modifying the boundary of Texas, the United States, in 1850, on condition of the cession by Texas of certain large tracts of land to the United States, agreed to pay Texas $10,000,000, but stipulated that "five millions of the same should remain unpaid until the creditors of the State holding bonds and other certificates of stock of Texas, for which duties on imports were specially pledged, should first file at the Treasury of the United States releases of all claims against the United States for or on account of such bonds or certificates, in the form prescribed by the Secretary of the Treasury and approved by the President of the United States."

Up to 1854, when a claim against the United States for the payment of Holford's bonds was presented to the mixed commission organized under the convention between the United States and Great Britain of February 8, 1853, difficulties between the United States and Texas as to the manner of appropriating the sum in question had prevented its payment to Texas, and new measures in regard to it were then pending before Congress. The British Government had never treated any of the claims of the holders of Texas bonds as a subject of interposition with the United States.

Thomas, the agent of the United States, protested against the commission's entertaining Holford's claim on the following grounds:

"I. Because it is in no proper sense a claim on the Government of the United States, embraced or contemplated by the convention of February 8, 1853, for the settlement of outstanding claims.

"II. Because the second of the resolutions for the admission of the Republic of Texas into the Union as a State, among other things, declares that 'in no event are the debts and liabilities of Texas to become a charge upon the Government of the United States.'

"III. Because the people of the said Republic of Texas, by

[1] Stats. at L. v. 798.

deputies in convention assembled, with the consent of the existing government and by their authority, did ordain and declare that they assented to and accepted the proposals, conditions, and guaranties contained in the resolutions above referred to, and thereupon she was admitted into the Union as a State.

"IV. Because it is not true, as is asserted in the statement of the claim presented to the commissioners, that Texas is incorporated into and subjected to the dominion of the United States Government so as to destroy her responsibility for debts contracted while an independent republic, or her ability to meet them; but, on the contrary, she is for the purpose of fulfilling these obligations as clearly responsible for their payment by the law of nations, by her separate and distinct organization, and by her solemn agreement with the United States as she ever was, and is fully able to discharge them; and this commission is not authorized to interfere to shift any such obligation from Texas upon the United States.

"V. Because this commission has nothing to do with any law or act of the United States addressed to the government or people of Texas, designed or tending to induce that State to perform her obligations entered into while an independent republic; and hence, to take jurisdiction of this claim would be a palpable and unwarrantable violation of the spirit and intention of the convention establishing this commission, to which the United States would have a perfect right to take exception, as much as if this commission were to pass laws for the government of the United States or do any other thing wholly without the limits of its authority."

The case was argued at length in reply to the protest of Mr. Thomas, as well as on the merits, by Mr. Hannen, British agent, and Mr. Cairns. On the application of one of the claimants it was reargued before the commissioners and the umpire, by Messrs. Reverdy Johnson and Hannen for the claim and Mr. Thomas against it. The arguments of counsel, and the opinions of the commissioners, who differed as to the liability of the United States for the payment of the bonds, covered a wide range. In the printed report of the proceedings of the commission the umpire's opinion is not given, but it is stated that he dismissed the claim on the ground "that cases of this description were not included among the unsettled claims that had received the cognizance of the governments or were designed to be embraced within the provisions of the convention, and were, therefore, not within the jurisdiction of the commission." Whatever may have been the meaning intended to be conveyed by this vague statement as to what the umpire held,

the language is misleading. The umpire's awards on the Texas bond claims are on file and are textually as follows:

"LONDON, *29th November 1854.*

"The umpire appointed agreeably to the provisions of the convention entered into between Great Britain and the United States on the 8th of February 1853, for the adjustment of claims by a mixed commission, having been duly notified by the commissioners under the said convention that they had been unable to agree upon the decision to be given with reference to the claims of the heirs of James Holford against the United States in relation to Texan bonds; and having carefully examined and considered the papers and evidence produced on the hearing of the said claim, and having conferred with the said commissioners thereon, hereby reports that this commission can not entertain the claim, it being for transactions with the Independent Republic of Texas prior to its admission as a State of the United States.

"JOSHUA BATES.
"*Umpire.*"

"LONDON, *29th November 1854.*

"The umpire appointed agreeably to the provisions of the convention entered into between Great Britain and the United States on the 8th of February 1853, for the adjustment of claims by a mixed commission, having been duly notified by the commissioners under the said convention that they had been unable to agree upon the decision to be given with reference to the claim of Messrs. Dawson, of Baltimore in the United States, relating to Texan bonds against the Government; and having carefully examined and considered the papers and evidence produced on the hearing of the said claim, and having conferred with the said commissioners thereon, hereby reports that in his opinion Messrs. Dawson have no right to claim before this commission, being, according to the law of nations, citizens of the United States and not British subjects; and were they British subjects, the claim being for transactions with the Independent Republic of Texas before it became a State of the United States, the claim can not be entertained by this commission.

"JOSHUA BATES, *Umpire.*"

Commission under the convention between the United States and Great Britain of February 8, 1853. (S. Ex. Doc. 103, 34 Cong. 1 sess. 382–426.)

Florida Bond Cases.

In 1835 the territorial government of Florida incorporated the "Union Bank," with a capital of $1,000,000, with power to increase its capital to $3,000,000. To aid in raising the capital stock, the Territory issued bonds acknowledging its indebtedness to the bank, which bonds were signed officially by the governor and

the treasurer of the Territory, and were intrusted to the bank with authority to dispose of them for its benefit.

The stockholders of the bank were to consist entirely of citizens of Florida. They were required to mortgage personal property and real estate to an amount equal in value to the stock subscribed for by them; and this property was to be held by the bank, and applied to the payment of the principal and interest of the bonds of the Territory as they fell due.

A charter with provisions of a similar character was granted about the same time to the "Southern Life Insurance and Trust Company." This company issued bonds or "certificates," as they were called, which were guaranteed by the Territory, and the property of the stockholders which was held by the company was pledged for their payment.

Through misfortunes and mismanagement these institutions failed, for the most part, to pay either the principal of the bonds and certificates issued to them by the Territory, or the interest upon them; and up to the time when the present question arose payment had not been made either by the Territory or the State of Florida. Some of the bonds and certificates were negotiated in Europe, and, in default of their payment by Florida, a claim was made before the commission under the convention between the United States and Great Britain of February 8, 1853, for their payment by the United States.

The following articles in the constitution of Florida of 1838 were adverted to in the arguments of counsel and the opinions of the commissioners and umpire:

"We the people of the Territory of Florida by our delegates in convention assembled at the city of St. Joseph on Monday the 3d day of December A. D. 1838, and of the independence of the United States the sixty-third year, having and claiming the right of admission into the Union, as one of the United States of America consistent with the principle of the Federal Constitution, and by virtue of the treaty of amity, settlement, and limits between the United States and the King of Spain, ceding the provinces of east and west Florida to the United States, in order to secure to ourselves and our posterity the enjoyment of all the rights of life, liberty, and property, and the pursuit of happiness, do mutually agree, each with the other, to form ourselves into a free and independent State by the name of the State of Florida.

"ARTICLE 1.

"*Declaration of rights.*

"CLAUSE 19. That no law impairing the obligation of contracts shall ever be passed.

"ARTICLE 8.

"*Taxation and revenue.*

"CLAUSE 2. No other or greater amount of tax or revenue shall at any time be levied than may be required for the necessary expenses of government.

"ARTICLE 11.

"*Public dominion and internal improvement.*

"CLAUSE 2. A liberal system of internal improvements being essential to the development of the resources of the country shall be encouraged by the government of this State, and it shall be the duty of the general assembly as soon as practicable to ascertain, by law, proper objects of improvement in relation to roads, canals, and navigable streams and to provide for a suitable application of such funds as may be appropriated for such improvements.

"ARTICLE 17.

"*Schedule and ordinance.*

"SECTION 1. That all laws or parts of laws now in force or which may be hereafter passed by the governor and legislative council of the Territory of Florida, not repugnant to the provisions of this constitution, shall continue in force until by operation of their provisions or limitations the same shall cease to be in force, or until the general assemby of this State shall alter or repeal the same, and all writs, actions, prosecutions, judgments, and contracts shall be and continue unimpaired; and all process which has heretofore issued or which may be issued prior to the last day of the first session of the general assembly of this State shall be as valid as if issued in the name of the State; and nothing in this constitution shall impair the obligation of contracts or violate vested rights either of individuals or of associations claiming to exercise corporate privileges in this State."

Arguments.

Mr. Rolt, Queen's counsel, and Mr. Cairns argued the case for the claimants, assisted by Mr. Hannen, the special agent and counsel to Her Majesty's government.

The following points were taken by Mr. Rolt:

1. The principles of equity, reason, and public morals required the United States to pay this debt of Florida, contracted while Florida was a Territory.

2. The terms of the treaty of cession of Florida by Spain to the United States, in 1819, Articles II. and VI., conducted to the same result.

3. The debt, from its origin, was a debt of the United States as well as of the Territory.

4. In any event the United States confirmed and assumed this debt when Florida was admitted into the Union.

Mr. Thomas, the agent of the United States, said that the claim for the payment of the interest and ultimately of the principal of the bonds was now for the first time presented against the Government of the United States. Florida was ceded to the United States by Spain on February 22, 1819, and it was agreed that the inhabitants should be incorporated into the Union as soon as consistent with the Federal Constitution, and admitted to the enjoyment of all the rights, privileges, and immunities of citizens of the United States. By section 3, Article IV. of the Federal Constitution, Congress is empowered "to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States." In 1822 Congress by law established a territorial government for Florida. In this, as in all previous territorial governments, the legislature had no power over the primary disposal of the soil, nor any power to tax the lands of the United States, nor to interfere with claims to lands within the Territory. Nevertheless, the government created for the Territory was not an agency of the United States, but a government by which the people could execute their purposes. Its officials were officers of the Territory, and not of the United States. It had executive, legislative, and judicial departments, possessing the powers usually exercised by the government of a State. Process ran in the name of the Territory. It had complete civil and criminal jurisdiction and possessed the power to lay and collect taxes. In the exercise of these ample powers it chartered the bank and the trust company in question.

The failure of the government of Florida to pay the bonds and certificates, did not, said Mr. Thomas, impose on the Government of the United States any obligation, nor had that government any authority to pay them. Its powers were limited by the Federal Constitution. It had power to borrow money on the credit of the United States to pay the debts of the United States, but none to borrow money on the credit of a Territory or to pay the latter's debts. It was true that in the act authorizing the territorial government, Congress reserved the power to *disapprove* the acts of the legislature; but this was not a new principle, and it did not render the United States liable for all the acts of the legislature and what was done under them. In the bill to charter the Union Bank there was a clause requiring the express sanction of Congress before the act should take effect. The governor objected to

this clause as derogating from the powers of the legislature, and it was stricken out. This fact was before the world when the bonds were sold; and if anything were wanting to show that it was understood that the credit of the United States was in no way involved, it was the circumstance that the bonds were sold and purchased at 10 per cent below par, while the obligations of the United States were selling above it. The bonds on their face pledged the credit of the Territory of Florida, and not of the United States. The implication of liability in the case of the British Government, in respect of colonial bonds, was much stronger than in the case of the United States, in respect of territorial bonds; and yet no one supposed that the British Government was bound for colonial bonds, unless it had expressly assumed liability for them, as in the case of the "guaranteed loan" of Canada. In support of his position Mr. Thomas cited *Williams* v. *Bank of Michigan* (7 Wendell, 539); *Opinion of J. C. Spencer* (5 Wendell, 481); *State* v. *New Orleans Navigation Co.* (11 Martin (La.) 309).

Mr. Cairns, for the bondholders, assisted by Hannen, agent and counsel for Great Britain, in reply, supported the claim on the following grounds:

1. On the general ground of the subordinate power and position of a Territory under the general government. The United States, it was pointed out, held the supreme power over Territories, appointed their chief executives, had a large interest in their lands, and in numerous respects held such a responsibility and charge over them, and such control over their legislation, that in justice and equity the general government should be responsible for their debts.

2. That the article in the constitution of Florida limiting the right of taxation to the necessary expenses of government might be construed, and probably was designed to be construed, in such a manner as to prevent the State government from making the necessary appropriations for the payment of the debts of the Territory; and that Congress, by the admission of the Territory with such a provision, became accessory to the wrong, and should be held to have pledged the resources of the United States for the payment of such debts.

3. It was further contended that, under all the circumstances of the case, the United States was morally bound to pay these debts; that a moral obligation was as high a claim as could be set up against a sovereign power, and was in such case fully

as binding as a legal obligation, since a moral obligation was the only kind of a claim that could exist against a sovereign.

Opinion of Mr. Upham.

Mr. Upham, the American commissioner, delivered the following opinion:

"I have listened attentively to the arguments urged in this case, but have been unable to see any just grounds on which the claim is based.

"To sustain the claim, one of two propositions must be maintained—either that the act of the Territory of Florida pledging her credit originally bound the United States, or that Congress subsequently approved and sanctioned the law of the Territory, so as to make it obligatory on the whole people of the Union.

"I. Could the Territory of Florida bind the United States originally by her acts? This depends entirely on the power vested in her as a government. Florida had been originally colonized by Spain, and had long been subject to her authority. It was ceded by that power to the United States on the 22d of February, 1819, with a provision that it 'should be incorporated into the Union as soon as should be consistent with the principles of the Federal Constitution.'[1]

"The power of holding Territories is evidently given to the general government. The Constitution of the United States provides that Congress shall have power 'to make all needful rules and regulations respecting its Territories.'

"The course of proceeding by Congress in such cases has been to constitute, within any given Territory, whenever the number of inhabitants will justify it, a territorial government, with power to establish its own laws, subject only to such reservations and restrictions as are specifically named in the charter bestowed upon it.

"The governor of Territories has been uniformly appointed by the President of the United States; and in some instances, for a short time, a territorial council has been appointed in the same manner, having the usual powers and authority of a legislature.

"A council was appointed in this manner in Florida until 1826, when it was provided that the inhabitants should elect their territorial council or, in other words, their legislature annually. By the act constituting the Territory of Florida the governor was invested with the powers of a chief executive magistrate; and the council or legislature was authorized, in express terms, 'to legislate on all rightful subjects of legislation,' provided that its laws were to be reported to Congress annually, and 'if they were disapproved by Congress they were thenceforth to be of no force.'

"Under the authority thus conferred courts were established having the highest civil and criminal jurisdiction; and her own

[1] Art. VI.

laws, within her own jurisdiction, subject only to the Constitution of the United States and the negative of Congress, constituted the supreme laws of the Territory.

"Florida exercised under this charter all the ordinary powers of a government. She regulated her own policy, assessed her own taxes, granted numerous acts of incorporation, and established various institutions deemed essential to her welfare and prosperity until 1835, when she passed the acts under which the indebtedness of the Territory was incurred.

"Can the United States be said to have enacted either of these laws or to be holden, as a government, responsible for the payment of the obligation created by them? No evidence has been shown to sustain such a proposition and no theory of government countenances it. Various suggestions have been thrown out as bearing on this point, to which we propose to advert.

"One suggestion which has been made is: That the governor of Florida was appointed by the President of the United States.

"In like manner the governors of every province of Great Britain are appointed by the Crown; but it was never understood that such provinces had not full power of enacting valid, binding laws, within their constituted sphere of action, to the same extent as other governments. It is wholly immaterial in this respect how the chief executive magistrate of a province or the other branches of its government are appointed. When constituted, they form the government of the province, with the ordinary rights, duties, and powers of a government. One of the very least of these powers is the capacity to contract debts in aid of the functions for which it was constituted. Each government possesses this power as one of its attributes, in common with every other public or private corporation, except so far as it may be expressly restricted in its exercise by some organic or other law, and no such law is here intimated or pretended.

"Another suggestion made is: That the laws of Florida might be disapproved by the general government. But this does not make the laws of the Territory the laws of the Union, or bind the Union to the obligations they impose. Such laws, when approved, only operate on the people of Florida. They have no power beyond her limits. If disapproved, they are a mere nullity. The power of approval of colonial laws before they take effect has always existed in the Crown of Great Britain from her earliest territorial acquisitions, and in every other government having colonies or subordinate possessions. The laws made by the colonies are, notwithstanding, their own laws, and have never been holden to bind the mother country.

"The capability of incurring debts for certain objects ordinarily exists in parishes, towns, cities, counties, etc.; and though they may be under control of the general government,

their contracts and their debts incurred by them are nevertheless their own. A different doctrine would confound all principles of just and accurate responsibility, and would seriously impair the advantages devised, through a variety of subordinate organizations, to secure the essential ends of good government.

"Again it is said: That the lands belonging to the United States within the Territory of Florida were not liable to be taxed. This is so. The public lands, however, of the United States are graduated at a price best calculated to insure their rapid settlement, and they become at once liable to taxation on their being sold and improved. The same policy exists in other governments. Public lands and public property are nowhere taxed, but such an exemption was never construed to render the general government liable for the debts of any town, county, or province within which such lands or property might be situated.

"It has been also said, and numerous authorities have been cited to the point: That the original power of the general government over the public territory was absolute and unlimited.

"So the people of the United States had originally unlimited power to adopt the form of government they preferred; and they may still change and modify their Constitution at pleasure, but this does not alter the facts as to the binding character of the acts of the government when once established.

"The United States has chosen to extend to her Territories, in the outset, the right of self-government, and has intrusted them, as in the case of Florida, with powers 'to act in all rightful subjects of legislation.' This power once granted is complete. From thirteen original States the Union has thus extended to thirty-one States, formed mostly from new Territories, each of which is wholly independent of the other as to the contracts and liabilities they may make and the legislation they may adopt, saving only their obligation to the general Constitution of the Union. The government of a Territory does not depend so fully and perfectly on the action of its own people as that of the individual States, but its laws, once enacted and not disapproved, have precisely the same binding power and efficacy, within its limits, as those of a State. No one of these suggestions to which we have adverted, or the whole combined, tend to show that the acts of Florida are the acts of the general government, or that her responsibilities are the responsibilities of the American people.

"II. It remains to consider the second point raised, whether Congress subsequently approved and sanctioned the local law of Florida, so as to make it a provision binding generally on the people of the Union. It is not contended that this local law was adopted or liability incurred by any direct act of the general government assuming the debt. It is said, however,

that the government has rendered itself liable for its payment, because she admitted Florida into the Union as a State without first compelling her to make payment of these debts.

"The argument proceeds on the ground that the United States can not admit a portion of its territory into the Union while in debt without becoming responsible for such indebtedness. It asserts, in substance, the principle that whenever the government has in its power, by the conditional denial of any privilege, to compel a Territory to make payment of a debt, it must insist on such compulsion or it shall be holden to have assumed such debt.

"This is a new responsibility imposed on governments.

"It is quite clear to me, on the other hand, that the United States might well assume the position that she had nothing to do with the contracts between her Territories and individuals, and that it is not a part of her duty to constitute herself into a judicial tribunal to pass upon the pecuniary relations existing between them. Florida might well contend that this should not be done, and that she will not be dictated to or interfered with by the United States on the subject.

"But this point is put still stronger. It is said that a provision was inserted into the constitution of Florida, preparatory to her admission as a State, that 'no other or greater amount of tax or revenue shall at any time be levied than may be required for the necessary expenses of government,' and it is contended that this provision expressly prohibits the payment of any prior existing debt; and that the United States, by admitting Florida into the Union with such a clause in her constitution, became accessory to the wrong done, and should be holden responsible for it. But this is a far-fetched construction of the clause in question, and forms altogether too remote a claim to impose a legal pecuniary liability. The most necessary expenses of a government are the payment of its obligations as they fall due. It can hardly be pretended, if a tax should be assessed by the State of Florida upon its citizens to raise funds to meet such obligations, that an individual could resist payment of such tax on the ground that it was unconstitutional. No court would give such a construction to this provision of the constitution, and unless we hold that such would necessarily be the decision of the court, then the objection is without foundation, and constitutes no ground for the assertion that the United States, by admitting Florida into the Union with this provision, should be held to have assumed the debts of the Territory.

"But whether such be the interpretation of the clause in the Constitution or not, the inference attempted to be drawn from it would not follow. If Florida has repudiated her debts for any cause, it was her act, and it was not incumbent on the United States to compel her, by any denial of the ordinary right of admission into the Union, to pay such debts. She

had no more rightful control over the acts of a Territory so situated than she had over a State.

"The creditors of the Territory had no power, either legal or moral, to interpose any such bar to her admission. It is not a remedy for coercing the payment of debts which was contemplated by any party to the contract when entered into. The United States, therefore, violated no principle of law, or equity, or moral obligation in admitting Florida into the Union, and is guilty of no laches for which she could be holden responsible in not disapproving the acts passed by her as a Territory.

"The several States and Territories are independent sovereignties for the ordinary purposes of local government. They have the power over the liberty and lives of their citizens, and the formation of their own civil and social relations within their precinct.

"They can incur obligations for all expenditures coming within their appropriate sphere as fully as the general government. Their delinquencies in any matter coming within the range of their powers are their own; and, however grievous a wrong they may inflict by such delinquencies on their creditors, the precedent of holding the general government responsible for such wrong would be still more disastrous. It would impose burdens on individuals having no immediate share or interest in the benefit received, would constitute taxation without representation, and would confound the necessary and rightful distinctions in the partition of responsibility and accountability essential for the maintenance of government.

"The wrong complained of is not one which can be charged against the United States; she is not amenable for it, and a proper appreciation of the distinct agencies of different organizations in government will fully exonerate the United States from the claim set up in this case. In my view, therefore, the claimants have shown no ground entitling them to recovery against the general government."

Opinion of Mr Hornby.

Mr. Hornby, the British commissioner, contended that the United States was liable for the bonds, first, because the Territories were "subject to the absolute government of Congress." Not only, he said, did the right of *government* belong to Congress, but the United States also owned the unsettled lands, the funds derived from the sale of which were at the absolute disposal of the national government, and were applied to national purposes; citing 1 *Kent Comm.* 276; *Story on the Constitution*, par. 1327; *State* v. *New Orleans Navigation Co.*, 11 Martin (La.) 313; *Opinion of Butler*, *At. Gen.* Op. 1006; *Opinion of Sherman*, *Senator*, *Williams* v. *Bank of Michigan*, 7 Wend. 554. From an early period in its existence, the terri-

torial government of Florida created a great number of corporations for public purposes. The acts for that purpose were duly submitted to Congress; some were disallowed, while others were permitted to stand after having been the subject of discussion in that body. Among these was the one establishing the "Union Bank of Florida" (1833). This act, though declared by a committee of the Senate to contain some objectionable provisions, was suffered to stand.

Mr. Hornby contended that Congress had thus "authorized and ratified" the various acts relating to the corporations whose bonds were before the commission; and the discussion had, he said, "entirely turned upon the extent to which Congress is affected by having given such authority and ratification."

On this subject Mr. Hornby said:

"Up to the 1st July 1841 the interest on the bonds was duly paid at the times and places appointed; but from that date to the present time no payment whatever has been made on account of them, and the corporations have become completely insolvent. Upon this, payment of the interest on the bonds was sought to be obtained from the territorial government, in accordance with the terms of the bonds; but the claim was refused, and in 1842 the territorial legislature passed resolutions declaring that the governor and council were 'never invested with authority to pledge the faith of the Territory so as to render the citizens responsible for the debts or engagements of any corporation chartered by the territorial legislature.' The revenue laws of the Territory were also suspended, 'so far as they authorized the assessment and collection of a territorial revenue in future,' with certain specific exceptions. These acts of the territorial legislature were submitted to Congress, and were permitted to pass into law without disapproval.

"From this time, then, until the admission of Florida into the Union as a State, the territorial legislature persisted in its repudiation of the engagements contracted on the bonds; and, although the subject was repeatedly brought before Congress in various ways—in some cases by memorial of the bondholders praying for relief—no action of Congress took place, and the bondholders remained without redress.

"Let us pause for a moment to consider what the position of the bondholders and Congress would have been had the facts already stated constituted the whole case.

"The bondholders advanced their money on an engagement entered into by the agents duly constituted by Congress for the government of the Territory, for the payment of money by the Territory; such engagement being sanctioned by Congress,

its acquiescence in the passing of the bank act having induced the public, in the language of Mr. Chancellor Kent, to invest property and make contracts upon the faith and validity of the charter. The Territory acknowledged itself to be indebted in the amount of the bonds, and the 'faith of the Territory' was pledged for the repayment. Now, what is the meaning of a Territory or State acknowledging itself to owe a debt, and pledging its faith for the liquidation of it? It plainly means this—or it means nothing—that the governing power engages that the revenue, resources, and property of the Territory or State are pledged for the debt, and shall be applied to its discharge. In other words, an obligation was created on the part of Florida by the executive, as the agent of the sovereign power, and by the legislature, as the agent of the people, which was sanctioned by Congress, to pay the debt; that obligation, in fact, operating on all the property of the Territory of Florida.

"It has been already shown that the government of the Territory was at the absolute disposal of the United States (represented by Congress), in whom the right of eminent domain was vested, and that Congress assented in the fullest manner to the pledge which was given by the territorial government. There was, then, an engagement to apply the resources of the Territory for the payment of a debt incurred with the assent of the sovereign power. Upon this state of facts it is obvious that, if those principles of equity which are binding on individuals be applicable to states, it became the duty of Congress to see that the funds which it had permitted to be pledged should be applied to the discharge of the debts they were intended to secure, and the bondholders were entitled to call upon the United States Government to cause those funds to be applied to their relief, or to indemnify them for loss arising from the failure to do so.

"The duty of thus protecting the interests of the bondholders was the more incumbent on Congress from the fact that, by reason of its being the owner of by far the greater portion of the soil of the Territory, it was the party most benefited by the introduction of the bondholders' capital into the Territory.

"But if the position of the bondholders was such as I have stated it to have been while Florida continued a Territory, it will be found that their claim assumed an entirely new form, and acquired immeasurably more force from the moment that the Territory was admitted to the Union as an independent State.

"This admission took place on March 3, 1845.

"By the second section of the eighth article of the constitution of the new State, which received the assent of Congress, it was declared that 'no other or greater amount of tax or revenue shall at any time be levied than may be required for the necessary expenses of government.'

"By the introduction of this clause into the constitution, Congress appears to have designed to lend effect to the repu-

diating resolutions of the territorial legislature, to which it had already given its assent.

"It has, indeed, been denied in the course of the argument that this clause was intended to have or had the effect of preventing the State from raising revenue in order to pay the debts of the Territory; but if any doubt could exist on this point it must be removed by the fact that those best able to judge of the meaning of the constitution of Florida, and having the power to enforce its own interpretation, viz, the legislature of the State, have declared that they are precluded by the article of the constitution in question from levying any tax to provide for the payment of the interest or principal of these bonds or from entering on any consideration of the question at all.

"It was then, when Congress admitted the insertion of this clause with a full knowledge of the injustice it would work, that the power to pay was taken away from the State that was then being called into existence. But this was not all; for the power which had hitherto been vested in Congress by virtue of its very sovereignty, whenever it chose to exercise it, to compel a Territory to observe the obligation of a contract or to do that which it was legally and morally bound to do was also divested by the change thus effected in the form of the government of Florida. * * *

"While, then, Florida remained a Territory the means existed of compelling it to perform the contracts entered into in its name, but from the moment that it became a State the creditors of the former Territory were deprived of all means whatever of enforcing their just demands.

"For the State of Florida, to whom it is said the debts of the Territory have been transferred, can not be sued by the creditors; for the Constitution expressly enacts that no State can be sued in the United States courts, and of course a State can not be sued in its own courts.

"Nor can Congress compel Florida to pay its debts; for it is an independent State, and can not be coerced by the others, either singly or collectively, into doing even that which is its duty.

"And, lastly, not only has Congress, by admitting Florida as a State, deprived the creditors of the means of enforcing their rights, but it has bestowed upon the State a constitution which actually prevents it from paying its debts. * * *

"The debt, then, is at present practically confiscated. This is the wrong which is complained of, and we have to determine whether it is one for which the United States is answerable. The possibility of a better state of public opinion inducing the inhabitants of Florida at some future time to remodel their constitution, so as to rescind the existing confiscation, can not affect the rights and liabilities arising out of the present state of facts.

"The principal arguments advanced in opposition to the claim, which I have not already adverted to, are these:

"1. That Congress, having only the powers enumerated by the Constitution, can do no more than is to be found within that document, and that the power to pay the debts of a Territory is not specified or to be implied.

"2. That Congress had not the power of rejecting the clause of the constitution of the proposed State of Florida which forbade the collecting of revenue for any other purpose than the necessary expenses of government, but that it was bound to admit the new State with this clause in its constitution, however objectionable it may be.

"The first of these objections tends to raise a discussion on a point which has long been definitely settled in the United States.

"In the first place, it assumes the whole question at issue in this case. If the United States have, by the acts of Congress, incurred an obligation to indemnify the present claimants, then a debt has arisen, and Congress has express power to levy taxes in order to pay its debts. I presume that it is not necessary to show by argument that a technical meaning is not to be attached to the word 'debts,' but that it signifies any pecuniary claim, whether for a sum certain or for unliquidated damages. But, secondly, the Constitution only prescribes the purposes for which *taxes*, etc., are to be levied. It is wholly silent as to the appropriation of national funds arising from other sources, such as the sale of public lands; and it has been shown that this is a source of revenue which is peculiarly proper to be applied to the relief of the present claimants. And, lastly, the Constitution has never been construed in the United States in the narrow spirit in which it is now sought to interpret it. It is fully established by Mr. Justice Story, in his Commentaries on the Constitution, book 3, chapter 14, that Congress has full power to apply the funds of the nation, from whatever source derived, to all purposes which they may deem national.

"That learned writer concludes his remarks with these words: 'In regard to the practice of government, it has been entirely in conformity to these principles. Appropriations have never been limited by Congress to cases falling within the specific powers enumerated in the Constitution, whether those powers be construed in their broad or narrow sense. And in an especial manner appropriations have been made to aid internal improvements of various sorts, in our roads, our navigation, our streams, and other objects of a national character and importance. In some cases, not silently, but upon discussion, Congress has gone the length of making appropriations to aid destitute foreigners and cities laboring under severe calamities, as in the relief of the San Domingo refugees in 1794, and the citizens of Venezuela, who suffered from an earthquake

in 1812.' So also in the case of three cities in [the District of] Columbia—Washington, Georgetown, and Alexandria—Congress assumed the debt which the cities had incurred, and for the liquidation of which their public faith had been pledged, and the Secretary of the Treasury was ordered to pay it.

"It is a misapprehension of the power of Congress to suppose that it was bound to admit the Territory of Florida to the Union without any discretion as to the terms upon which the admission was to take place. The time and mode of admission were entirely for Congress to determine. Mr. Justice Story, in his Commentaries, sec. 1321, shows that precedents and judicial decisions 'have established the rightful authority of Congress to impose restrictions upon the admission of new States.' But, without citing authorities, it is obvious that Congress can not be regarded as having merely administrative functions on such admission, to record the event without control over it. It would be powerless to discharge the most important of its functions as the guardian of the national interests, if it were bound to admit every new State, with any constitution its inhabitants might think fit to propose for themselves, however inconsistent it might be with the general welfare of the Union, with private morality, or with public honor.

"It will not be necessary to examine the history of the 'Pensacola Bank' and the 'Southern Life Assurance Company,' whose obligations were also guaranteed by the territorial government. As against that government, the claim of the holders of the Pensacola Bank bonds is strengthened by the circumstance that that company gave the territorial government very considerable security on real and personal property against the liability which was incurred by pledging the public faith. The claim, however, as against the United States Government, is the same in each case.

"I am of opinion, therefore, upon these facts, that the United States Government is bound to pay to the British subjects hereunder enumerated the principal of the bonds of which they are holders, when the same shall become due, and to pay to them forthwith the arrears of interest on such bonds, with interest at 5 per cent on such arrears, up to the 14th September 1854, amounting in the whole to the sums set opposite their names."

Umpire's Decision.

The commissioners having disagreed, the umpire rendered the following decision:

"This claim has been brought before the commissioners by the holders of bonds issued by the 'Territory of Florida,' while it was under a territorial government and before Florida was admitted into the Union as one of the States of the United States.

"At the time of the issue of the bonds in question the Territory was governed by a legislative council chosen by the

people, the governor being appointed by the President of the United States. All the acts or laws of the legislative council were required, by the law of the United States, to be laid before Congress, and if not disapproved of, they became law in Florida.

"For one portion of these bonds the claimants contended that, by the right which Congress claimed to reject or veto any law passed by the legislative council of Florida, the United States Government rendered itself liable to pay the interest and principal of these bonds should Florida fail to do so.

"For another portion of the bonds the claim on this ground was abandoned and their claim was based on the fact that the United States had, in the session of Congress of 1843–44, admitted Florida into the Union with a constitution having the following clause in it: 'No greater amount of tax or revenue shall at any time be levied than may be required for the necessary expenses of government.' (Article 8 of Florida constitution.)

"The first ground of claim need hardly be treated seriously; it might as well be contended that the British Government is responsible for all the Canadian debentures, because all the acts passed by the Canadian parliament require the sanction of the home government before they become laws. It will be seen, however, that at the time these bonds were bought it was never imagined by the buyers that the United States were in any way liable.

"With regard to the second ground of claim—that the United States, by having admitted Florida into the Union as a State, with the article in her constitution above referred to, were rendered liable to pay the debts of Florida—it may be remarked, that Congress could not justly refuse to admit Florida into the Union with such a constitution; there was nothing in it contrary [to] or in violation of the Constitution of the United States; Congress had only the power to fix the time of admission, and reject any constitution that was contrary to the Constitution of the United States; nor does it appear that the bondholders are in any way damaged by this article in the constitution of Florida.

"If the people of Florida refused to pay or neglected to pay, as a Territory, would they be less likely to pay as a State? There would be the same people to deal with; the members of the convention that formed the constitution were chosen by the people; and the legislature, chosen by the people, would not be likely to be very different from the convention. It is by no means clear that the eighth article of the constitution forbids any taxes for liquidating the liabilities of the State; and if that be so, there is no difficulty in amending the constitution. Most of the States have amended their constitutions from time to time. The bondholders have the same remedy against the State as they had against the Territory; they have a just

claim. But they are under the well-known disadvantage in both cases—they could not sue the Territory, they can not sue the State.

"It has been urged that there is no way of getting at a State government except through the Government of the United States; this is a mistake. There is no difficulty in the way of individuals dealing with the separate States in any matters that concern the State alone; nearly all the States have public works and contract loans with individuals, American and foreign, and any person aggrieved may petition the governor or legislature for relief. A State can not deal with a foreign government; the intercourse with foreign nations belongs to the general government.

"To show that the Florida bondholders never supposed the United States in any way responsible, attention is called to the prospectus issued by the agents for the sale of the bonds created for the 'Union Bank.' It is as follows:

"'*Florida six per cent sterling bonds—Interest and principal payable at the house of Messrs. Palmers, MacKillop, Dent & Co.*

"'These are the bonds of the Territory of Florida, payable to the order of the Bank of Florida, and endorsed by the bank. They are in sums of one thousand dollars each, bearing interest at the rate of six per cent per annum, payable half yearly; the interest and principal payable in London, at the rate of 4s. 6d. sterling per dollar. The bonds are payable on the 1st of January, 1862, 1864, 1866, and 1868. The proceeds of the sale of the bonds form an addition to the active capital of the Union Bank. The bank commenced business on the 16th of January, 1835, with a capital of one million of dollars, with a privilege of increasing it to three millions; and it is to complete that increase of capital that these bonds are to be sold. The profits of the bank, after paying interest of bonds and expenses of management, are retained to accumulate as a sinking fund, until that fund shall be equal in amount to the bonds issued.

"'On the 1st of January 1839, upon a bank capital of one million of dollars, the amount of the sinking fund exceeded three hundred thousand dollars. Owing to peculiar circumstances the profits of the past year have been very large; but previous experience has proved that, in ordinary years (after paying the interest of its capital and the expense of management), the annual surplus profits of the bank (which will be added to the sinking fund) will exceed four per cent, which annuity, compounded at the bank interest at 8⅔ per cent, will cause the sinking fund to effect its object in fourteen years. Indeed, the present amount of that fund, compounded at the bank interest, would pay off the whole $3,000,000 of bonds in twenty-eight years, without any aid from the future annual

profits of the bank—the average maturity of the bonds being twenty-six years.

"'The capital of the bank, equal in amount to the bonds and the sinking fund, are to be retained and held as security for the repayment of the bonds. Another ample security for their payment is provided by a mortgage of the property of the stockholders of the bank, to the extent of three millions of dollars. The value of the property mortgaged for that object was first ascertained by the appraisement, upon oath, of five commissioners in each county, appointed for that purpose by the governor and the legislature of the Territory; and these appraisements were again subjected to the revision of a board of twelve directors, of whom five are appointed by the governor and legislature. So great has been the rise in value of every kind of property in Florida that the property mortgaged to the bank would, even now, sell for thrice the amount of the bonds, and each succeeding year necessarily enhances its value; the holders of the bonds have therefore a fourfold security for their payment, viz:

"'1. The capital of the bank, equal in amount to the bonds.

"'2. The sinking fund, which will effect its object in fourteen years.

"'3. The property of the stockholders, originally appraised at three millions, with its increased value.

"'4. The faith and credit of the Territory and State of Florida.

"' By the direction of an act of Congress a convention is now in session for the purpose of framing a constitution for Florida, and she will probably become a State this year.

"' In extent of territory she will be the sixth State in the Union. Her soil and climate are adapted to the profitable productions of Sea Island and short staple cottons, sugar, rice, Cuba tobacco, indigo, cochineal, corn, and all the other agricultural staples of the Southern States, as well as many of the productions of the West Indies. She is rapidly increasing in numbers and wealth.

"' Her export of cotton in the past year has exceeded 110,000 bags, and, with her growth, is greatly extending. She possesses the only good harbors on a coast of near two thousand miles in the Gulf of Florida, which, with the contiguity of the West Indies, gives her great commercial advantages, and will insure her becoming a great commercial State.'

"The securities enumerated in this document are four, and they were ample if honestly administered; but not the slightest allusion is made to any liability of the United States, nor is there discoverable the smallest foundation for the claim of the bondholders before this commission, which is constituted for the purpose of settling the claims of British subjects against the Government of the United States, or of the citizens of the United States against the British Government.

The bondholders have a just claim on the State of Florida; they have lent their money at a fair rate of interest, and the State is bound by every principle of honor to pay interest and principal; and it is to be hoped that sooner or later the people of Florida will discover that honesty is the best policy, and that no State can be called respectable that does not honorably fulfill its engagements."

Bates, umpire, Florida bond cases, convention between the United States and Great Britain of February 8, 1853. (S. Ex. Doc. 103, 34 Cong. 1 sess. pp. 246–300.)

Colombian Bond Cases.

Various claims were presented to the commission under the convention between the United States and New Granada of September 10, 1857, for the payment of overdue New Granadian bonds. These claims being among those that were not decided by the commission, they were referred to the commission under the convention between the United States and Colombia of February 10, 1864.[1] The bonds and the indorsements upon them were as follows:

DEUDA CONSOLIDADA [coat of arms] DE LA NUEVA GRANADA.

Numero 434. Pesos 400.

Inscripcion al cinco por ciento.

La Repùblica de la Nueva Granada reconoce como deuda nacional el capital de cuatrocientos pesos, procedente de créditos colombianos, al cual señala el interés anual de cinco por ciento, pagadero por semestres en los veinte ùltimos dias de los meses de Febrero i agosto de cada año, i de los fondos destinados à este objeto por la lei de 20 de Abril de 1838, à saber: la quinta parte del siete por ciento de alcabala de importacion; el producto del arrendamiento de minas de metales i de piedras preciosas, i de cualesquiera fincas del Estado; el derecho de sello de los despachos, tìtulos i diplomas que se espiden por las Secretariàs de Estado; i la cuarta parte del sobrante anual de las tesorerìàs. La presente obligacion es amortizable por los medios que la misma lei establece: queda anotada en el respectivo libro subsidiario de la deuda nacional, al folio 68, i gana interés desde el dia 1º de Setiembre de 1838. Bogotà, 27 de Noviembre de 1839.

El Secretario del Despacho de Hacienda, J. DE D. DE ARANZAZU.

El Director del crédito nacional, YGN. GUTIERREZ.

El Secretario de la Direccion, BERNARDO DE ALCASÁR.

[1] Claim of the executors of E. Riggs, No. 153; claims of the legal representatives of Robert Oliver, Nos. 154–161, inclusive; claim of Jas. J. Fisher, executor of Douglas, No. 171.

Attached to these bonds were coupons as follows:

DEUDA CONSOLIDADA GRANADINA.

Inscripcion al cinco por ciento.

Capital, cuatrocientos pesos. N. 434.

Interés pagadéro al portador en los veinte ultimos dias del mes de agosto de 1851. Ochenta reales.

GUTIERREY. ALCASAR.[1]

[Translation.]

CONSOLIDATED DEBT OF NEW GRANADA.

Number 434. 400 pesos.

Inscription of five per cent.

The Republic of New Granada recognizes as a national debt the capital of four hundred dollars growing out of Colombian debts for which it appropriates interest at the rate of five per cent per annum, payable semi-annually during the last twenty days of the months of February and August of each year, and of the funds appropriated for this purpose by the law April 20, 1838, to wit: One-fifth of the seven per cent import tax; the proceeds of the lease of mines of metals and precious stones, and of any real property belonging to the state; the stamp duty for public documents, titles, and diplomas issued by the executive departments; and one-fourth of the annual surplus of the Treasury. The present obligation is fundable by the means which the same law establishes; it is recorded in the proper subsidiary book of the national debt on folio 68, and draws interest from September 1, 1838. Bogota, November 27, 1839.

Secretary of the Treasury, Director of the National Credit,
J. DE D. DE ARANZAZU. YGN. GUTIERREY.

Secretary of the Direction,
BERNARDO ALCASAR.

(Last coupon.)

CONSOLIDATED DEBT OF GRANADA.

Number 434. Inscription of five per cent.

Interest payable to bearer during the last 20 days of the month of August 1851.

GUTIERREY. ALCASAR.

Numero 225. Capital, 100 ps.

DEUDA CONSOLIDADA DE LA NUEVA GRANADA.

La República de la Nueva Granada reconoce como deuda nacional la cantidod de cien pesos reales, procedente de créditos colombianos, i por mitad de intereses insolutos de vales cancelados de la deuda interior consolidada de Colombia: cuya deuda no devenga interés. La presente obligacion será amortizada por los medios que disponga la lei, i queda anotada

[1] Of course, the dates of payment on the different coupons varied.

en el respectivo libro subsidiano de la deuda nacional, al folio 183. Bogotá 4 de Mayo de mil ochocientos treinta y nueve.

El Secretario del Despacho de Hacienda,
J. DE D. DE ARANZAZU.

El Director del crédito nacional,
J. MAN'L RESTREPO.

El Secretario de la Direccion,
BERNARDO DE ALCASAR.

[Translation.]

Number 225. Capital 100 pesos.

CONSOLIDATED DEBT OF NEW GRANADA.

The Republic of New Granada recognizes as national debt the sum of one hundred pesos reales, growing out of Colombian debts, and for the half of interest unpaid on cancelled obligations of the consolidated internal debt of Colombia, which debt does not draw interest. The present obligation will be funded by such means as the law may provide, and is recorded in the proper subsidiary books of the national debt, folio 183. Bogota, May 4, 1839.

Secretary of the Treasury,
J. DE D. DE ARANZAZU.

Director of the National Credit,
J. MAN'L RESTREPO.

Secretary of the Direction,
BERNARDO DE ALCASAR.

The commissioners being unable to agree, the claims were referred to the umpire, Sir Frederick Bruce, who said:

Opinion of Sir Frederick Bruce.

"In these cases the first and most important question for consideration is that of jurisdiction. Does this class of debts fall within the scope and meaning of the 'claims' which the international convention between the two governments was constituted to examine and definitely settle? In order to decide this question it is necessary to state briefly my opinion as to the nature and attributes of a mixed commission, such as that by virtue of which we have the honor to sit.

"The high contracting parties in substituting for themselves a special tribunal for the settlement of certain matters at issue between them, do not thereby divest themselves of their power to treat directly and in the ordinary manner all questions which are not expressly submitted to the commission so substituted in their stead. Moreover, in all cases in which reasonable doubt exists as to its competence, and especially in those now under consideration which interest directly the credit and the good faith of one of the contracting parties, the commission is bound to decline to entertain them, and to construe its powers in a limited and not in an extensive sense. Were the commission to adopt the contrary principle of interpretation, it would be open to the charge of assuming powers the exercise of which is always jealously reserved by governments to themselves. The time and manner prescribed for the

presentation of 'claims,' and the limited duration of the functions of the commission, show, if further proof were necessary, that the powers delegated to it are of an exceptional and circumscribed character.

"The term 'claims' in the convention must be construed so as to confine it to demands which must have been made the subject of international controversy, or which are of such a nature as, according to received international principles, would entitle them on presentation to the official support of the government of the complainant.

"The claims for payment of the 'bonds' are not in my opinion of such character. The Government of the United States, like that of Great Britain, has not laid down or acted upon the principle that a citizen, who holds an interest in the public debt of a foreign country, and who in common with the other shareholders in that debt is unable to obtain payment of what is due to him, is entitled as of right to the same support in recovering it as he would be in a case where he has suffered from a direct act of injustice or violence. The government reserves to itself on special grounds the right to determine when and under what conditions such support shall be given, and this commission can not assume upon the strength of a general term, and in the absence of express language to that effect, that the Government of the United States intended to delegate to it powers which it has not exercised itself in a matter of so much delicacy.

"It does not appear to me that the correspondence quoted with the United States legation at Bogotá is sufficient to constitute such an official support on the part of the United States Government to these claims as the circumstances of these cases would require in order to give them a '*locus standi*' before the commission. It is of a private or at most of an officious character, and does not transcend the limits of that friendly countenance and aid which the ministers of foreign powers always give to the holders of shares in public debts. No evidence has been adduced of instructions having been given by the State Department to press for the satisfaction of these particular claims, and indeed it is easy to see that many reasons of policy may exist which would deter a government from insisting on a preferential payment of a part only of the public creditors of a foreign state.

"The letter which has been put in evidence from General Cass, as Secretary of State, confirms these views. He states that the government has not been in the habit of enforcing such claims against foreign governments. It is true that he refers them to the commission for consideration, but this reference does not *per se* confer jurisdiction, nor does it relieve the commission from the duty of examining whether, upon the principles of international law, these claims fall within its jurisdiction—a point which it belongs to the commission itself to determine.

"I am therefore of opinion that these bond cases can not be entertained, and that consequently the rights of the bondholders against the United States of Colombia are unaffected by this decision and remain to them unimpaired."

Claim for Overdue Mexican Coupons.

Mr. Wadsworth, United States commissioner, delivered the following opinion:

"Although the United States Government has assumed the responsibility of presenting here a claim for nonpayment of overdue coupons on a portion of the recognized bonds of the Government of Mexico, and demands an award, nevertheless it appears to me that neither government has with sufficient clearness agreed to refer such claims to this commission, and it is my decision that this case be dismissed without prejudice to the rights of the holders of the bonds and coupons."

Mr. Zamacona, Mexican commissioner, said:

"The bonds, and they alone, are the ground of this claim. Proceeding logically, then, the first point which must be considered is whether the commission can admit claims founded upon the bonded debt of Mexico. This question is not only the first in order, but the first in importance among those involved in this case. In order to decide this question negatively, the undersigned will not have to give his own individual opinion; it will be enough to appeal to the generally accepted views of the subject, founded upon general propriety and justice. The disturbance which would ensue in the administration, credit, and relations of modern nations, if the claims on account of the public debt, such as those involved in this case, were made the matter of international claims, has long been understood. * * * The defense here maintains that claimants received bonds to the amount of $33,000. * * * Now, instead of $33,000, the claimants present $47,000 of bonds. It may very well be that they may have obtained the difference as they say they did, but it may also very well be that they may have received this additional sum of bonds from some other holder who, perhaps, is not an American citizen. Accepting this as a diplomatic claim, when in the future claims have to be settled between Mexico and the United States, the whole of the debt of the former would be covered by the flag of the latter, whose citizens would appear as monopolizing Mexican bonds."

Du Pont, de Nemours & Co. v. *Mexico*, No. 440, convention of July 4, 1868, MS. Op. IV. 367.

Venezuelan Bond Cases: Opinion of Mr. Little.

"Little, for the commission:

"The immediate basis of this claim is 366 debentures of 500 pesos each, executed and delivered, 1839, by Venezuela to Gardner G. Howland and Samuel S. Howland, citizens of the United

States, doing business in the city of New York, under the firm name and style of G. G. & S. S. Howland, in exchange for 406 obligations of like amount each, issued by the old Republic of Colombia to, or obtained by, said firm in 1829, and forming a part of that portion of the Colombian public debt for which Venezuela became responsible under the convention of settle- of 1834–35 among the States which had formed that republic.

"Each bill with indorsement reads as follows:

DEUDA CONSOLIDABLE DE VENEZUELA.

Número ——. Pesos 500. Fol. 6.

Deuda Consolidada. Interes 5 por ciento.

La República de Venezuela reconoce á favor del portador el capital de quinientos pesos procedentes de créditos contra Colombia con el interes de cinco por ciento el año desde primero de Enero de mil ochocientos veinte y siete.

Caracas 15 de Setiembre de 1839.

República de Venezuela.

G. SMITH. ML. ECHEANDIA. VICENTE LECUNA.

[Indorsed.]

Recibido y anotado bajo el No. 10 del Libro respectivo.

PEDRO MANUEL FIRADO.

Es conforme.

El Secretario de Hacienda,

CADENAS.

El Director,

MANUEL A. CARREÑO.

El Vocal,

PEDRO NARANJO.

[Seal of "Comis. Liquid. de Cred. Contra el Estado. 1859."]

[Translation.]

CONSOLIDABLE DEBT OF VENEZUELA.

Number ——. 500 dollars. Fol. 6.

Consolidated debt. Interest 5 per cent.

The Republic of Venezuela acknowledges itself indebted to the bearer in the sum of five hundred dollars, arising from the debt of Colombia, with interest at five per cent per annum from the first of January, one thousand eight hundred and twenty-seven.

Caracas, September 15, 1839.

Republic of Venezuela.

G. SMITH. ML. ECHEANDIA. VICENTE LECUNA.

Received and entered under No. 10 of the respective book.

PEDRO MANUEL FIRADO.

Correct:

CADENAS,
Secretary of the Treasury.

MANUEL A. CARREÑO,
Director.

PEDRO NARANJO,
Vocal.

[Seal of the "Commission for the Liquidation of the Debt of the State. 1859."]

"No part of these bills has been paid, and they are still owned by American citizens, claimants here.

"The question first arising fully and ably argued by counsel for the United States and the claimants, though not urged by counsel for Venezuela, is as to jurisdiction. 'Claims' only being submitted to this commission, do these obligations come within the meaning of that term? The distinguished umpire of the mixed commission created under the convention of 1857 between the United States and New Granada for the settlement of claims against the latter of citizens of the former, and in which the language of submission was, *mutatis mutandis*, identical with that of the present treaty, held, 1864, that 'bonds' of New Granada were not 'claims' under the convention, and therefore not within the jurisdiction of that commission. If his conclusion was correct, it perhaps would follow that these bills do not constitute a 'claim' under the present convention, although we are not advised whether New Granada made a defense, on the merits, to the bonds in that case, as is done here.

"Perhaps as good a way as any to discuss this question is to review, by paragraphs, the umpire's opinion. He says (italics ours):

"'The high contracting parties in substituting to themselves a special tribunal for the settlement of certain matters *at issue* between them, do not thereby divest themselves of their power to treat directly and in the ordinary manner all questions which are not *expressly* submitted to the commission so established in their stead.'

"The implication here that only matters 'at issue' between the two governments are for 'settlement' would seem to lack support in the terms of the treaty. The language of submission is:

"'All claims on the part of corporations, companies, or indi-

viduals, citizens of the United States, upon the Government of Venezuela, which may have been presented to *their* government or to *its* legation at Caracas * * * shall be submitted,' etc.

"It will be observed there is no requirement that matters submitted shall have been 'at issue,' if by that is meant an assertion of the claim by one government and a denial of it by the other, or any existent controversy between the two concerning it, unless such is implied in the word 'claims' itself. While it seems probable both governments knew, because it was their concern to know, just what claims were embraced within the terms of designation used, there is nothing in the language to indicate or require actual knowledge. A claim filed with the American legation at Caracas within the time limited, although unknown to either government in fact, and therefore not at issue between them, is brought by the terms of the treaty as fully within the competence of the commission as if it had been the subject of heated controversy between the two powers.

"Moreover, if a claim so filed arose *ex delicto* it would not necessarily follow that Venezuela would or could take issue respecting it; and if, on the other hand, it pertained to bonds it would not therefore result that she might not controvert it. Thus, if the test of submission were whether the demand had been 'at issue' or controverted, or even controvertible in fact, it might happen that some claims sounding in tort would be excluded, while others arising on contract, as bonds, would be included. Under such a rule these bills being resisted on the merits, and therefore 'at issue,' would be embraced..

"It is true the high contracting parties have not divested themselves of their power to treat directly and in the ordinary manner, questions not *expressly* submitted to the commission, as they have not indeed respecting any submitted, whether expressly or otherwise. Resort to a judicial agency to determine questions does not prevent the parties from determining them themselves if they choose to do so. But it is not perceived how the proposition aids the contention. To assert that bonds are among the 'questions' reserved by the governments from the operation of the treaty, is merely another form of asserting they are not 'claims.' It does not advance one towards a conclusion.

"He continues:

"'Moreover, in all cases in which reasonable doubt exists as

to its competence, and especially in those now under consideration, which interest directly the credit and the good faith of one of the contracting parties, the commission is bound to consider its powers in a limited and not in an extensive sense.'

"How the exercise of jurisdiction could have injuriously affected the credit *and* good faith of the defendant state in that case, or how it could so operate in this one, is not apparent. Certainly the thought is not that the conservation of credit and good faith is involved in avoiding old promises that new ones may be the better kept.

"But does construction of terms in a treaty become a question of convenience to one of the parties? Is it to be inferred that if the *fisc* of New Granada had been prepared to meet all her bonded indebtedness a different interpretation of 'claims' might have been called for or allowable?

"In Hall *v.* Franklin (3 M. & W. 259) Lord Abinger said:

"'We have been strongly pressed with the inconveniences that may result from the construction of the statute. We are not insensible to them; but the only proper effect of that argument is to make the court cautious in forming its judgment. We can not on that account put a forced construction upon an act of Parliament.'

"If we understand the umpire, and it be permitted to deduce a general rule of treaty interpretation from his enunciation, when words of jurisdiction are used having a wide and a limited signification, the latter is to be taken where there is room for reasonable doubt as to which was intended. In other terms, jurisdiction must be denied in all cases unless its existence is manifest beyond a reasonable doubt.

"Such does not seem to us to be in accordance with the scheme of either treaty. The very fact that the Granadian convention provided for a reference of questions of jurisdiction (and others), about which the two commissioners might disagree, to an umpire for decision, is of itself a recognition that jurisdiction might properly be declared and exercised in cases of reasonable doubt as to its existence. For it could not be presumed that questions would be referred as to the proper decision of which there was no reasonable doubt; nor anticipated that, in case of reference, the decision would be against jurisdiction rather than for it. Were the rule as claimed, the umpire's duty would have been merely nominal; in fact, there would have been no need of an umpire. A disagreement would *ipso facto* presumably have been made to work defeat of juris-

diction. So under the present treaty, the fact that a majority of the commissioners may decide in favor of jurisdiction against the judgment of the minority, implies in itself the contemplation of reasonable doubt touching the correctness of the conclusion reached in any case of such difference. Had the other rule been intended, a division would have been made, we may well assume, to work exclusion of jurisdiction.

"The argument of the umpire here seems to proceed upon the hypothesis that the language of submission is of doubtful import; that it is susceptible of two constructions—one inclusive and the other exclusive of bonds and like contractual obligations. Even were this the case, it is more than doubtful whether his conclusion could be supported upon principle or authority.

"His reasonable doubt rule, and especially when the doubt springs from circumstances outside the terms and revelation of the instrument itself, is not sustained, we think, by publicists generally. Rules of treaty interpretation, as laid down by them, apply alike to all portions of the instrument. Jurisdictional parts are not construed differently from other parts. In fact, the language of treaties kindred to these, is in a large sense, jurisdictional throughout, for it is definitive of authority.

"The following passages from Vattel's Chapter on Interpretation of Treaties (book 2, chap. 17) are believed to be universally recognized as law,[1] (emphasis ours):

"'The first general maxim of interpretation is, That it is not allowable to interpret what has no need of interpretation. When a deed is worded in clear and precise terms, when its meaning is evident and leads to no absurd conclusion, there can be no reason for refusing to admit the meaning which such deed naturally presents. To go elsewhere in search of conjectures in order to restrict or extend is but an attempt to elude it. If this dangerous method be once admitted, there will be no deed which it will not render useless.'

"'Since the sole object of the lawful interpretation of a deed ought to be the discovery of the thoughts of the author or authors of that deed, whenever we meet with any obscurity *in it* we are to consider what *probably*'—not what beyond a reasonable doubt—'were the ideas of those who drew up the deed, and to interpret it accordingly.'

"'In the interpretation of treaties, compacts, and promises we ought not to deviate from the common use of the language

[1] Wheaton, Elem. Int. L. 1857, 355; Grotius De Jure Belli ac Pac. book 2, chap. 16; Hall, Int. L. 281.

unless we have very strong reasons for it. In all human affairs where absolute certainty is not at hand to point out the way *we must take probability* for our guide. *In most cases it is extremely probable that the parties have expressed themselves conformably to the established usage;* and such probability ever affords a strong presumption, which can not be overruled but by a still stronger presumption to the contrary.'

"'Words are only designed to express the thoughts; thus the true signification of an expression in common use is the idea which custom has affixed to that expression. It is then a gross quibble to affix a particular sense to a word in order to elude the true sense of the entire expression.'

"Says Grotius:

"'If there is no conjecture which leads another way, words are to be understood from their propriety, not in the grammatical sense springing from their origin, but according to their popular sense.' (De Jure Belli ac Pac. 2, chap. 16.)

"If, then, as appears, and as President Woolsey sententiously puts it, 'the ordinary *usus loquendi* obtains, unless it involves an absurdity,' there would seem to be no room to doubt that the word 'claims' of itself comprehends overdue bonds or bills. The two leading lexicographers of the English tongue define 'claim' and 'claimant,' as follows:

"Webster:

"'Claim 1. A demand of a right or supposed right; a calling on another for something due or supposed to be due. "Doth he lay *claim* to thine inheritance?"—*Shak.* 2. A right to claim or demand; a title to any debt, privilege, or other thing in possession of another: "A bar to all *claims* upon land."—*Hallam.* 3. The thing claimed or demanded; that to which anyone has a right, as a settler's claim.—[U. S. and *Australia.*] 4. A loud call (*obs*).

"'Claimant, 1. One who claims; one who demands anything as of right; a claimer. 2. A person who has a right to claim or demand.'

"Johnson:

"'Claim, 1. A demand of anything as due. 2. A title to any privilege or possession in the hands of another.

"'Claimant. He that demands anything as unjustly detained by another.'

"The corresponding word in the Spanish text, *reclamacion*, is thus defined by Spanish authors, translated:

"'Reclamation: The act and effect of claiming, *Reclamatio.* 1. The opposition or contradiction which is made to anything as unjust, or by showing that it contradicts itself, *Reclamatio, oppositio.*

"'2. The demand made for anything by him who has the right of property in it against him who possesses or denies it.—Salva.

"'Reclamation (claim): The opposition or contradiction that is made in words or in writing against anything as unjust, or by showing that it contradicts itself; and the claim or demand for anything by him who has the right of property in it against him who possesses it.'—Escriche: Dic. of Legislation.

"Should there appear to be a meaning in the word of one language not found in that of the other, of course it should be disregarded, and only that meaning taken which is common to both.

"Equally comprehensive is the term, if its legal sense is sought. Mr. Justice Story, speaking for the Supreme Court of the United States, in Prigg *v.* Pennsylvania (16 Peters, 615), said:

"'What is a claim? It is, in a just juridical sense, a demand of some matter as of right, made by one person upon another to do or to forbear to do some act or thing as a matter of duty.'

"Lord Chief-Justice Cockburn, in Queen *v.* The Guardians (9 L. Q. B., 395), held that an order of a court upon a public authority to pay a designated sum of money weekly was a 'debt, *claim*, or demand' within the meaning of statute of limitations. Blackburn, J., in the same case, said 'claim or demand' would 'cover everything.'

"Deady, J., of the circuit court of the United States, construing the word as used in an act of Congress, held this language:

"'In my judgment a claim *upon the United States* is something in the nature of a demand for damages arising out of some alleged act or omission of the government, not yet provided for or acknowledged. As the term imports, it is something asked for or demanded on the one hand and not admitted or allowed on the other (*Worcester*, *Bouvier*—Claim). When the demand is admitted or provided for by law, it is not a mere claim, but a debt. It no longer rests in mere clamor or petition, but is something due upon which an action may be maintained.' (Dowell *v.* Cordwell, 4 Saw. 228.)

"The qualifying words 'upon the United States' distinguish this definition. United States obligations about which there is no contention are paid on demand without controversy. The distinction, however, here taken between 'claim' and 'debt, while not against this claim, is not a recognized one in treaty expression. In the convention (1803) between the United

States and France, 'for payment of sums due' from the latter to citizens of the former, provision was made for the settlement of demands of all kinds, which were denominated indiscriminately 'debts' in one part of the instrument and 'claims' in another.

"Claim is the generic term employed in the legislation of the United States to express every form and character of demand that one can urge against another. It would seem quite superfluous to cite particular statutes or authority.

"So in British legislation. The vice-admiralty courts, by act of Parliament, June 8, 1863, for illustration, had their jurisdiction defined, for the most part, by the use of the very word in respect of every matter, whether arising *ex contractu* or *ex delicto*, brought within their cognizance. That jurisdiction was extended to—

"'(1) *Claims* for seamen's wages; (2) *claims* for master's wages; (3) *claims* in respect of pilotage; (4) *claims* in respect of salvage of any ship or of life or of goods therefrom; (5) *claims* in respect of tonnage; (6) *claims* by damage done any ship; (7) *claims* in respect of bottomry; (8) *claims* in respect of any mortgage where the ship has been sold,' etc.

"Reference is also made to Laws of Venezuela, 1864, volume 2, page 326.

"It is laid down, it is true, by recognized authority that where language is employed in a treaty which is susceptible of two meanings, 'that is to be preferred which is least for the advantage of the party for whose benefit the clause is inserted. For, in securing a benefit, he ought to express himself clearly.'[1] There does not appear to be ambiguity, or lack of clear expression here, however, in the language of submission. Were it otherwise it could not be said that these 'claims' are submitted to arbitration more for the benefit of one party than the other. It was expressly done to 'preserve unimpaired as *reciprocally desired* the good understanding of both nations.'

"And, again, the general doctrine just stated would be subject to modification by this principle, announced by Mr. Justice Story, on behalf of the Supreme Court of the United States, in Shanks *v.* Dupont (3 Peters, 249), which is thoroughly embedded in the jurisprudence of the United States and is believed to be internationally a sound one, to wit: 'That where a treaty admits of two constructions, one limited and the

[1] Woolsey Int. L. § 113

other liberal, one which will further and the other exclude private rights, the most liberal exposition should be adopted.' It was affirmed in recent years by the same high authority in the case of Hauenstein *v.* Lynham (100 U. S. 483), Mr. Justice Swayne speaking for the court, as follows: 'Where a treaty admits of two constructions, one restrictive as to rights that may be claimed under it and the other liberal, the latter is to be preferred.' This finds support, if any were needed, in what Grotius says: 'In the things which are not odious words are to be taken according to the general propriety (*totam proprietatem*) of popular use, and if there are several senses, according to that which is widest.' (De Jure Belli ac Pac. book 2, chap. 16.)

"The qualifications of the general term, 'claims,' may, perhaps, within the limits of fair construction, be regarded as if embodied in a proviso. The treaty would have meant the same had it read: All claims of citizens of the United States, etc., shall be submitted to a new commission, provided they shall have been presented to the Washington government, or to its legation at Caracas, before August 1, 1868. It is a rule of construction, generally recognized, that a proviso is to be construed, so that the general enactment shall admit of the fullest operation possible, consistent with the terms of restriction.

"The Supreme Court of the United States, in United States *v.* Dickson (15 Peters, 165), held this language: 'We are led to the general rule of law which has always prevailed and become consecrated almost as a maxim in the interpretation of statutes, that when the enacting clause is general in its language and objects, and a proviso is afterwards introduced, that proviso is construed strictly and takes no case out of the enacting clause which does not fall fairly within its terms.' In the contemporaneous case of Minis *v.* United States (Ib. 445) the same court said: 'The office of a proviso generally is either to except something from the enacting clause, or to qualify or restrain its generality, or to exclude some possible ground of misrepresentation of it, as extending to cases not intended by the legislature to be brought within its purview.'

"Almost in the language of the court it can be said: The office of the qualifying words relative to 'claims' in the treaty is to except demands from the general terms 'all claims' and to qualify and restrain their generality. And it would seem to be of little moment in what form those qualifying words were put, whether in that of a proviso or that in which they

stand. The principle of construction would be the same—that being that the qualifying words are, while the general terms of submission are not, to be taken in a restrictive sense, if there is to be any distinction.[1]

"The comprehensive term 'claims' is the one always employed in similar claims treaties, though sometimes with a synonym—or as near that as the language affords—and is always accompanied with words of restriction. The restriction relates to ownership, time, origin, character, or circumstance, or to several of these. Under the convention between the United States and Ecuador (1864) ownership was the only qualification. It was competent to present any claim before the commission against either state, provided it belonged to a *citizen* of the other. In the treaty of 1834, between the United States and Spain, a single circumstance determined admissibility, to wit, that the claim had been 'preferred by either party against the other.' Usually several of the elements are embraced in the terms of qualification. The treaty of 1795, between the powers last mentioned, comprehended in them ownership, time, and character. The claims for adjustment there were 'for losses sustained by *citizens* of the United States in consequence of their vessels and cargoes having been *taken* by the subjects of His Catholic Majesty *during the late war* between Spain and France.' In 1832 the United States and the Two Sicilies treated for an indemnity to be paid by the latter to American merchants 'for losses inflicted upon them by Murat by the depredations, seizures, confiscations, and destruction of their vessels and cargoes in the years 1809, 1810, 1811, and 1812.' Here are the elements of ownership, time, origin, and character. All the five elements named are embraced in the qualifying terms of the '*Alabama* claims' treaty of 1871. It is unnecessary to particularize or to illustrate further. But attention may be directed still to two conventions under this head, that of 1802 between the United States and Spain, embracing the qualifying elements of time, ownership, and character, and that of 1864 between France and the Republic of Venezuela, comprehending the two latter only.

"In the former treaty provision, by reference to a commission on behalf of individuals of both countries, was made for

[1] R. *v.* Taunton, St. James 9 B. & C. 836; Voorhees *v.* Bank, 10 Pet. 449; Wayman *v.* Gauthord, 16 Wheat. 30; Bond *v.* U. S., 19 Wall. 227.

the adjustment of 'the claims which have arisen from the excesses committed during the late war by individuals of either nation, *contrary to the laws of nations*, or the treaty existing between the two countries.' In the latter, provision was made for the settlement of 'claims of French subjects for expropriations, damages, and injuries of the nature of those for which, *according to the law of nations*, the government of the republic is responsible.' In these two treaties there would seem to be an implied recognition by each of the parties to the present treaty, scarcely less strong than if expressly stated, that in order to restrict the term 'claims' in a treaty to those demands which either state, on behalf of its citizens, would diplomatically press against the other, it must be so nominated in the instrument.

"In the treaty under which we sit there are but three qualifying elements embraced—ownership, circumstance, and time. The claims must be those of citizens of the United States. The circumstance of their having been presented to the Government of the United States, or to its legation at Caracas, before August 1, 1868, must exist. And, of course, the claims must have existed before that date. The element of character is wholly wanting. Would it not constitute a material change in the treaty to insert a qualifying phrase fixing the character of the claims contemplated; such, for instance, as that embraced in the last two treaties quoted from or such as would distinguish torts from contracts? On an indictment for forgery where the evidence must establish guilt beyond a reasonable doubt, could it be maintained that the interpolation after the words 'all claims,' of the phrase 'for which according to the law of nations the Government of Venezuela is responsible;' or of the phrase taken from the United States–Mexican treaty of 1868, 'of citizens arising from injuries to their persons or property;' or of the phrase 'not arising *ex contractu;*' or of the phrase 'not including any bills, bonds, or other like evidences of debt,' would not constitute a material alteration of the instrument?

"Considering that it is common in such treaties as this among nations to qualify the word 'claims' by indicating the character of the demands to be adjudicated or adjusted by descriptive or apt words, does there not arise a clear implication that where such qualification is omitted none was in-

tended? The principle announced by the Supreme Court of the United States per Marshall, C. J., *In re* 'The Nereide,' 9 Cranch, 419, seems internationally sound and applicable here. The court said:

"'Treaties are formed upon deliberate reflection. Diplomatic men read the public treaties made by other nations' [and of course by their own], 'and can not be supposed either to omit or insert an article common in public treaties without being aware of the effect of such omission or insertion. Neither the one nor the other is to be ascribed to inattention.'

"But what has been the practical construction of the term 'claims' in such treaties? Aside from the decision under discussion, it seems to have been generally taken in its usual and comprehensive sense. Sir Edward Thornton, the umpire of the commission between the United States and Mexico, 1868, comprehending the adjustment of 'all claims on the part of * * * citizens * * * *arising from injuries to their persons or property*,' etc., held, March 1876, that claims arising *ex contractu* did not come within the purview of the treaty; not because, however, they were not embraced within the meaning of the general term, but because they did not fall within the terms of its qualification. In other words, because they were not of the *character* of the claims therein contemplated. He said:

"'In the case of Dewhust and Emerson *v.* Mexico, No. 673, the claim arises out of an alleged contract with the Mexican Government, through its agent, for the supply of munitions of war, some of which are stated to have been delivered to that government. * * * The umpire maintains his opinion that the acts complained of did not constitute *one of those injuries to the property* of U. S. citizens, which was contemplated by the convention of July 4, 1868.'

"The present claim was dismissed by the former commission as 'being consolidated debt' (a mistake in fact, for it was *consolidable* debt only). But that commission allowed the claim of R. W. Gibbs, founded upon a Colombian obligation for $5,000, the amount allowed being Venezuela's distributive share (28½ per cent).

"The convention of September 21, 1868, between Great Britain and Venezuela, entered into 'with the view of determining the amount of *all pending British claims* upon the Government of Venezuela,' provided a tribunal with an umpire, 'to sit as a mixed commission to fix the amount due to those

British subjects whose claims have not yet been adjudicated upon.' That commission, 1869, allowed by the decision of the umpire eleven claims on account of Venezuelan notes, common and preferred stock of the Bank of Venezuela, and Colombian bonds, amounting, including interest, to $139,104.04, to wit: To W. A. Cage, $3,879.42; Sarah Campbell, $4,005.01; Court & Borde, $6,058.87; L. Augustini, $2,150.16; W. A. Andrel, $7,199.87; H. O'Callaghan, $19,093.21; M. A. Elizando, $5,498.07; Robert Syers, $7,924.72; Bernardo Daly, $1,527 33; Arthur Halle, $70,795.06, and to J. A. S. Cipriani, $10,971.33.

"Other instances could be supplied, but these being contemporaneous will suffice.

"Although the opinion of either government respecting the interpretation and scope of the treaty would not bind us, still such opinion would be entitled to high respect and may be cited as any other authority. It would seem from the note of Mr. Scott, American minister at Caracas, to Mr. Bayard, Secretary of State, under date of January 14, 1889, that the Venezuelan Government regarded the claim of Nathaniel Jarvis, pending here, alleged to be founded upon bonds issued in 1863 to him by said government, as coming within the purview of the treaty, and as proper to be submitted to the commission then about to be formed.

"The umpire proceeds: 'Were the commission to adopt the contrary principle of interpretation it would be open to the charge of assuming powers, the exercise of which is always jealously reserved by governments to themselves.'

"So much of this argument as may not be said to fall under the head of *petitio principii* seems to proceed upon an untenable assumption. It does not follow that if jurisdiction is not to be declined because there may be a reasonable doubt of its existence, the 'contrary principle' must be adopted, which would seem to be, to wit: To take jurisdiction unless its exclusion is required beyond a reasonable doubt. Why go to either extreme? Why not take the plain middle ground, ascertaining the meaning of the language employed according to the ordinary standards of interpretation? It is not apparent how a body passing upon a judicial question, any more than upon a mathematical one, can be concerned about what may be charged against it if led to this conclusion or to that. Were it otherwise, a charge of assumption of power is no more to be

avoided perhaps than a complaint of failure to exercise power conferred, through apprehension of such charge.

"The umpire goes on: 'The time and manner prescribed for the presentation of claims, and the limited duration of the functions of the commission, show, if further proof were necessary, that the powers delegated to it are of an exceptional and circumscribed character.'

"Very true. But this fact, it is believed, is no sufficient warrant for giving to terms employed in a treaty other than their ordinary meaning in like relation.

"Says he in continuation: 'The term "claim" must be construed so as to confine it to demands which have been made the subject of international controversy, or which are of such a nature as according to received international principles would entitle them on presentation to the official support of the government of the complainant.'

"It occurs to add to what has already been said touching this proposition: In discussing the scope of the word 'claim' in the treaty of 1819 between the United States and Spain, Mr. John Q. Adams, Secretary of State, in his letter to Messrs. White and others of March 9, 1822, observed that the treaty under the general term 'claims'—

"'Provided for the settlement of claims on contracts as well as claims on torts.'

"'The government was indeed aware' he says, 'that the abstract right to its interposition of citizens who had suffered by acts of foreigners, without any cooperation of their own, was more clear and imperative than that of others who had voluntarily staked their property on the good faith of Spain; and in the course of the negotiation a proposal was made to omit the renunciation which included the latter class of these claims. It was, however, finally agreed to, with the full understanding that all claims should have the same benefit of the provision.

"'As there is no limitation in the words of this renunciation with regard to the nature of the transactions in which the claims originated, whether by contract or by tort, so none was intended. These were claims, of all of which it was believed that the only possible chance of obtaining *any* satisfaction to the claimants consisted in the execution of the treaty.'[1]

"It was not thought then, it would seem, that interpretation could discharge the office claimed for it in the opinion under consideration. Had it been, the 'renunciation' referred to

[1] Am. State Papers, For. Rel. VI. 796.

would have been implied, and its insertion superfluous. If the umpire's doctrine be tenable, there is no difference in meaning between these two sentences in a claims treaty:

"'All claims on the part of corporations, companies, or individuals, citizens of the United States, upon the Government of Venezuela, which may have been presented to their government or to its legation at Caracas, before the first day of August 1868 * * * shall be submitted to a new commission.'

"'All claims on the part of corporations, companies, or individuals, citizens of the United States, upon the Government of Venezuela, *which have been made the subject of international controversy, or which are of such a nature as, according to received international principles, would entitle them on presentation to the official support of the government of the complainant, and* which may have been presented to their government or to its legation at Caracas, before the first day of August 1868 * * * shall be submitted to a new commission.'

"It would be a bold declaration to assert their substantial sameness. Had it been the intention thus to limit the claims in *character*, it is difficult to understand why language to that end was not used as had been done before, as seen, and by the same parties, in conventions with other powers.

"The umpire says further:

"'The claims for payment of the bonds are not, in my opinion, of such a character. The government of the United States, like that of Great Britain, has not laid down or acted upon the principle that a citizen who holds an interest in the public debt of a foreign country, and who, in common with the other shareholders in that debt, is unable to obtain payment of what is due him, is entitled as of right to the same support in recovering it as he would be in a case where he had suffered from a direct act of injustice or violence.'

"Very true; bonds are not of the character of claims ordinarily diplomatically pressed by one government against another; but since the celebrated circular of Lord Palmerston, in 1848, to British representatives at foreign courts, it would appear to be the established English doctrine at least that a

state has *the right* authoritatively to interpose in behalf of its subjects or citizens in support and enforcement of claims founded on bonds against other states, if it chooses to do so. (Phillimore, Int. L. vol. 2, 8; Hall, Int. L. 236–237.) And both the United States and Great Britain, as also other powers, have repeatedly, through treaties and other agencies, secured money due their citizens on contractual obligations from other states. And why not?

"Hall, with much reason, says:

"'Fundamentally, however, there is no difference in principle between wrongs inflicted by breach of a monetary agreement and other wrongs for which the state, as itself the wrongdoer, is immediately responsible. The difference which is made in practice is in no sense obligatory, and it is open to the governments to consider each case by itself, and to act as seems well to them on the merits.'

"'The umpire goes on: 'The government reserves to itself on special grounds the right to determine when and under what conditions such support shall be given, and this commission can not assume, upon the strength of a general term and in the absence of express language to that effect, that the government of the United States intended to delegate to it powers which it has not exercised itself in a matter of so much delicacy.'

"The strength of language does not consist in multiplicity of words. The 'strength of a general term' may be quite as effective as that of many terms. Where, in words, '*all* claims' are submitted, there can not be said to be an 'absence of express language' of submission, nor room for assumption in that regard. While the United States, under its settled practice hitherto, would not diplomatically urge the payment of bonds to its citizens upon another state, it by no means follows, either from principle or precedent, that it would not treat for their settlement along with other claims or even alone; and to put a narrow construction upon language in a general claims treaty, so as to exclude bonds upon the grounds suggested, would seem to have no better warrant than narrowly to construe conventional language conferring other benefits, to attain which a state would decline diplomatic interference or a resort to force.

"He says further:

"'It does not appear to me that the correspondence quoted with the United States legation at Bogota is sufficient to con-

stitute such an official support on the part of the United States Government to these claims as the circumstances of these cases would require to give them a "*locus standi*" before the commission. It is of a private and at most of an officious character, and does not transcend the limits of that friendly countenance and aid which the minister of foreign powers always gives to the holders of shares in public debts. No evidence has been adduced of instruction having been given by the State Department to press for the satisfaction of these particular claims, and indeed it is easy to see that many reasons of policy may exist which would deter a government from insisting on a preferential payment of a part only of the public creditors of a foreign debt.'

"Is it the thought here that, had the Secretary of State been more urgent in the tone and character of his dispatches to the American minister about the bonds, the words of the treaty would or might have borne a different interpretation, and the bonds been accorded a *locus standi* before the commission?

"It may be that reasons of policy may on occasion deter a state from insisting on preferential payments of bonds to its citizens or subjects as stated; and such also may *not* at times be the case, as evidenced under the English-Venezuelan treaty of September 21, 1868, above referred to. The only way to ascertain whether such be the fact in any given case of conventional compact in the presence of that character of indebtedness would seem to be from the language of the instrument itself, applying to it the ordinary meaning of the terms employed.

"And it may be remarked that, in the task of interpretation, a commission like this, it is believed, has little to do with policies outside of the revelations of the instrument under consideration, especially as these, with respect to either government concerned, are liable to change, and as between the two are often variant. 'What is termed the policy of the government with reference to any particular legislation,' said Mr. Justice Field in Hadden *v.* Collector (5 Wallace, 111), 'is generally a very uncertain thing, upon which all sorts of opinions, each variant from the other, may be formed by different persons. It is a ground which is too unstable upon which to rest the judgment of the court in the interpretation of statutes.' In the English case of St. Gregory, cited in Potter's Dwarris, 214, Taunton, J., said: 'The judgment was arrested by Mr. Justice Bailey, partly on the consideration of public policy;

a very questionable and unsatisfactory ground, because men's minds differ much on the nature and extent of public policy.' And Williams, J., added: 'The ground of public policy is a very unsafe one; it is best to adhere to the words used in the act of Parliament.'[1]

"Were the question propounded, What has been the *policy* of the United States or Great Britain, if either can be said to have any, with respect to providing in claims treaties for the discharge of contractual obligations toward her citizens? the answers would likely be materially different. The controlling 'policy' with us, as respects interpretation, is the to-be-assumed one, that nations in their treaties with each other say what they mean and mean what they say. 'The only sound principle,' says Story, 'is to declare *ita lex scripta est*, to follow and to obey; nor, if a principle so just could be overlooked, could there be well found a more unsafe guide or practice than mere policy and convenience. Men on such subjects complexionally differ from each other. The same men differ from themselves at different times. The policy of one age will ill suit the wishes or policy of another.' (Story on Const., § 436.) It is to be borne in mind that the question is not what Venezuela might do in respect of the payment or disposition of her public debt or other contractual individual obligations, in her capacity as sovereign, or what the United States might do under an established policy in the absence of treaty compact, respecting the claims of her citizens holding any of such obligations. The sole question is, whether, *as determined by the language of the treaty*, fairly and according to recognized canons of construction and interpretation considered, the high contracting parties did in fact submit this claim to the commission.

"From any and all points of view, therefore—whether it be that of the ordinary (which is the treaty) import of the terms; that of their legal signification and use; that of usage in framing claims treaties, or of actual practice under them—we are led to a different conclusion from the umpire. To refuse jurisdiction here would, in our opinion, be in effect to interpolate a most material clause in the treaty. In fact, to attempt interpretation' of the plain words '*all* claims' at all, in the

[1] Building Society *v.* Kent, L. R. 9, App. Cases, 273; Hadden *v.* Taylor, 42 N. Y. 259; R. *v.* Barbour, 8 B. & C. 99; Attorney-General *v.* Lockwood, 9 M. & W. 395; R. R. Co. *v.* Pittsburg, 104 Penn. St. 543.

connection employed, we should have felt, but for the opinion under review from so able a publicist, would be violative of Vattel's first rule, above quoted. We should have said what seems even yet to us true, to wit: They need no interpretation.

"In coming to this conclusion we have not been unmindful that too close adherence to mere words or too rigid an application of formulated rules is to be as much guarded against as too great a laxity in these respects. This claim was placed with the American legation at Caracas as early as February 22, 1855. It was presented to the government at Washington August 15, 1857, and on December 22 following, the Secretary of State, Mr. Cass, directed the American minister at Caracas to bring it to the attention of the Venezuelan Government and to exercise 'good offices' in that behalf. Before that it was urged upon the attention of the latter government by Mr. Henry S. Sanford, as agent of the claimants. It was presented to the former commission in 1868 through the United States legation at Caracas. So that it not only comes within the literal terms of the treaty as to presentation, but it was thoroughly known to each government when the present convention was framed as a pending claim. There is no question, from the showing here, that, in their origin, these bonds pertained to citizens of the United States. What the consideration of the 406 Colombian bonds was appears inferentially. The great bulk of the 5 per cent Colombian domestic debt of which they formed a part had as its basis indebtedness for military and other supplies. In their letter to the Secretary of State, August 15, 1857, the claimants speak of this class of obligations as 'founded upon considerations of the highest character.' It seems quite probable, as claimed in the oral argument, that the Colombian bonds were issued to the New York firm in payment for merchandise, though at what rate does not appear. This claim comes within the treaty.

"The allowance of the claim is resisted upon this ground, stated in the language of the learned counsel for Venezuela:

"'The defence set up by Venezuela in this case is that the bills of credit upon which suit has been brought, being a portion of what in 1839 and ever since has been known as 'the consolidable debt of Venezuela,' have never been directly payable in money; that the only method of satisfying them at any time, as was known to those whom the claimants represent when the bills were applied for and received, was by their conversion into the *consolidated* debt of Venezuela, the latter

afterward to be satisfied in money; and that the method of converting such bills into that consolidated debt was *by auction*, in which a limited amount of the latter was exposed to be bought by the holders of the former, of which comparatively very large amounts were outstanding; the subsequent method of obtaining *money* for the consolidated debt being also a like *auction*, where the debt offered would in turn be out of all proportion larger than the amount of money to be bid for.'

"The debt of Colombia was divided into two general classes, the foreign and the home debt. The former amounted to near 30 million dollars, bore 6 per cent interest, and its payment was specially provided for. The latter, made up itself of several classes, aggregated some 26 millions, and carried two rates of interest. A part bore 5 per cent, a part 3 per cent, and a part was noninterest-bearing. Colombian bonds were issued on account of the interest-bearing portions of the home debt under an act of May 22, 1826, which constituted what was called 'the national consolidated Colombian debt.' To the payment of the interest thereon, some fourteen distinct sources of revenue were specifically dedicated by said act. There was also special provision made therein for the redemption of the principal.

"The exchanged bonds of the Howlands were a part of this 5 per cent consolidated Colombian debt. At the partition of the Colombian debt among the constituent States of the old republic under the treaty between Venezuela and New Granada of 1834, 28½ per cent thereof fell to Venezuela, and in her portion were these 406 Howland bonds received by them before the dissolution. That part of the treaty bearing particularly upon this subject reads as follows:

"'ART. 10. The consolidated debt at five per cent annual interest, which is inscribed in the great book of the national debt of Colombia, amounting to 5,374,905.75 pesos, which, by the sinking fund made up to December 31, 1829, remains reduced to 5,359,355.75 pesos, is divided in the following manner:

"'The Republic of Venezuela binds itself to recognize the sum of 1,527,416.37½ pesos.

"'The Republic of New Granada binds itself to recognize the sum of 2,679,627.87½ pesos.

"'And the Republic of Ecuador will recognize the sum of 1,152,261.50 pesos.

* * * * * * *

"'ART. 12. The governments of the three republics, after the exchange of ratifications of the present convention, will

proceed to the conversion of the national consolidated Colombian debt into a debt belonging to each one of them for the amounts which respectively pertain to them, calling in and cancelling the Colombian bonds conformably to the regulations which may be laid down by the respective legislatures; these so called in and cancelled will be transmitted to the commission of ministers of the three republics, which shall meet in the city of Bogota for their verification and destruction.'

"Accordingly, in her law of April 26, 1838, sec. 7, Venezuela provided:

"'For the conversion of the debt of Colombia into the debt of Venezuela, treasury bills of credit payable to bearer will be issued from fifty up to one thousand pesos, in accordance with the request of the creditors.'

"Like the old republic, she made special provision for the foreign or European debt falling to her; and likewise set apart several—some four or five—distinct sources of revenue for payment, interest and principal, of the three and the five per cent Colombian domestic debt.

"In addition to these resources, this Colombian debt, with the Venezuelan bonds or bills issued on account thereof, was made convertible into the consolidated debt of Venezuela, so called. This consolidated debt was a sort of irreducible sinking fund fixed at 500,000 *pesos*, on account of which 5 per cent bonds were issued in exchange, according to a prescribed method, for said convertible or consolidable securities, and for the yearly payment of the interest on which, and the reduction of the principal, 50,000 *pesos* were permanently appropriated from the customs revenue. After payment of interest on the consolidated bonds, the balance of the 50,000 was devoted to the reduction of the principal of the consolidated debt, those holders being paid who would bid at 'auction' the largest amount of them for a given sum (100 *pesos*) of money, not less than dollar for dollar. The sinking fund was then reimbursed from consolidable securities in the same way; that is, the holder of consolidable bonds who would give most of them for a given amount of the consolidated would obtain it.

"The 16th article of the act provided:

"'*The holders of evidences of the debt of Colombia who shall not convert them in conformity with this decree shall preserve the rights which they have acquired in respect to the manner and terms of payment; but those who request and obtain the conversion will have no other rights than those which this law confirms in articles 4 and 10.*'

"Articles 4 and 10 referred to are the ones providing for the payment of interest on and the reduction and replenishment of the consolidated debt or sinking fund, as stated.

"The act of May 10, 1839, followed. It provided:

"'ART. 1. In order that the total amount of the Colombian debt may be determined without delay, and in pursuance of the arrangements made by the convention of December 23, 1834, in relation to the division of the said debt, and of the subsequent agreements made by the commission of ministers which met at Bogota, the Executive Power is authorized to proceed to convert into Venezuela's own debt the proportion which falls to this Republic conformably to Article 1 of the said convention.

'ART. 2. The debt converted into Venezuela's own debt shall be represented by notes (bonds) authorized by the commission of public credit, in accordance with such forms as shall be established by the Executive Power, with all proper precautions against counterfeiting, and shall bear the name of *Consolidable Debt of Venezuela.* (*Deuda Consolidable de Venezuela.*)

'ART. 3. *From the date of the issue of the notes (bonds) referred to in the preceding article, no others shall be admitted to the conversion of consolidable debt of Venezuela*, to which the law of April 26, 1838, relative to the public debt, refers.'

"In this state of the law, the Howlands converted their Colombian bonds, 1839, into 'Venezuela's own debt' and obtained the bills in controversy.

"Before this last act they, it would seem, preferred their Colombian bonds, which were a charge against New Granada and Ecuador as well as Venezuela, to the consolidated 'treasury bills' of the latter authorized by previous legislation. But now, the pledge being added that the consolidable securities should be confined to the Colombian domestic debt falling to Venezuela, the extent of which was known, their own holding constituting a good part thereof, they made the change.

"There was subsequent legislation on the subject, radically changing the law of this period, which need not be traced particularly. The principle, however, of maintaining the consolidated debt as a sinking fund, in one form or another, was kept up with interruptions.

"Three changes in the law will be generally noted:

"1. The price at which the consolidable bonds could be exchanged for the consolidated was soon arbitrarily fixed. At first, three of the former were required to be surrendered for one of the latter; and at last, 1865, five for one.

"2. New loans and other forms of indebtedness to a large

amount, in excess of the original Colombian conversion, were added to the consolidable debt of Venezuela and thus made convertible into the consolidated debt, and they were made exchangeable on better terms than the consolidable bills of 1839—a part being convertible *peso* for *peso*. The interest and redemption fund annually appropriated was not, after 1852, kept at ten per cent of the sinking fund.

"The option of the holder of these (1839) consolidable securities to convert or not as he chose into consolidated debt, under the law of 1838 quoted, and reenacted in 1843, was finally taken away in 1865, when he was required to convert at 20 cents on the dollar. By executive decree, July 1, 1865, it was provided:

"'The republic will not recognize as its debt any bills, securities to bearer, or evidences of any kind whatsoever unless the same shall have been presented on or before the date fixed' [which was December 31, 1865, as to this class of debt] 'nor shall any bills, securities to bearer, or other evidences of indebtedness be converted into consolidated debt which are presented for conversion after the date designated by the preceding article.'

"This time was subsequently extended to April 30, 1866.

"The owners of these 366 bonds never exercised the option or yielded to the requirement of conversion. The securities stand as they did on the day of their issue save the official indorsement of their genuineness made in pursuance of law in 1859.

"The question is, under this state of fact, What are the rights of the parties?

"Under the constitution of 1830 (Title 14, § 14), the Venezuelan Congress had power 'to contract debts on the credit of the state,' and such was its duty in respect of the Colombian indebtedness assigned to Venezuela under the treaty of 1834. There is no question, therefore, as to the validity of the legislation under which these bonds were issued, as there is none as to their *bona fides*. There is no doubt either that this legislation entered into and formed a part of the contract with the takers of the securities as fully as if engraved on the bills and in terms made a part thereof. But the contract was mutual. In justice it bound the government as well as the bill holder. Holders were given the right to exchange their bills into consolidated debt at the market value, and thus put themselves in the line of certain, regular interest payment and the ulti-

mate discharge of the principal. It could be exercised at any time 'at the will of the holders,' 'while the classes of international debt existed,' of which these bills were a part. This was the contract.

"The act of 1838 and that of 1839 being on the same subject are to be taken together as constituting one law, in so far as they are consistent with each other. The latter may be regarded as an amendment of or addition to the former, and at points of variance it will of course prevail. Article 16, above quoted, not being inconsistent with the later act, was in force when the Howlands obtained their securities and was, as it were, impressed on them.

"It provides two things: 1st, Holders of Colombian securities, 'who shall not convert them in conformity with this decree shall preserve the rights which they have acquired in respect to the manner and terms of payment.' 2d. 'Those who request and obtain the conversion will have no other rights than those which this law confirms in articles 4 and 10.'

"There are two 'conversions' contemplated by 'this law,' to wit: Conversion of 'consolidated or consolidable debt of Colombia into consolidated debt of Venezuela,' and 'conversion of the debt of Colombia into the debt of Venezuela.' While the Howlands may not possibly have literally made their exchange 'in conformity with *this decree*,' yet they did so in substantial conformity thereto, although under the act of 1839. And taking the term in its wider sense, they, in making their 'conversion,' voluntarily shut themselves up to the sinking fund or 'auction' mode of payment. And such would seem from the letter of their agent, Mr. John M. Foster, to the American minister at Caracas in 1855, to have been their actual understanding. For the complaint then was not of nonpayment, but of failure on the part of the Venezuelan Government to carry out in good faith the sinking fund law. Had that been done—had the law, as it stood in 1839, been fairly administered—the claimants would have no right to look to other source of payment. But the difficulty is that was not done. The contract was not fulfilled by Venezuela. The law was greatly modified to their prejudice and in violation of the understanding embodied in the legislation of 1838–39, under which they acted. When the means of payment to which they had agreed to look was thus taken away or materially impaired, what in justice became their rights? They had exchanged

their Colombian bills for these bonds redeemable according to a prescribed method on the faith that such method would be faithfully regarded and carried out.

"It seems to us there can be but one answer to this question, namely: At the impairment, the debt as it then was became due and payable. The government having disregarded and put out of the question the execution of the contract as to the terms and manner of payment, the holders became thereby absolved from it.

"Would anyone for a moment say that when by the contract the Howlands were given the right at will to exchange their bills into consolidated debt at the best rate the market would allow, it was not an impairment of that right arbitrarily to fix a less advantageous price at which the exchange should be made? Could it be claimed that when the law of 1839, forming a part of the contract, provided that no other notes or bonds than the Colombian indebtedness therein referred to 'shall be admitted to the conversion of consolidable debt of Venezuela,' the admission thereto of large amounts of other bonds and subsequently accruing debts of the republic, and on greatly better terms of exchange at that, was not an impairment of this source of payment?

"Was it not violative of their rights, in respect of payment, to take away from them the option aforesaid, given in the original legislation, and compel them to invest in the consolidated debt at five bonds for one, at the penalty of forfeiting their whole claim?

"These questions answer themselves. Debts can not be paid by acts of Congress. This is not a case of bankruptcy. There is no difference in principle between discharging a part of a debt by legislative decree and wiping out the whole of it by the same means, as there is none between paring off and diminishing the value of an obligation by degrees, in one way and another, until that value is destroyed, and out-and-out destruction at once. If there be any difference it is in favor of the latter, as a quick death is preferable to torture.

"Under the scheme provided in the legislation of 1838–39 it would seem this class of securities advanced in value until 1852, when the consolidable debt was reduced to some 300,000 *pesos*, two-thirds of which face value the Howlands held. Had the laws not been altered, to the prejudice of the holders, it appears not unlikely that those who deferred the exercise of their option,

as did the Howlands, would have in due time and long ere this seen their securities reach par, they having gradually gone up from 1839, as the evidence discloses, under the then faithful administration of the law, reaching 50 in 1852.

"The Howlands are the original takers of the bills in controversy. Were not such their situation, their rights under the treaty might be different. Had they bought the bills in the market they might occupy no more favorable position here than would the seller.

"Under such circumstances what does justice require at our hands?

"There seems but one answer: allowance of the claim.

"On the question of interest a majority of the commission, under the discretion given by the convention in that regard, are of opinion that substantial justice will be done if allowance be made from the date of the very material impairment of their rights by Venezuela by the increase of the consolidable debt in 1853, the original claimants having in 1855 expressed themselves as satisfied with the administration of the sinking fund before that date.

"The entry may, therefore, be for the face of the bills with 5 per cent interest from April 26, 1853, to September 2, 1890, inclusive, counting the *peso* at 75 cents gold coin of the United States."

Opinion of Mr. Findlay.

Findlay, commissioner, on jurisdiction:

"It is the law of the United States and the respective States composing that Union that neither the sovereignty of the federation nor of any of its constituent parts can be brought into court at the suit of a private individual without its consent, and in giving this consent the sovereignty is at liberty to prescribe the conditions under which the suit shall be instituted and conducted. It is also the law of the United States that the sovereign of another country can not be sued in its courts by its citizens nor subjected to judicial process by attachment or other proceeding to enforce an appearance. This law was laid down by the Supreme Court in the leading case of Cohens *v.* Virginia, in 6 W. p. 264, and has been repeated and reaffirmed since in a multitude of decisions, both State and national. (Joseph D. Beers, &c. *v.* State of Arkansas, and notes, L. C. P. Co. book 15, p. 991.) It has been carried so far indeed that no judgment can be rendered against the United States for balance found due a defendant in set off. (Reeside *v.* Walker, 11 H. 272.)

"This principle of immunity from suit applies to every sovereign power without regard to the form of the government, as it is held to be essential to the common defence and general welfare, as without its protection government would be disabled from performing the various duties for which it was created. As before observed, it applies to suits against foreign sovereigns and prohibits the seizure of property within the domestic jurisdiction for the purpose of facilitating such procedures. (Vavasour *v.* Crupp, 9 Ch. Div. 351; The Parlement Belge, 5 Prob. Div. 197; The Exchange *v.* McFaddon, 7 Cr. 116; U. S. *v.* Lee, 106 U. S. 196.)

"It is believed there is no exception to this rule, which is manifestly founded in the very conception of a sovereign power, but the voluntary departures from its enforcement are numerous; and most, if not all, civilized states recognize the necessity for establishing some judicial means by which errors in administration may be corrected and wrongs remedied of which the state has been the cause and the citizen the victim. Hence, courts of claims of one kind or another, some with a limited and others with a more enlarged jurisdiction, have been established in which the individual may seek redress against the sovereign and obtain relief by the same methods as practiced in the ordinary tribunals of justice. The great question that confronts us on the threshold of this case is: Whether by the use of the terms under which this commission has been created it was the intention of the United States to demand and Venezuela to assent to a submission of a portion of her public debt to the decision of this body as one of the claims agreed to be referred within the clear intent and purview of the treaty? It will be observed, by the express language of the treaty, that *all claims*, without limitation or qualification, are within the terms of the submission, the only proviso being that they shall be claims of citizens of the United States against the Government of Venezuela, and that they shall have been presented in the mode and by the time prescribed. Giving full and unrestrained effect to this sweeping provision, it would be impossible to exclude any claim of any kind, whether affecting the public debt or not, provided the claim, both in origin and presentation, had the required national status.

"This limitation, however, it will be observed, would necessarily confine the allowance of such a claim to persons who were citizens of the United States when the obligations were incurred, or who now hold them in virtue of representation

of such persons; and, in consequence, the danger of letting in by assignment or transfer the bulk of the outstanding debt would be avoided. There is not much aid then, by way of construction, to be derived from the general and comprehensive character of the terms used as suggestive in themselves of some implied or latent restriction; for, while the terms are broad enough to include claims of every kind, the right to enforce them is confined to the only class of persons intended to be benefited, to wit, citizens of the United States. It is to be observed, too, that this claim was presented to the old commission and dismissed because it represented 'consolidated debt,' but the integrity of the claim was in nowise to be affected or invalidated by such action. (See Journal of Proceedings, p. 114.)

"The joint resolution of 1883, which provided for a reopening of the old claims and the creation of a new commission, was passed, as its recitals show, not at the instance of Venezuela only, but of citizens of the United States also who felt themselves aggrieved by the action of the old commission in dismissing or refusing to entertain their claims. Indeed, the evidence shows that the most active promoter of the legislation necessary for a rehearing was the gentleman who has argued this case in part for the claimants and who appears to have been the draftsman of the joint resolution in which this convention originated. There were, in fact, two active, powerful, and cooperating interests at work in accomplishing this result. On the one side was Venezuela complaining that the former awards were tainted with fraud and should be set aside, and on the other were citizens of the United States alleging that in the eagerness to pass certain claims the old commission forgot or overlooked its duty toward others equally, perhaps more, meritorious; and as the result of the joint pressure of these representations Congress was finally induced to adopt the resolution referred to.

"These facts, of course, were well known to both the United States and Venezuela when the convention of 1885 was negotiated, and in view of these facts—that is, that this claim had been presented to the old commission and rejected, and that this rejection was among other causes which led to the creation of the new commission—are we justified, notwithstanding the magnitude of the claim and its somewhat novel character, in saying that it was not the intention to include it within the

terms of a submission which refers *all claims* without any reservation or limitation whatever?

"If such is the conclusion, it can only be because the case itself does not show a claim within the meaning of that term, and this we will examine for a moment.

"The case rests upon the presentation of 366 of the bonds or due bills of Venezuela, which were given in exchange for 406 of Colombian bonds. They are all dated the 15th of September 1839 at Caracas, and bear five per cent interest per annum from the 1st of January 1827, and are acknowledged in favor of the bearer, but state no date when they shall become due and payable. Each one is for the sum of 500 pesos, and their genuineness has been proved and is conceded. It is also a concession that no part of the indebtedness represented by these bills, either principal or interest, has ever been paid.

"It is contended, however, by the learned counsel for Venezuela, in a printed brief recently filed, that there was in fact no obligation to pay them in money; that they were in the nature of scrip with the privilege of being converted or funded into a debt called the consolidated debt, and that until this was done they were simply consolidable, and that the claimants by inaction in availing themselves of the option to convert have not only lost it, but Venezuela has become acquit and released from any obligation for the debt itself.

"On the other hand, the claimants contend that if they did not avail themselves of the option, but chose to hold the original evidences of this debt, submitting, in some way not explained, to a discount of $20,000 on the exchange of Colombian for Venezuelan bills under a law which at the time of the exchange preserved whatever rights they had as holders of said bills until the conversion was made, then it matters not what course Venezuela pursued subsequently with reference to her public debt, as any refusal to pay or provide for the satisfaction of these bills taken on the faith of existing law would be flat repudiation. Between these contentions the radical point of departure seems to be whether the alleged option was an option or not. If it was an option as generally understood, and a time had been prescribed within which it must be exercised or held to be forfeited, nothing but the right to convert and whatever benefits the conversion would bring with it could have been lost. Upon what principle the failure

to exercise the option would destroy the obligation of the debt itself, or how that obligation is to be discharged except by payment, compromise, or satisfaction of some kind is more than we can perceive. Waiving this discussion, however, for the moment and reverting to the original question, would it not be difficult on any interpretation, legal or conventional, to hold that a controversy with these radical elements of difference did not constitute a claim? As originally argued at bar the contention of Venezuela was that the claimants had not presented their bills in twelve years, and therefore for that period must suffer a loss of interest, but the integrity of the debt itself was not questioned. The ground has been since shifted and the question waived whether there is any debt.

"On the concession that there was an actual subsisting debt of a definite amount, represented by certain positive obligations, the genuineness of which was admitted, one party to the controversy would be retired and the litigious character of the claim destroyed. The claimant then would have simply occupied the position of one who was asking payment of a claim which his debtor did not dispute, and some question might have been raised as to whether there was not involved in the very idea of claims, as submitted for our decision, the elements of controversy and resistance. But Venezuela now not only does not admit the existence of the obligation to pay, but insists that the *vinculum juris* between her and her creditor has been destroyed; that there is no debt in fact, and that her acknowledgment of such, in 1839, has been subsequently defeated by the exercise of the same sovereign will by which it was originally declared.

"If this contention, along with the vigorous denial of the claimants, does not constitute a claim, and a disputed claim at that, I am at a loss to understand the meaning of language, and shall not travel out of my way in search of precedents or illustrations to show that such must be its significance. As a claim, then, how shall we, bound by a solemn declaration to do impartial justice, escape the responsibility of passing upon it, whatever may be the amount or other issues of grave importance involved? We are aware, of course, that it is not the policy of the United States to exert diplomatic intervention in behalf of claims purely contractual in their character, and that the eminent men who have filled the Department of State from an early period have contended that such engagements,

being voluntary, should be settled between the parties without the interference of the government. And so, if we were representing or speaking simply for the policy of the United States, as expounded by its secretaries of foreign affairs, we would be compelled to dismiss this petition and send the parties to Caracas. But we are sitting here under a treaty between the two countries, the plain, the sole object of which is to have heard and determined all claims, contractual or otherwise, which the citizens of one country have against the government of the other. If it be said that the policy of the United States should be imported into the treaty for the purpose of modifying express terms too general in their character, and cutting down the claims to such as that country would make the subject of a diplomatic representation, then the plain answer is that all the claims of that nature would be excluded from our jurisdiction, and the object of the treaty as expressly declared, which is to dispose of all claims, would be defeated. It was just because the policy of the United States in this respect did not permit it to urge claims of this kind outside of the mild and inoffensive range of personal and unofficial good offices that the greater necessity existed to provide for their settlement by convention. And besides, as before shown, after the submission of this claim to the old commission, and the steps that were taken to open its work, and have a new adjudication, it would strain probability beyond endurance to suppose that this matter was not discussed by the plenipotentiaries of the respective powers, and that the whole matter under the comprehensive word 'claims' was referred for settlement to this commission. If the plenipotentiary appearing for Venezuela desired that the jurisdiction of the commission should be confined to certain classes of claims and that others should be excluded it is probable that he made his desires known, and that the most he could accomplish with the representative of the United States was in getting him to agree that all claims should go to the commission and that that body should determine for itself the limits of its jurisdiction. At all events that is the form in which jurisdiction is vested in us, and, unless we deliberately shirk the discharge of a plain duty, we see no way of escape from the conclusion that this claim is one which we are bound to hear and consider. In this connection, too, it is well to state what has been so forcibly presented by other counsel for the claimants, that the history

of previous international arbitrations between the United States and certain of the South American republics and Mexico demonstrates that this class of reclamations was acknowledged and recognized in repeated instances by commissions organized under treaties containing the same general words of submission with which we are now dealing. For example, by the treaty of 1857, between the United States and New Granada 'all claims' were referred to a commission, and an award was made in favor of Robert W. Gibbs on a claim founded upon a certificate that a certain sum of money was due by the Colombian Government, the same certificate, in fact, on which this commission has also made an award in favor of the same party for the percentage of the claim to be paid by Venezuela.

"By the treaty of 1863, between the United States and Peru, 'all claims' were submitted to a commission, and an award was made in favor of a party on a bill of exchange made by Peru. On November 15, 1869, a treaty was made for the settlement of 'all pending claims' of British subjects against Venezuela, and it appears that several awards were made for the 28½ per cent of the indebtedness of Colombia awarded by Venezuela. It is true that Sir Frederick W. A. Bruce, as the umpire of a second commission, under a treaty between the United States and New Granada, held that it was not reasonable to suppose that claims of this kind were intended to be submitted, notwithstanding they were included in the express terms of the submission.

"His argument is based upon the proposition that the term 'claim' must be 'construed so as to confine it to the demands which have been made the subject of international controversy, or which are of such a nature as, according to received international principles, would entitle them, on presentation, to the official support of the government of the complainant.'

"The learned jurist then proceeds to state:

"'That the Government of the United States, like that of Great Britain, has not laid down or acted upon the principle that a citizen who holds an interest in the public debt of a foreign country, and who in common with the other shareholders in that debt is unable to obtain payment of what is due to him, is entitled as of right to the same support in recovering it as he would be in a case where he had suffered from a distinct act of injustice or violence. The government reserves to itself, upon special grounds, the right to determine under what conditions such support shall be given, and this commission can

not assume upon the strength of a general term, and in the absence of express language to that effect, that the Government of the United States intended to delegate to it powers which it has not exercised itself in a matter of so much delicacy.'

"It will be admitted, as it has already been, that the policy of the United States with reference to the enforcement of claims purely contractual is correctly stated; but it may be a matter of question whether, in view of Lord Palmerston's famous circular, the view of Great Britain upon the same subject has not been put a little too broadly. (See also, Hall Int. Law, p. 257.)

"But concede that there is no error in the statement with respect to either country, when enforcing its foreign policy through the ordinary diplomatic channels, we can perceive no reason why such a policy should not be departed from when arbitration is adopted as the method of finally adjudicating international claims. A claim is none the less a claim because it originates in contract instead of tort. The refusal to pay an honest claim is no less a wrong because it happens to arise from an obligation to pay money instead of originating in violence offered to person or property. Torts, as a rule, present more aggravated cases of injustice and affect the citizen at points which more loudly call for redress than ordinary breaches of contract; but after all the difference lies in degree only.

"This difference, however, has been sufficient to check, as a rule, official demands for reclamation in the case of contracts with the *ultima ratio* of reprisals and possible war projecting its ugly shadow over the negotiation. But when two countries, by mutual agreement, have referred the causes of reclamation of the citizens of one against the government of the other, without distinction as to the origin or nature of the claims, it does not strike us that the policy of either country with reference to such claims, as illustrated by the history of diplomatic intervention, is at all valuable for the purpose of explaining what, indeed, according to our view, does not stand in need of interpretation.

"On the contrary, if we were to call in inference to aid us in the interpretation of an ordinary term, which explains itself, we should say that the very fact that a government felt itself constrained to deny to its citizens effectual interposition in such cases would afford strong ground for supposing that it purposed to accomplish this end by the peaceable method of arbi-

tration. We know of no country which has ever held that it was no part of its duty to its citizens to provide for redress, in cases of contract, although the doctrine has been held by the United States that it would not officially intervene by diplomatic representation, with a purpose of accepting the final responsibility for such a course. Nor do we understand this to be the position of the learned gentleman whose opinion we are now considering. He surely would not contend that a government owed no duty to its citizens in such cases, provided the debtor country itself opened up the way to a settlement. His contention is, that nothing short of express terms descriptive of this class of claims, *eo nomine*, will vest the jurisdiction to determine them, and giving the treaty a reasonable and not a merely literal interpretation they can not be considered as included by the general term used. But if we have the right to say that one class of claims shall be excluded, why not another? A government due bill is but a promise to pay. A contract to build a breakwater between a government and the citizens of another country is a promise to pay money on the fulfilment of the contract.

"We have just decided, all the commissioners concurring, that the commission has jurisdiction in the breakwater case, and we have made an award against Venezuela for the money remaining due on the contract. Upon what principle could we justify the taking jurisdiction in the one case and decline it in the other? Both, it will be observed, are contractual in their nature and neither would have received the aid of the United States diplomatically exerted, except in the form of good offices. The United States would have been as much bound by this policy to refuse its aid in the Walter claim for a breach of contract in not paying money due for a breakwater as in the present case for the due bill. If this policy, then, is to be imported into the treaty for the purpose of excepting out of it matter which falls directly within its express terms, upon what principle shall we determine what class of contractual claims was intended to be included? We do not understand that the United States has refrained from pressing a claim of this kind because it was founded on the public debt of another country, but because the claim itself was a voluntary engagement which the respective parties had better settle among themselves. This principle it applied to claims of this kind of every character, big or little, concerning public debt or otherwise.

"Importing it into the treaty as a rule of interpretation with the effect of overruling the express terms of the instrument, it is obvious that the class of claims which this commission is empowered to determine would be limited to torts. But that is the very class which governments have always held themselves bound to redress through the ordinary diplomatic channels. While, of course, they are included within the terms of the submission, it would be strange indeed if the other class, not subject to redress in this way, should have been excluded.

"On the whole, without protracting this discussion further, we have come to the directly opposite conclusion from that reached by Sir Frederick, and hold that nothing short of words of express exclusion, at least in a treaty negotiated under the circumstances of this one, could restrain and limit the meaning of the plain language used."

Wm. H. Aspinwall, executor of G. G. Howland and others, v. *Venezuela*, No. 18, United States and Venezuelan Claims Commission, convention of December 5, 1885.

Dissenting Opinion of Mr. Andrade.

Mr. Andrade, commissioner on the part of Venezuela, delivered the following dissenting opinion:

"'There is no question, from the showing here, that, in their origin, these bonds pertained to citizens of the United States. The great bulk of the 5 per cent Colombian domestic debt of which they formed a part had as its basis indebtedness for military and other supplies. In their letter to the Secretary of State, August 15, 1857, the claimants speak of this kind of obligation as "founded upon considerations of the highest character." It seems quite probable, as claimed in the oral argument, that the Colombian bonds *were issued to the New York firm in payment for merchandise*, though at what rate does not appear.' (Little, for the commission, p. 318.)

"For me, on the contrary, it is most questionable that, in their origin, these bonds did ever pertain to citizens of the United States.

"Public debt is that which the government contracts to meet the obligations of the state, whenever the ordinary and permanent resources are not sufficient, borrowing money at a fixed interest, that rises or declines in a direct ratio with the circumstances—that is to say, the rating of credit that the government enjoys. This means to provide for the expenses of the nation constitutes what, on the subject of national finance, is called by statesmen and economists 'public loans,' which, aside from all considerations of an economical character that we have not to deal with here, are of general use and practice among all the governments of the world.

"Public loans are *voluntary* or *forced;* it is unnecessary to rest to explain which constitute the former and which the latter; both define themselves.

"They are reimbursable within a shorter or longer period or *nonreimbursable* or *perpetual*. In regard to the former, the government pays the

interests every year, or semiannually, or quarterly, and sometimes monthly; and it refunds the principal totally or partly, all at once, or by successive instalments, at a fixed or at an undetermined time.

"The loans can also be for a *real* or for a *nominal* capital; for a *real* capital when the government recognizes itself as debtor of the amount received, and for a nominal capital when it declares itself debtor of a sum partially imaginary. In the former the capital is fixed, but the interest may change; in the latter, on the contrary, the interest is fixed and the capital variable. That depends on the higher or lower rating of the credit of the government.

"There are loans by *adjustment* and loans by *subscription*. In the former case the government admits the different propositions from bankers and accepts the most favorable; in the latter case it establishes the conditions and negotiates with everybody.

"As to the guarantee pledged to the creditor, they are divided into *mortgaged* or *bonded loans* and *nonbonded*. In the former some property of the nation or the proceeds of some revenue are pledged; the others are raised on no other security than the confidence in the credit of the state.

"Respecting *the origin* of the capital realized, public loans are divided into *foreign* (exterior) loans, the evidences of which are issued *in favor of foreign capitalists*, and *domestic* or *internal*, the evidences of which are issued *in favor of national capitalists*.

"The different manners of contracting a public loan engender different kinds of debt.

"When the government wants to provide at once for immediate needs, and finds itself short of revenues on account of the ordinary revenues having failed to come in in time, or on account of the expense having not been foreseen, or it having to advance the same, it issues *treasury bonds* that bear an interest and are reimbursable within a certain time. The treasury bonds are just like bills of exchange, payable at the treasury at their maturity; whence the *floating* debt, so called, because of its being transient, occasional, and changeable. This operation of credit does not constitute a regular loan, it being only a mere advance of funds or a simple discount of the proceeds of the public revenues.

"The *consolidated debt* includes all those loans definitely settled or liquidated, and for the extinction and interests of which appropriation is made in the ordinary budget of the state. It is sometimes named *inscribed debt* also, because it is inscribed or recorded in the *great book of the public debt*. It is divided in *redeemable* and *irredeemable*.

"These are elemental scientific notions to be found in all books on political economy.

"Colombia, during her war of independence, was frequently necessitated to contract debts, abroad as well as at home, for the liquidation of which she began to provide by a legislative act of her first congress.

"'The general congress of Colombia, considering: the honor of the republic being interested in the early recognition and satisfaction of the debts contracted for the glorious cause of independence * * * decrees what follows:

"'ART. 1. A commission is hereby created for the purpose of liquidating the national debt.' (Decree of October 12, 1821.)

"The state of the liquidation accomplished by the commission up to 1826, together with new provisions for the prosecution thereof and for the satisfaction of the national debt, is shown in the law of May 22, of said year, intended to lay the basis of the national credit:

"'ART. 1. The Republic of Colombia recognizes as national debt: 1. The sum of 2,000,000*l.* sterling, which Francisco Antonio Zea contracted for in Paris, in the name of the Republic, in March 1822, reserving the rights that may pertain to the Republic, against all whom it may concern, in consequence of the liquidation thereof ordered by the law of July 1, 1823. 2. That of 4,750,000*l.* sterling contracted for at Calais on April 14, 1824, by Manuel Antonio Arrublas and Francisco Montoya. 3. The one already examined and liquidated by the commission of liquidators, established in this capital, and which, up to the present, amounts to 1,181,407 pesos four reals and seven-eighths; and that which shall continue to be examined and liquidated by the said Commission in uniformity with the law of the matter. 4. That of 814,710 pesos, which has been contracted, and is unpaid, in virtue of the loan decreed by the law of July 26, 1823, year 13, to cover the military credits of the troops and officers of Apure; and that which is still to be contracted for the exact fulfilling of the said law. 5. The sum still owing of the 5,458,600 pesos of military credits, which, according to the law of September 28, 1821, year 11, has been awarded to the servants of the Republic, and what else may be hereafter awarded in pursuance of the same law. 6. That which may exist unpaid of the one-half of the salaries of civil and military officers of the Republic, retained in compliance with the decree of the President Liberator, of September 14, 1819, of which the Secretary of the Treasury shall give an account to the coming Congress at its first session. 7. The amount of the third part of the salaries of the same class of officers, retained according to the law of October 8, 1821, year 11, of which amount the Secretary of the Treasury shall also present an account to the coming Congress at its first session. 8. The amount of the annuities allowed or transferred during the several periods of the revolution, by the Republican Government, payable at the several provincial treasuries of the former New Granada and Venezuela, and of which the Secretary of the Treasury shall render account to the next Congress at its first session. 9. That which was acknowledged and guaranteed by the act of independence of the Isthmus of Panama, after being examined and liquidated by the commission of liquidators established in this city, and of which a statement shall also be presented to the next Congress by the Secretary of the Treasury.

"'ART. 2. It is declared: 1. That *the foreign debt mentioned in Nos. 1 and 2* of the foregoing article has earned and shall continue to earn the annual interest of *six per cent* stipulated in the respective contracts, and shall be redeemed as agreed therein. 2. That those (sums) *mentioned in Nos. 3 and 4* which have earned *five per cent* annual interest from the day they were contracted, shall continue to earn the same interest hereafter; but those included in No. 3 which have earned a lesser interest, or none at all, shall earn in future five per cent yearly from the day of their inscription in the great book of the national debt. 3. That those mentioned in Nos. 5, 6, 7, 8, and 9 shall earn a premium of three per cent annually from the 1st of July of the present year of 1826.

"'ART. 9. The Congress shall keep *a great book of the national debt*, which shall have for its heading a full copy of this law, signed by the presidents and secretaries of both houses. (Art. 8.)

"'In that book shall be inscribed the several sums, which by this law are acknowledged as national debt, and all the inscriptions thereof shall be signed by the presidents and secretaries of both houses. The formula shall be as follows:

"'*The Republic of Colombia acknowledges as national debt the capital sum of ——— pesos, resulting from ——— and approved by ———, to which the annual interest of ——— per cent is allowed, payable every six months, out of the funds applied thereto by the law of ———, and out of such other funds as may hereafter be applied to the said end.*

"'ART. 18. The commission of the national credit shall call in all the obligations of *the home debt* emitted by the Treasury Department up to this time, *all the certificates for military credits* issued by the chief commission sitting in this capital, and *all the certificates for salaries withheld*, approved by the Secretary of the Treasury; and sealing again all these documents in order that they may remain cancelled, in lieu thereof and in accordance with this law, it shall emit obligations with interest, payable to bearer, showing the annual rate of interest.

"'ART. 19. These obligations shall be for 25, 50, 100, 200, and 500 pesos.' * * *

"It will be noticed from that law that Colombia, in accordance with the economical rules generally adopted, divided her total national debt into two principal portions—*the foreign debt* entered into with *foreign capitalists* (Nos. 1 and 2, art. 1) and the *home or domestic debt* contracted with *national capitalists* (Nos. 3 to 9); that the foreign debt earned *six per cent* annual interest and the home debt *five per cent* (Nos. 3 and 4) or *three per cent* (Nos. 5 to 9); that all the sums resulting from the several sources of the national debt should, after liquidation, be entered in the 'great book of the national debt;' that is, *consolidated* under a certain formula; that obligations for 500 *pesos* bearing *5 per cent interest* could only be emitted in lieu of *the former obligations of the home debt* issued by the treasury department and of *the certificates of military credits* issued by the commission of liquidators created in 1821; that is, in evidence of the items described in Nos. 3 and 4 of article 1 (articles 2, 18, and 19).

"The Colombian obligations held by the Howlands in 1839 were, as it appears, for 500 *pesos* bearing *5 per cent* interest, and therefore represented a portion of the *home debt* contracted with *national capitalists*, and could not have been emitted *originally* in their favor, because they were foreigners, citizens of the United States, not naturalized or domiciliated in Colombia; had not had any property taken or destroyed there during the war; had not lent any money to the government; had not been civil or military officers of the Republic; in short, were on no account *original, direct, domestic creditors* to Colombia. Nor is it probable that such obligations were issued to the New York firm in payment for merchandise. Colombia did never cancel with bonds of public debt her obligations toward foreigners arising out of contracts for military or other supplies. She used to pay therefor in money, bills of exchange on Europe, treasury notes, tobacco, etc., as the majority of the commission had the opportunity to note in the case of Idler--never in bills of public debt, either internal or external. The words quoted from their letter to the Secretary of State, August 5, 1857, refer to the obligations of Venezuela towards Colombia, not to the Colombian bonds. Those words would seem rather to exclude the probability of their having acquired the bonds in that way, it being inconceivable that any cause of a mercantile nature could be properly qualified as a consideration of the *highest character*. Such a style is acceptable only in connection with moral or intellectual considerations. But if they had, they should prove it, because both the usages and the history of Colombia testify against that fact. No; the bonds here contemplated did not pertain *in their origin* to the Howlands or to any other citizens of the United States. They could not have come into the possession thereof but by purchase in the market in the way of speculation. Those bonds were not *international debt*.

"In 1830, Colombia was severed into the three independent States of Venezuela, New Granada, and Ecuador, and on December 23, 1834, a treaty was concluded in Bogota, between the plenipotentiaries of the governments of Venezuela and New Granada, for the settlement of all matters concerning the *active and passive debt* which they and that of Ecuador had contracted in common and recognized while forming the Republic of Colombia. For this purpose the appointment of a commission was provided for, composed of three ministers or representatives, one for each republic (art. 24). The division was agreed to be effected in the proportion of 50 per cent for New Granada, 28½ per cent for Venezuela, and 21½ per cent for Ecuador (art. 1). In consequence of this agreement, Venezuela became responsible for 570,000*l.* sterling out of the Paris loan of 1822 and for 1,318,395*l.* 15*s.* of the Calais or Hamburg loan of 1824, which aggregated the whole of the foreign debt of Colombia (arts. 2 and 3).

"With respect to the domestic debt, Venezuela obligated herself to recognize as Venezuelan debt the sum of 1,977,896 *pesos* 37 cts. of the 3 per cent and 1,527,416 *pesos* of the 5 per cent Colombian *consolidated* debt (Arts. 9 and 10). But the domestic debt not being yet, at that time, totally consolidated (Art. 14), these figures are only temporarily established here and subject to rectification.

"'ART. 16. As soon as the acknowledgment of the total amount of the debt be accomplished, the commission shall proceed to divide it among the three Republics in conformity with the basis fixed in Article 1 of this treaty, *adjudicating, in preference to each of them, the debts pertaining to her own citizens or inhabitants.*

"'ART. 12. After the exchange of the ratifications of the present treaty, the Governments of the three Republics shall proceed to convert the national consolidated debt of Colombia into debt of their own for the sums to be respectively recognized by them, causing the Colombian bonds to be collected and cancelled according to the rules enacted by their several legislatures; this done, the bonds shall be remitted to the Commission of Ministers of the three Republics sitting at Bogota, for the verification and destruction thereof.'

"In pursuance of the said treaty, a law enacted by the Congress of Venezuela in May, 1837, provided:

"'ART. 3. The amount of 1,806,763 *pesos*, 3 per cent. consolidated debt, and that of 1,395,091 *pesos*, 5 per cent. consolidated debt ascribed to Venezuela, as per the partition agreed to in the treaty above mentioned, deducting the sums redeemed from January 1, 1830, heretofore; also the amount of the interests due on said capitals and of those which may become due henceforward; that of 456,958, consolidable debt, according to the law of May 22, 1826, which approximately will be apportioned to Venezuela on completing the partition of this Colombian debt, deducting that which has been redeemed since January 1, 1830, shall be paid out of the following supplies.' * * *

"The foregoing law was included in that of April 26, 1838, which provided:

"'ART. 2. The amount of 1,806,763 *pesos*, 3 per cent. consolidated debt, and that of 1,395,091 *pesos*, 5 per cent. consolidated debt, ascribed to Venezuela, as per the partition agreed to in the treaty above mentioned, deducting the sums redeemed from January 1, 1830, heretofore; also the amount of the interests due on said capitals and of those which may become due henceforward; that of 456,958 *pesos*, consolidable debt, according to the law of May 22, 1826, which approximately will be apportioned to Venezuela on completing the partition of this Colombian debt, deducting that which

has been redeemed since January 1, 1830, shall be paid out of the following supplies:

"'1. The residue of tributes, taxes, and duties, of whatever description, collected up to June 30, 1831.

"'2. The residue of the tithes collected before the extinction of said revenue, without prejudice to the creditors thereof, according to the provisions of the law of February 12, 1836.

"'3. The debt of the tobacco farmers, with all the actions and rights of the said revenue.

"'4. The personal and real estate of the national patrimony, which may be sold according to the law of the matter.

"'5. The public lands which may be sold in accordance to the law.

"'ART. 4. *Creditors for consolidated debt, as contemplated by the law of May 5, 1837, and for that which may be consolidated in virtue of Article 6 of the present law, shall be paid the annual interest of 5 per cent., since July 1st of this year, every three months, in the first fortnight of October, January, April, and July.*

"'ART. 5. *For the payment of this interest and the gradual redemption of the capital, 50,000 pesos of the receipts of the custom-houses shall be appropriated.*

"'ART. 6. *The consolidated debt of Venezuela shall not exceed the capital sum of 500,000 pesos; but the Executive shall issue bills on that account, so as to keep the said sum always full during the existence of the kinds of internal debt mentioned in Article 2, which are hereby declared 'consolidable,' at the option of the holders, under the following rules:*

"'1. The holder or holders of the promises or documents referred to, shall make offers to the Economic Treasury Board in Caracas, either directly or through the Governors of their respective provinces, in order to have their promises of consolidated or consolidable debt of Colombia converted into consolidated debt of Venezuela.

"'2. The board shall accept in preference those proposals by which the largest amount, in promises or documents of the debt of Colombia, may be offered, until covering the sum of 500,000 pesos fixed as maximum in this article; and shall give the Executive notice of the proposals received and of those accepted by it, in order that, while receiving and cancelling the bonds of Colombia, it may *emit and surrender corresponding the bills of Venezuela.*

"'3. *The board shall consider as equal the amounts offered by the holders, either belonging to capitals of any of the three kinds of debt mentioned in article 2, or to the interest due and not paid on the two first kinds bearing interest.*

"'ART. 7. *For the conversion of the debt of Colombia into the debt of Venezuela, bills of credit payable to bearer shall be issued for, from 50 to 1,000 pesos each, as the creditors may require them; as to amounts under 50 pesos, bills shall be issued for the total sum owing.* * * *

"'ART. 10. *After the interest being paid, the surplus of the amount appropriated by article 5 shall be applied to the redemption of the principal. This shall be made by dividing the amount into portions of 100 pesos each, which shall be put up at public auction and shall be given to the bidder of the largest sum in bonds of those referred to in this law, provided that the nominal value of the bonds offered be not inferior to the portion proposed.*

"'ART. 11. *The auction shall be made in the capital of the Republic, in the presence of the Economic Treasury Board, within the ten days following those appointed for the payment of interest.*

"'ART. 16. *The holders of documents of the debt of Colombia who will not convert it in conformity with this decree, shall have the rights preserved, which they have acquired respecting the form and date of payment; but those who will desire and obtain the conversion shall not have other rights than those which this law gives them by articles 4 and 10.*

"'ART. 17. *If in consequence of the arrangements which have been ordered to be carried out by the Commission of Ministers at Bogotá, the amounts of each class of debt apportioned to Venezuela be altered, by way of compensation of the ones for the others, the Executive shall admit to the conversion larger or smaller amounts according to the alteration made in Bogotá.*'

"The law of April 26, 1838, was additioned by that of May 10,1839, as follows:

"'ART. 1. As soon as the Executive be cognizant of the total amount of the debt of Colombia, it shall proceed, subject to the provisions of the Treaty of December 23, 1834, concerning the partition of the said debt, and to the subsequent arrangements made by the commission of ministers sitting at Bogota, to convert into Venezuela's own debt the part apportioned to this Republic according to Article 1 of the said treaty.

"'ART. 2. The debt converted into Venezuela's own debt shall be represented in bills authorized by the commission of public credit, following the models which the Executive shall make with all proper precautions against counterfeiting, *and shall bear the name of consolidable debt of Venezuela.*

"'ART. 3. *From the date of the issue of the bills referred to in the preceding article, no others shall be admitted to the conversion into consolidated debt of Venezuela, spoken of in the law of April 26, 1838, on public credit.*'

"The law of May 10, 1839, was followed by several others relative to the same subject of the conversion of Colombian debt into consolidable debt of Venezuela, and of this into consolidated debt of Venezuela, namely:

"Law of April 11, 1840:

"'ART. 1. The Executive shall convert into *consolidable debt of Venezuela* the sum of 88,745 *pesos*, 4 cents, of 5 per cent. consolidated of Colombia, and the sum of 53,872 *pesos*, 10 cents, growing out of interest acknowledged by the said Republic, in order to complete therewith the amount which has been apportioned to Venezuela in the final partition of the domestic debt of Colombia.'

"Decree of April 28, 1840:

"'ART. 1. In order to convert the sum mentioned in the foregoing law, composed of 88,745 *pesos*, 4 cents, 5 per cent. Colombian consolidated debt, and 53,872 *pesos*, 10 cents, interest acknowledged by the said Republic, the holders of promises of either kind shall present them to the commission of public credit, from the date of this decree to the 30th of June next.'

"Law of April 15, 1840:

"'ART. 1. The Republic of Venezuela acknowledges as *domestic national debt* the sum of 500,000 *pesos* aggregating the consolidated debt of Venezuela at five per cent. interest per annum; and, besides, that which is still owing of the 7,217,915 *pesos and 12 cents*, capital apportioned to her by the commission of ministers assembled at Bogotá, for her 28½ per cent. of the *domestic debt* of Colombia, in the following manner: 1,337,643 *pesos* and 60 cents, consolidable and consolidated debt at 5 per cent. interest per annum; 2,188,206 *pesos* and 51 cents, floating debt, with its interest as stated in the respective documents; 2,781,040 *pesos* and 29 cents, consolidated and consolidable debt, at 3 per cent. annual interest; 66,386 *pesos*, 75 cents, floating debt without interest; 764,953 *pesos*, 59 cents, treasury debt, without interest; and 80,274 *pesos* and 37 cents arising from acknowledged interests unpaid.

"'ART. 2. *The holders of promises of consolidable debt of Venezuela, originating in the 3 and 5 per cent consolidable debt, as well as in the 3 and 5 per cent consolidated debt of Colombia, shall continue to earn in future the same annual interest of 3 and 5 per cent, and are entitled to the interests earned by their credits, according to circumstances, as per the law of May 22, 1826.*

"'ART. 3. *For the payment of the interests on the consolidated debt of Venezuela, and gradual redemption of the capital and interests on the whole domestic national debt, 50,000 pesos are appropriated, which shall be disposed of subject to the rules to be given in articles 4 to 9.*

"'ART. 4. Creditors on account of the *consolidated debt of Venezuela* shall be paid in money the interest of 5 per cent per annum, and this payment

shall be quarterly in the first fifteen days of the months of January, April, July, and October.

"'ART. 5. After paying the interests on the *consolidated debt*, the *rest of the sum named in article 4 shall be applied to the redemption of its capital. This shall be effected by dividing the sum in portions of 100 pesos each, which shall be put up at public auction, and shall be given to the highest bidder of the bills mentioned in this law, provided that the nominal value of the capital (bills) bidden be not below the portion proposed.*

"'ART. 9. *The consolidated debt of Venezuela shall not exceed the capital of 500,000: but the Executive shall issue bills of this debt, so that the said capital be kept always full, so long as the kinds of internal debt mentioned in article 1, may exist, which shall be consolidated at the holder's option according to the following rules:*

"'1. The holder or holders of the promises or documents above mentioned, shall make offers to the Economic Treasury Board, in Caracas, either directly or through the governors of their respective provinces, in order to have their debt converted into *consolidated debt of Venezuela.*

"'2. *The board shall accept in preference those proposals by which the largest sum be offered in promises or documents of the consolidable debt, until reaching the amount of 500,000 pesos fixed as maximum in this article; and shall give the Executive notice of the proposals received and of those accepted by it, in order that while receiving and cancelling the consolidable promises, it may issue and deliver the corresponding bills of consolidated debt.*

"'3. The board shall consider as equal sums those which may be offered to it by the holders, whether they arise from capitals of the debts mentioned in article 1, or from interests due, but unpaid, on those debts which earn interest.'

"Law of April 5, 1841:

"'ART. 1. *The Executive is hereby authorized to issue bonds of consolidated debt, at 5 per cent interest per annum, for the amount of 1,300,000 pesos, with the object to convert thereto the consolidable debt under the terms which shall be indicated.*

"'ART. 3. *The conversion shall be effected at the rate of 100 pesos, capital and interest, of consolidable debt, for 13⅓ pesos of consolidated debt.*

"'ART. 4. *For the payment of interest, and for the fund of redemption of the capital sum of 1,300,000 pesos consolidated debt, created by the present law, the amount of 130,000 pesos, which shall be inserted in the budget of expenses, shall be annually appropriated.*

"'ART. 7. *Creditors unwilling to make the conversion of their credits under the terms offered by this law, shall continue to enjoy the rights conceded to them by the law of public credit.'*

"Law of April 27, 1843:

"'ART. 1. The Executive is hereby authorized to continue the issue of bonds of consolidable debt, at 5 per cent annual interest, in order to convert thereto the consolidable debt which remained unconverted on June 30, 1842.

"'ART. 3. The conversion shall be effected at the rate of 100 *pesos*, capital and interest, of consolidable debt, for 33⅓ of consolidated debt.

"'ART. 7. Creditors not desirous to have their credits converted under the terms offered by the present law, will continue to enjoy the rights granted to them by the law of public credits.

"'ART. 8. The consolidable debt not converted by the 30th of June, 1844, may be converted at any time in accordance with article 3 of this law; but the interests already accrued, and those which may accrue, up to the quarter year in which the conversion be effected, shall be capitalized and converted as provided by the said article 3 of this law; the interests of the debt consolidated in this wise shall not be paid in money, but from the quarter year following that in which the conversion be made.

"'ART. 9. *Upon the total consolidable debt being consolidated, the sum of 50,000 set aside by the law of the public credit for the debt therein mentioned, and that of 130,000 pesos appropriated by the present law for the consolidable debt already consolidated, or which may be hereafter consolidated,* shall con-

stitute a single fund for the payment of interests and redemption of the whole 5 per cent consolidated debt; and to this latter object all the sums shall be applied which may gradually become unnecessary for the payment of interests, in consequence of the progressive redemption of the capital.'

"Law of December 12, 1856:

"'ART. 1. The Republic of Venezuela recognizes as national *consolidated* debt, of but a single inscription, bearing the same interest of 5 per cent per annum heretofore assigned to it: 1. The *consolidated debt* actually in existence, by virtue of the laws of April 15, 1840, April 27, 1843, May 8, 1847, and April 18, 1853. 2. The Espera Treasury debt. * * * 3. All other credits originating in substitutions of the state. * * *

"'ART. 3. The *consolidable debt in circulation, which may have been issued in accordance with the provisions of the law of April 15, 1840,* of the treaty with Spain, and of the legislative decrees of March 22, 1852, and March 10 and May 13 and 14, 1856, *may be converted at any time, at the option of the holders, into the consolidated debt recognized by article 1 of this decree, until, through the conversion, the maximum of 500,000 pesos shall have been reached.*

"'ART. 4. The conversion of every 100 *pesos*, capital and interests, of the consolidable debt, shall be made for 33⅓ of the consolidated debt.

"'ART. 9. For the payment of the interest on the consolidated debt, *there shall be included annually, in the budget of public expenses up to the sum of 250,000 pesos.*'

"Law of June 16, 1865:

"'ART. 23. As national *consolidated* debt is recognized:

"' 1st. The amount of loans made to the authorities and military chiefs of the federation. * * *

"'2d. The other securities of the internal debt which may be converted *at the will of the holders* and in conformity with article 26.

"'ART. 26. The conversion into the national consolidated debt of the different debts comprised in article 23, will be made in the following terms:

"'5th. The treasury bills issued without interest in conformity with the distinct regulations which have governed the matter; the *consolidable debts* and * * * will be converted at the rate of 100 *pesos* for 20 of the new debt.

"'ART. 28. The verification and liquidation of the bills and credits which have to constitute the national consolidated debt, will be made according to the following general directions:

"'2. On each bill which is received for comparison and converson will be noted on its back, under the seal and the signature of the minister, that it is registered in the respective book of certifications, and it will be returned to the interested party, who will give a receipt on the counterfoil of the certificate, returning it. The certificates returned will be cancelled by the Secretary and will be filed in the archives.'

"Decree of June 19, 1865:

"'ART. 8. Are subject to revision:

"' 1st. The credits which, according to the laws in force, were examined or liquidated *and have not yet been definitively recognized.*

"'ART. 16. The bills and titles issued to bearer, *which have not yet been presented for comparison,* shall be presented to the Board of Public Credit with a statement signed by the presenter, showing distinctly the class of each debt or title, the series, names, folio, and value of each bill, and the number of coupons attached thereto.

"'ART. 22. The bills of public debt and the bonds of the extinguished Bank of Venezuela *are required to have the note of comparison and to be resealed, in order to become admissible to the conversion of law.*'

"Decree of July 1, 1865:

"'ART. 1. The holders of bonds of public debt and other titles to bearer, to which the law of public credit refers, shall present them to the board for their confrontation up to December 31 of the present year.

"'ART. 5. The republic shall not recognize as her own debt the bonds or titles to bearer, or credits of any kind whatever, which shall not be presented up to the respective date fixed by articles 1, 2, and 3; *nor shall be converted into consolidated debt the bills or titles to bearer or other documents of credit which shall be presented for conversion after the date fixed by the foregoing article.*

"Returning now to 1838, on the 15th of October, that year, the Howlands surrendered to the Venezuelan Government their Colombian bonds for their conversion into Venezuelan debt, and on September 15, 1839, they received from Venezuela the identical bonds proven in this case, and from that time the possession of the bonds and title therein have been in the claimants. But this is not enough to give them the right to have their claim taken into the cognizance of this commission. United States citizens and corporations only may claim before it, and such citizenship must have existed when the claim accrued. In the present case the claim is held to have had its origin in the Colombian bonds converted into consolidable debt of Venezuela, of which the Howlands, as shown, could not be and were not *original owners*, but *assignees or transferees;* and the conversion did not change their character as such, nor give them better rights than those of their assignors or transferers, who were not citizens of the United States. By the conversion the Colombian debt was assimilated into Venezuelan debt, not into United States substance. This claim does not come within the treaty under which this commission sits.

"My colleagues have been, however, of a different sentiment. Disregarding the nature of the transaction through which the claimants became the first takers of the Venezuelan bonds, and thereby led, perhaps, to misapprehend the *native character* of those bonds, they have taken jurisdiction of the case and decided it upon the assumption that the Howlands are therein *original creditors* of Venezuela. Upon this assumption, what would have been the rights of the latter? No other than those which the law of April 26, 1838, gave them by articles 4 and 10; that is, to be paid every three months the interest on their bonds, and after the interest being paid, to have the surplus of the sum of 50,000 *pesos* appropriated by art. 5 applied to the redemption of the principal, by dividing the surplus into portions of 100 *pesos* each, and putting up these portions at public auction (art. 16). But these rights were understood to be given only to creditors on account of *consolidated debt* of Venezuela, as explicity stated in arts. 4 and 5 of the law of April 15, 1840, which is to be regarded as the essential one in this respect, because it was that law which finally determined and recognized the true amount of the 28½ units of Colombian debt convertible into national debt of Venezuela, and precisely defined her obligations toward her creditors on that account. The laws of 1837, 1838, and 1839 were provisional regulations, adopted for the present need and intended to give way to that of 1840; and all the provisions in this last law, as well as in all the others following it, for the payment of interests or of principals, distinctly refer to the *consolidated* debt. As to the *consolidable* debt, its right to be satisfied was, in possibility, capable of passing in act through its conversion into consolidated debt, not otherwise.

"Venezuela promised to recognize as national debt of hers and to admit the validity of the 28½ per cent of the Colombian debt at the time of the dissolution of Colombia, and that she did with all the forms of law, at all

times, since 1837. She never promised in any form to pay, with interest, the moneys now claimed. Her *consolidable debt bonds*, like *the Colombian consolidated bonds* which she had received in exchange therefor, represented in their face a *nominal, partially imaginary*, not a *real* capital, and what she promised in regard to them was only, first, to consolidate them by public auction, and afterward to pay them also by public auction, thus attempting to secure the end, as far as possible, of paying only their *real* capital. Everybody familiar with this matter of public debt knows well that such is a usual method, with governments, of relieving themselves of that kind of obligations. Therefore the claimants' complaint, in 1855, of failure on the part of the Venezuelan Government to carry out in good faith the sinking fund law, supposing the existence of such failure, was not a just one on their own part, because their credit against the government being still *consolidable*, they had not any right in the sinking fund appropriated exclusively for the *consolidated* debt.

"There were two conversions contemplated in the law of 1838, to wit: Conversion of 'consolidated or consolidable debt of Colombia' into 'consolidable debt of Venezuela,' and conversion of 'consolidable debt' of Venezuela into 'consolidated debt of Venezuela.' The former was *optional*, the latter *peremptory*, so far as regarded the right in act, to payment in any form. The holders of documents of Colombian debt, who would not convert them into 'consolidable debt of Venezuela' had the rights preserved, which they had acquired in Colombia, respecting the form and date of payment; those who would desire and obtain the conversion should have no other rights than those granted to them by the said law in articles 4 and 10. The claimants preferred the conversion of their Colombian bonds into 'consolidable' debt of Venezuela, and by that fact bound themselves to convert this debt into 'consolidated' debt of Venezuela, as a condition of its payment, and accepted the rights, in possibility, offered to them by articles 4 and 10 of the law of 1838.

"This right of conversion by public auction was secured to them through the subsequent legislation up to 1865, while from 1840 a second method of conversion, which was *optional*, was offered to them, consisting of a kind of private auction, in which the auctioneer was the Economic Treasury Board of Caracas (see law of April 15, 1840, art. 9). All the holders of *consolidable* debt of Venezuela chose to convert by either method, except the claimants.

"From 1841 to 1865 it was left to the option of holders of *consolidable* debt to consolidate it at the rate of 33⅓ per cent. All were willing to consolidate except the claimants.

"In 1865 the rate of conversion was reduced to 20 per cent, always optionally to holders of consolidable debt; and all of these wished for the conversion except the claimants.

"When the bills which are the subject of this claim were applied for and received by the Howlands, Venezuela declared in the most solemn legal form that they were not payable in money, but after their *conversion into consolidated debt*, she made the conversion a condition *sine qua non* of their payment, and promised to provide the proper means for the performance of the condition, which was by 'public auction.' The Howlands accepted the bills as dischargeable peremptorily under that condition and by this means. Such was the contract.

"Venezuela not only provided for the conversion through public auction, but supplied the Howlands, at their option, with other means to facilitate it, such as private auctions, or direct arrangements at certain fixed rates per cent. The claimants always resisted the conversion by any means. Who broke the contract?

"My colleagues believe that the Government of Venezuela failed to carry out in good faith the sinking-fund law (it is supposed that they mean thereby the conversion law), and that 'had the law, as it stood in 1839, been fairly administered, the claimants would have no right to look to other source of payment. But the difficulty is, that was not done. The contract was not fulfilled by Venezuela. The law was greatly modified to their prejudice and in violation of the understanding embodied in the legislation of 1838-39, under which they acted. When the means of payment to which they had agreed to look was thus taken away or materially impaired, what in justice became their rights? They had exchanged their Colombian bills for these bonds, redeemable according to a prescribed method, on the faith that such method would be faithfully regarded and carried out.'

"My colleagues charge Venezuela with the fault, but without proving it; they do not show where and when was the law modified and violated. I do not find the charge supported by the facts at all. In my opinion it is only founded upon the letter of the claimants' agent, Mr. John M. Foster, to the American minister at Caracas in 1855, and the statement of 1857 attributed to Mr. Henry S. Sanford. But the whole body of the legislation before cited and analyzed by me, subsequent to that of 1838-39, bears testimony to the contrary.

"In regard to the means of payment, they were not taken away or impaired in anywise; but had that been done, the rights of the claimants with respect thereto became none, absolutely none, because as already shown, according to the understanding embodied in the legislation of 1838-39 under which they acted, the means of payment were only intended for the *consolidated* debt, and the claimants' bonds were *consolidable* debt.

"As to the method prescribed for the redemption of these bonds, on the faith of which the claimants had exchanged their Colombian bills, it was not less faithfully regarded by Venezuela as more than sufficiently proved, also by the testimony of said legislation. That method consisted, first, in the *consolidation* by 'auction,' and then in the sinking of the debt 'so consolidated likewise by' auction, which the claimants did never wish for; they looked with all probability, but without right or justice, first to the consolidation at par and then to the redemption at par. According to all the laws forming part of their contract with the Government of Venezuela, they had no other source of payment than 'consolidation,' nor other source of consolidation than 'auction.'

"But it is said that the Howlands were given the right *at will* to exchange their bills into consolidated debt at the best rate the market could allow, and afterward a less advantageous price was fixed at which the exchange should be made. This is another assertion that I do not find justified by the facts, and which probably rests only on some misunderstanding of the law. For me it is evident that there was not such right given them, but an obligation imposed upon them, which they should fulfil if they wished to consolidate their bills; and the means to accomplish

that obligation, which was public auction, was never impaired by Venezuela. The rights left to their option were those of making direct offers to the commission of public credit, and of exchanging their bills at the rate of 33⅓ per cent, which, let it be said by the way, was not a less advantageous rate than that which had been obtained at the public auction.

"It is also contended that the law of 1839, forming a part of the contract, provided that no other notes or bonds than the Colombian indebtedness therein referred to should be admitted to the conversion into consolidated debt of Venezuela, and notwithstanding large amounts of other bonds and subsequently accruing debts were afterward admitted thereto, and on greatly better terms of exchange than that, which was an impairment of the supposed right of conversion.

"By the law of April 5, 1841, the capital of the consolidated debt was increased from 500,000 *pesos* to 1,300,000 for the purpose of converting thereinto the consolidable debt, and 130,000 *pesos* yearly instead of 50,000 were appropriated for the payment of interests and fund of redemption. Can it be said that this was an impairment of the right of conversion?

"The law of April 27, 1843, authorized the executive power to continue the issue of bonds of the consolidated debt bearing five per cent interest per annum for the purpose of converting the consolidable debt which had not been converted up to June 30, 1842. This law provided also that 'Upon the whole of the consolidable debt being consolidated the 50,000 *pesos* set aside by the law of public credit for the debt mentioned therein and the 130,000 *pesos* assigned by the present one to the consolidable debt already converted or which may be henceforward converted into consolidated debt shall constitute a single fund for the payment of the interests and redemption of the entire consolidated debt.' * * * Here the sinking fund is increased up to 130,000 *pesos* without admitting to consolidation any other bonds or debts whatever. Was this an impairment of the right of conversion? Was it not, on the contrary, a facilitating the exercise thereof?

"The law of April 18, 1853, provided as follows:

"'The republic acknowledges as national debt:
"'1. The treasury debt from July 1, 1846, to June 30, 1852. * * *
"'2. The debt weighing upon custom-houses.' * * *

"The treasury and the custom-house debts are not 'consolidable' but 'floating' debt; it can not be said that this was an admission of other debts to consolidation. Such admission did not affect the regular method of converting the consolidable debt nor the fund formerly appropriated for the satisfaction of the consolidable debt; new, especial fund was assigned for the payment of this debt hereby recognized. Besides, ten years had elapsed from 1843, and the consolidable debt arising out of Colombian debt was considered totally consolidated already and in fact was so, except only, perhaps, that of the Howlands. Can this be named an impairment to their right of conversion?

"By the decree of December 12, 1856, the republic recognized as national consolidated debt: (1) The consolidated debt in existence at present, according to the legislation from April 15, 1840, to April 18, 1853. (2) The Espera treasury debt. (3) All other credits originating in substitutions of the state for which Espera treasury debt was to be emitted. (Art. 1.) The same law provided by art. 3 that 'the *consolidable* debt in circulation,

which may have been issued in accordance with the prescriptions of the law of April 15, 1840; of the treaty with Spain, and of the legislative decrees of March 22, 1852, and March 10, April 24, and May 13 and 14, 1856, may be converted at any time, at the pleasure of the holders, into the consolidated debt recognized by art. 1 of this decree, until, through conversion, the maximum of 500,000 *pesos* shall have been reached.' Art. 1 of this decree refers to *consolidated* debt, not to *consolidable* debt, for the payment of the interest of which the sum of 250,000 *pesos* annually was appropriated. The kinds of *consolidable* debt referred to in art. 2 were all Colombian debt not liquidated by the commission of ministers at Bogota, and which, like that represented by the bills of the Howlands, was entitled to be acknowledged as national debt of Venezuela. Was this an impairment of the claimant's right of conversion?

"By the law of June 16, 1865, this right was also protected to them. When and where did the impairment begin to exist? In my judgment there never existed such impairment. My colleagues assume that it existed, and upon this assumption go on saying:

"'What became of their rights?

"'It seems to us there can be but one answer to this question, namely: At the impairment the debt as it then was became due and payable.'

"It seems to me that in matter of rights and obligations there can be no other than those strictly derived from the respective stipulations. In the present case the stipulation was a conditional one. Venezuela promised to pay under the condition that the Howlands should previously convert their bills into consolidated debt. The right acquired through a conditional stipulation is eventual or consequential to the accomplishment of the condition; so long as this remains suspended the right resulting therefrom is a mere hope; *tantum spes est debitum iri.* (Justinian Inst.) The condition of consolidating their bills, stipulated for by the Howlands in 1839, was never fulfilled by them or by their representatives in this claim.

"Under such circumstances what does justice require at the hands of the commission?

"In my opinion, disallowance of the claim.

"The bills upon which this claim is based were exchanged for Colombian bills bought in open market; neither they nor those for which they were exchanged did represent in their face a *real* value; they were convertible into consolidated debt by public auction and payable by public auction also; all the other holders of this kind of bills converted them at about 33⅓ per cent of their face value and afterward redeemed them at about the same rate of their consolidated value. Such bills have never been sold in the market at a higher price than 42 per cent; this is their actual price. My colleagues have allowed to the claimants the face value of their bonds with five per cent interest from the date of the supposed impairment of their right of conversion, counting the *peso* at 75 cents, gold coin of the United States. This decision seems to me a total departure from justice."

CHAPTER LXV.

WAR CLAIMS.

1. COMMENCEMENT OF WAR.

Case of Bangs & Southmayd.

"The American schooner *Caroline*, the property of the claimants, was forcibly taken possession of by a military force, under Mexican authorities, at a place called Berrita, the seaport of Matamoras, on the 26th of April 1846. She had on board a cargo of wool and hides, bound for New York, and was then ready to sail, having been regularly cleared from the custom-house. The pretense for this proceeding on the part of the Mexican authorities was the advance of the American Army, under General Taylor, from Corpus Christi toward the Rio Grande, regarded by them as the commencement of hostilities. The vessel was retained by the military force on board of her until the 10th of May, when, in consequence of General Taylor's victories, she was abandoned by them, and was taken possession of by her master and crew. At this time the water in the river had fallen so low that she could not pass over the bar, and she was detained from that cause until the 9th of July following, having in the meantime received some injury by grounding and beating upon the bar. The cargo was considerably damaged in consequence of the leaking of the vessel and the long time it was kept on board, not having been discharged until the month of August. The claim is preferred for indemnity for the losses thus sustained.

"At the time of the seizure of the vessel in the manner stated war had not commenced between the two countries, and the proceedings complained of can not be justified on the ground of a belligerent right of Mexico.

"The board is of opinion and decides that the claim is valid, and allows the same accordingly."

Memorial of *Frederick Bangs and Alfred Southmayd:* Opinion of Messrs. Evans, Smith, and Paine, commissioners, January 21, 1851, under the act of Congress of March 3, 1849.

2. Destruction of Property by Military Operations.

Case of the "Lodi."

Asmos C. Bredall, a citizen of the United States, claimed damages for the loss of the cargo of the schooner *Lodi* in 1838. The damages were alleged to have proceeded (1) from the illegal seizure of the vessel and her cargo, and (2) from unnecessary delay on the part of the court in which proceedings were instituted to determine the guilt or innocence of the claimant in arriving with and unloading his vessel at a part of the coast where there was no port of entry. To show the truth of these allegations the claimant produced a copy of the proceedings of the court at Matamoras before which the inquiry was conducted. From this it appeared (1) that Bredall, the owner of the schooner (Blake, master) and consignee of her cargo, sailed from New Orleans on the 27th May 1838 bound for the port of Matamoras; (2) that he had reason to believe at the time of sailing that Brazos St. Iago and the mouth of the Rio Grande were blockaded by a French vessel of war, so that he might be compelled to land his cargo on some part of the coast above or below the entrance into Matamoras; (3) that from conversations with a merchant of Matamoras, with custom-house officers and the captain of the port at the mouth of the Rio Grande while on a former voyage and with the Mexican minister and the Mexican consul at New Orleans before sailing, he had reason to believe that such landing of his cargo upon the coast would be assented to by the collector at Matamoras; (4) that within twenty four hours after sailing the vessel began to leak, and that she continued to leak until, fearing that if she was delayed by the blockade he might lose his cargo, he anchored on the sixth day of the voyage off the bar at the Nueces, but was forced across the bar two or three days thereafter; (5) that on the 22d of June he began to land the cargo on the bank of the Nueces, to be transported thence to Matamoras; (6) that two days later he set out for Matamoras on foot, a distance of 150 miles, and arriving there presented his papers at the custom-house; (7) that while he was still on his way to Matamoras a small party of armed men, belonging to the coast guard or troops of Mexico, arrived and captured the vessel and cargo; (8) that this proceeding was taken in consequence of an inquiry which had been instituted as to the intent of the vessel's arrival and of the landing of her cargo, Nueces being at the time a

"prohibited port," declared by the laws of the Mexican Government to be enemy's country and to be under martial law; (9) that General Filisola, the commander in chief of the Mexican army at Matamoras, directed the collector to investigate the matter, but that on the petition of the parties interested the inquiry was continued before General Filisola himself; (10) that on the 5th of July the same parties filed a petition praying to be released from any responsibility incurred by reason of their arrival and the landing of the goods at the Nueces; (11) that on the 9th of July they filed another petition, asking permission to bring the goods into Matamoras, there to await the final sentence of the court, alleging as a reason a well-founded apprehension that they might be pillaged or destroyed by the Texans or Indians, and that this permission was granted on the 10th of July as well as an order that the guard should assist Bredall in the transportation of the goods; (12) that a few days later a body of Texans, numbering several hundred, made a descent upon the cargo and began to destroy it; (13) and that, upon receiving information of this fact, the court dispensed with the examination of certain witnesses for whom it was waiting, and proceeded to give a definitive sentence, which declared that "the arrival and unloading" of the schooner were "innocent," that her "captain, passengers, crew, and consignees" were "free from responsibility," and that such parts of the cargo as might "escape from the enemy which had taken possession of it" might enter the city "on the payment of the respective duties."

The following decision was rendered:

"That the seizure of the vessel and cargo at the Nueces by the revenue or coast guard was, under the circumstances, proper; that on the part of the court to which the parties applied for permission to bring the goods to Matamoras there was no delay in granting such permission; that for the destruction of the cargo by the enemies of Mexico that government is not responsible; that the claimant had entered and landed his goods in territory which was under martial law and which subjected anyone found there without permission to be treated as an enemy, and that the release of the claimant and his goods from such responsibility was a matter of favor; and therefore the board decides that the claim of Asmos C. Bredall is not valid against the Republic of Mexico."

Opinion of Messrs. Evans, Smith, and Paine, commissioners, February 10, 1851, under the act of Congress of March 3, 1849.

Hazards of War: Shattuck's Case.

"In the case of *David O. Shattuck and Dickson P. Shattuck* v. *Mexico*, No. 600, the umpire is not of opinion that he would be justified in making an award against the Mexican Government. The damages and losses alleged by the claimants seem rather to be the result of the inevitable accidents of a state of war than to have arisen from a wanton destruction of property by Mexican authorities. It is alleged that the farm of the claimants was damaged by Mexican soldiers passing through it and injuring the crops, but it appears that both French and Mexican troops were on the spot at different times and that a Mexican army was encamped close to it for some time. Under such circumstances it would have been next to impossible for the general in chief of any army to have prevented encroachments upon private property, and this is a misfortune to which natives were exposed as much as foreigners, with the additional disadvantage that the former were generally forced to take up arms."

Thornton, umpire, convention of July 4, 1868, MS. Op. VI. 361. This case was cited and followed by Sir Edward Thornton in *John Samuel* v. *Mexico*, No. 604, MS. Op. VI. 367.

Rigg's Case.

Damage done to property in consequence of battles being fought upon it between the belligerents is to be ascribed to the hazards of war, and can not be made the foundation of a claim against the government of the country in which the engagement took place.

Thornton, umpire, *William A. Riggs* v. *Mexico*, No. 620, convention of July 4, 1868, MS. Op. VI. 371.

Baker's Case.

"The umpire considers it to be sufficiently proved that cattle, horses, mules, wagons, fodder, and other stores were taken by forces belonging to the Mexican army for their use, and that on two occasions at least, when the number of troops was considerable, they were accompanied by officers with whom the claimant remonstrated against the seizure of his property, and one of whom, Colonel Martinez, is named. On some other occasions it is probable that stray bands of soldiers without officers and perhaps of common marauders committed robberies; and some of the destruction and losses complained of must be attributed to the necessities and accidents of the state of war which existed. But for those articles which the troops really took for

the use of the Mexican army, and which were so used, the umpire thinks that the Mexican Government is bound to compensate the claimant."

Thornton, umpire, *Thomas C. Baker* v. *Mexico*, No. 696, MS. Op. VI. 395.

Blumenkron's Case.

"The second claim in this order is founded on damage done to home property belonging to the claimant or his wife by Mexican troops under General Porfirio Diaz, who, in laying siege to the city of Puebla, broke through the walls, tore up the pavements, and otherwise damaged claimant's house. The city was held by a foreign enemy and was besieged by native troops. Under these circumstances and during the actual carrying on of hostilities the umpire does not consider that the property of a foreigner residing in the besieged city, more particularly when that is real property, can be looked upon as more sacred than that of natives. It is not shown nor has the umpire any reason to believe that any indemnity was granted to native Mexicans on account of similar damages; neither can the Mexican Government be expected to compensate foreigners for damages done to their real property by reason of actual hostilities for the purpose of delivering the country from a foreign enemy. Those who prefer to take up their residence in a foreign country must accept the disadvantages of that country with its advantages, whatever they may be."

Thornton, umpire, *Adolph Blumenkron* v. *Mexico*, Nos. 329 and 795, convention of July 4, 1868, MS. Op. VII. 408.

Dresch's Case.

"In the case of '*L. J. Dresch* v. *Mexico*,' No. 655, it is alleged that the claimant was robbed of a rifle and revolver and of a sum of money by a military force under the command of General Naranjo, at Las Piedras, in Mexico. It appears to the umpire that the Mexican Government can not be made responsible for these losses, because they arose during the capture of a town from the enemy and must be attributed to the hazards of war; because it is not proved that the robbery complained of was anything more than an act of pillage by uncontrollable soldiery, or was committed with the countenance of authorities or officers. The circumstance that an officer attempted to cause the restitution of the property is no proof that the restitution was possible, or that the culprits were not punished, or would not have been so if they had been identified. The umpire

therefore feels himself obliged to award that the above-mentioned claim be dismissed."

Sir Edward Thornton, umpire, February 4, 1876, convention of July 4, 1868, MS. Op. VI. 379.

Cole's Case.

"The umpire is further of opinion that the damage done to cotton crops by cavalry passing over them in the neighborhood of the scene of hostilities must be attributed to the hazards of war, and for which the government of the belligerent can not be held responsible. A certain amount of wanton mischief is frequently committed by soldiers, especially when they are not highly disciplined, and this may have been the case in the present instance; but the proportion is so small as compared with the damage done by large bodies of troops moving over cultivated lands, and it is so difficult to distinguish the one from the other, that it can not generally, and certainly not in the present instance, be taken into consideration."

Thornton, umpire, July 15, 1876, *John Cole* v. *Mexico*, No. 948, convention of July 4, 1868, MS. Op. VI. 497.

Buentello's Case.

"In the case of *Aniceto Buentello* v. *The United States*, No. 695, the umpire is of opinion that when during time of war and in the enemy's country straggling soldiers and marauders go about robbing and destroying property it can not be considered that it is an injury done by the authorities of the country whose troops are invading an enemy's country. In this case it is not shown that any officer was present at the commission of any of the offences charged, nor to what regiment they belonged, nor that they were under any control whatever. During war and in the enemy's country it is impossible to maintain perfect discipline. Such losses are amongst the misfortunes and hazards of war. The claimant knew that war existed, and might easily have withdrawn his property and retired into his own country; he preferred remaining in Texas and running the risks of the war and has consequently little to complain of. The umpire therefore awards that the above-mentioned claim be dismissed."

Thornton, umpire February 21, 1876, convention of July 4, 1868, MS. Op. VI. 318.

Michel's Case.

A claim was made for property destroyed on the occasion of the taking by the Mexican forces of the town of Guaymas, when held by the imperialists. The umpire said that neither the claimant

nor his witnesses pretended that they saw Mexican soldiers destroying or sacking the property. One of the witnesses deposed that he knew that claimant's property of all kinds was taken away or destroyed and used by the Mexican soldiers and authorities. There was no proof that the destruction was carried out by the orders of Mexican authorities or even in the presence of an officer, and under these circumstances, and as the occurrence took place during the disorder and tumult which accompanied the assault and capture of the town occupied by the enemy, the umpire disallowed the claim.

Thornton, umpire, *Joseph F. Michel* v. *Mexico*, No. 547, convention of July 4, 1868, MS. Op. IV. 45.

Schlinger's Case.

"In the case of *Leopold Schlinger* v. *Mexico*, No. 576, the umpire believes from the evidence that the claimant really possessed a respectable store in Matamoras, and that this store was plundered during the attack made by Carvajal upon that city in 1861; but it is not at all clear that Carvajal was a Mexican authority, or that he was not even fighting at the time against the constituted authorities of the republic. Neither is it proved by whom the robbery was committed—whether by troops under his orders and control, whether any officer was present at the time and authorized the seizure of the goods, or whether the plundering was done by common robbers. Even if the goods of the claimant were carried off by Carvajal's troops, he being considered a Mexican authority and having therefore the right and even the obligation to attack the city, the losses can hardly be looked upon otherwise than as one of the inevitable hazards of war. The umpire is not justified in holding the Mexican Government responsible for losses suffered under such circumstances, and therefore awards that the above-mentioned claim be dismissed."

Thornton, umpire, November 25, 1875, *Leopold Schlinger* v. *Mexico*, No. 576, MS. Op. VII. 595.

Weil's Case.

"It is alleged that property belonging to the claimant and existing in a house belonging to him in Tehuantepec was plundered and carried off by Mexican troops on the 7th of January 1867, when that town was subjected to a general sack. The evidence is most conflicting and even the testimony of the witnesses for the claimant is contradictory, both as to the existence of the property and as to the time at which it is said to have been robbed. * * * But even if it [the property]

did exist, there is no proof whatever by whom the property was robbed, whether by common plunderers availing themselves of the commotion arising out of the war, or by soldiers, and if by the latter whether the plundering was done by the direction and under the control of officers. It would rather appear, however, that the officers had lost all control over their men and that the sacking of the town was general, natives suffering equally with foreigners; nor is it shown that the former were ever compensated for such losses. In such cases the umpire is of opinion that these losses are the unhappy consequences of a state of war, for which the Mexican Government can not be made responsible."

Thornton, umpire, *Lewis Weil* v. *Mexico*, No. 792, convention of July 4, 1868.

Antrey's Case.

"The claimant resided in Huamantla, in the State of Tlaxcala, Mexico. The town was attacked by the constitutional forces of the government. During or immediately after the attack, the town was pillaged by the troops and a number of houses were sacked, amongst which was that in which the claimant lived. But there is no proof whatever that the sacking of the town was done by the order of or was even countenanced by the commander of the forces. On the contrary, it is stated in the defensive evidence, and the statement is not refuted by the claimant, that the general in command endeavored to prevent the pillage; nor is there any proof whatever that any officer was present when the claimant's home was sacked, and it can only be inferred that the acts complained of were committed by uncontrollable soldiery, from whose violence the natives suffered as much as the claimant. In cases of this nature the umpire considers that the Mexican Government can not be called upon to grant compensation."

Thornton, umpire, August 15, 1875, *A. P. J. Antrey* v. *Mexico*, No. 171, convention of July 4, 1868, MS. Op. VII. 393.

Wanton Destruction: Brooks's Case.

In the case of *Aaron Brooks* v. *Mexico*, No. 201 (MS. Op. II. 200), Mr. Wadsworth, the United States commissioner, maintained that the claimant should have an award for the losses sustained by the appropriation of his property by the troops of Corona, and for the wanton and unnecessary destruction of growing crops. "I do not know anything more criminal or more stupid," declared Mr. Wadsworth, "than the wanton destruction of the

labors of the farmer by the military who possess the district where he resides. This policy can only be tolerated when it becomes necessary to lay waste a territory in order to teach an enemy to respect the rights of peaceful, unarmed populations, or to embarrass his retreat, or pursuit, or advance." Mr. Wadsworth thought that the claimant should receive an award for $7,000.

The umpire, Dr. Lieber, awarded him $4,000.

Johnston's Case.

In the case of *Geo. Pen Johnston* v. *Mexico*, No. 357, Sir Edward Thornton, June 27, 1874, held:

"With regard to the damage alleged to have been done to the crops of cotton, barley, and oats by General Corona's forces in the spring of 1866, the umpire is of opinion that some damage was done, but not to the extent of the claim made, which seems to him to be exaggerated to a great degree; that as the defendants have not proved that the requirements of war rendered that damage necessary, it must therefore be considered to have been unnecessary; and that therefore the claimants are, on account of that damage, entitled to compensation."

Jeannotat's Case.

"In the case of *Alfred Jeannotat* v. *Mexico*, No. 804, the umpire is of opinion, * * * after a careful examination of the voluminous testimony offered on both sides, that the plundering and destruction of the property of the claimant, of which he complains, must be classed amongst claims arising from injuries to persons or property by authorities of the Mexican Republic. It is clear that General Diaz Salgado was one of the supporters of the revolution under the Plan of Ayutla, which revolution led to the establishment of the Liberal Government of that republic; indeed, it may certainly be said that on the 22nd of August 1855 that government was the '*de facto*' government of the republic, as it afterwards became so '*de jure*,' and General Salgado was an officer of that government. It was a force detached from the army under that general, which, accompanied and commanded by officers, entered the Mineral de la Luz, released the convicts from the prison, and in concert with them sacked the town, including the store of the claimant. The umpire acquiesces in the opinion that there have been in the history of nations revolutions which have been of the greatest value by contributing to the establishment of liberty, and that these revolutions are frequently accompanied by unavoidable evils; for such evils a govern-

ment founded upon a revolution of that nature can hardly be held responsible; but where, as in the sacking of the Mineral de la Luz, the mischief is unnecessary and wanton, the responsibility must be accepted. It has been alleged that in the above-mentioned instance the sacking was done by the released prisoners, and by a mob belonging to the population of the town; but, if it were so, it was the military force commanded by officers who put it in the power of the convicts and incited the mob to assist them in their acts of violence and plunder. It does not appear that without the arrival of the military force, which ought to have protected the peaceable inhabitants of the town, there would have been any inclination to commit such acts of violence. The umpire is therefore of opinion that compensation is due to the claimant from the Mexican Government."

Thornton, umpire, April 9, 1875, convention of July 4, 1868, MS. Op. IV. 627.

Barrington's Case.

Claimant's cotton and corn were destroyed and used by troops under the command of Colonel Para of the Mexican Government. His fences were torn down and burnt, and other property taken and destroyed by the same troops under the same command. The umpire said that there seemed to have been no necessity for this destruction of property, since there was no proof that it was done in the presence of the enemy, who at that time did not seem to have been near. For property destroyed in this way, even though it was destroyed to prevent its falling into the hands of the enemy, as well as for forage taken and used by the troops, the umpire held that the claimant was entitled to an award.

Thornton, umpire, *Alexander R. Barrington* v. *Mexico*, No. 365, convention of July 4, 1868, MS. Op. VII. 425.

Wilson's Case.

"The claim embraces two different causes of complaint.

"The first is to obtain compensation for the occupation of a cattle farm in the jurisdiction of San Juan de los Remedios, from March 1870 until October 1872, by the Spanish authorities as a place of refuge for 200 to 250 loyal Spaniards, and for devastation on the place during this occupation.

"The second is a claim for other damages arising out of the invasion and destruction of his property, posterior to the occupation referred to in the foregoing paragraph, in consequence

of armed conflicts between the Spanish troops and the Cuban insurgents. The amount claimed is in all $30,000.

"With regard to the first claim, the umpire is of opinion that the farm was occupied by Spain for military use without the owner's consent, express or implied; that it was situated in a district permanently occupied by the Spanish forces; that it is usual in such cases to give compensation; but that in the present case, for reasons already stated,[1] no claim can be admitted on account of the use, and that the only remaining point to be decided is, whether any compensation is due for property destroyed. * * *

"In the opinion of the umpire the destruction of property which took place was the result of use, accident, and the like, and in consequence no indemnity can be allowed in this case.

"With regard to the second claim the umpire is of opinion that the injuries complained of were the result of military operations in time of war, and for such injuries no indemnity can be claimed on the ground of international law. For these reasons the umpire hereby decides that both claims be dismissed."

Count Lewenhaupt, umpire, case of *Joseph O. Wilson*, No. 121, Span. Com. (1871), November 12, 1881.

Cleworth's Case.

In the case of *Charles Cleworth* v. *The United States*, No. 48, a claim was made, among other things, for the value of a house destroyed in Vicksburg by shells thrown into the city by the United States forces during the bombardment. The commissioners said: "The United States can not be liable for any injury caused by the shells thrown in the attacks upon Vicksburg."

Am. and Br. Claims Com., treaty of May 8, 1871, Howard's Report, 22. See also Hale's Report, 49. The same principle was applied in the case of *James Tongue* v. *The United States*, No. 49, to a claim for property destroyed "by the bombardment, sacking, and pillage of Fredericksburg on the 11th, 12th, and 13th days of December 1862."

Burning of Columbia.

"Several claims were brought for property alleged to have been destroyed by the burning of Columbia, on the allegation that that city was wantonly fired by the army of General Sherman, either under his orders or with his consent and permission. A large

[1] Viz, the concealment by the claimant, up to 1876, of his alleged American nationality.

amount of testimony was taken upon this subject, including that of General Hampton and other Confederate officers on the part of the claimants, and of Generals Sherman, Logan, Howard, Woods, and other Federal officers on the part of the United States. The claims were all disallowed, all the commissioners agreeing.

"I am advised that the commissioners were unanimous in the conclusion that the conflagration which destroyed Columbia was not to be ascribed to either the intention or default of either the Federal or Confederate officers. The commission did not pass on the question whether in case the city had been burned by the order or permission of the commanding officer any liability for resulting losses would have existed against the United States."

Am. and Br. Claims Com., Treaty of May 8, 1871, Hale's Report, 50. See also Howard's Report, 49, 52, 409, 413, 425, 429, 433, 448.

Howard gives the following report of the case of Brown and Sharp (Report 52) in regard to the burning of Columbia:

"General Sherman, of the United States army, appeared before the city of Columbia on the 16th of February, 1865. Gen. Wade Hampton, of the Confederate army, evacuated the town and retreated with his forces. The mayor of the city surrendered the same to General Stone, United States army, on the morning of the 17th of February. General Stone entered the city at 9 o'clock of the same day, and Generals Sherman and Howard did likewise a few hours later. On the same night fires broke out in various parts of the city, which consumed the property in question.

"The defense held—

"1. That had the city been burned by the express order of General Sherman it would have been a legal act of war, as the town had been defended by Gen. Wade Hampton, bridges destroyed, and the United States camp shelled.

"2. That Columbia was not burned by either General Sherman or any of his officers.

"3. That it was burned by the Confederates, by their having set fire to the bridge on the Congaree River, the railway depot, and to cotton which they had piled in the streets for the purpose of being burned.

"4. That some acts of pillage may have been committed by lawless or straggling soldiers, but that the United States generals did everything in their power to save the city and repress disorder after the fire had broken out.

"The claimant's counsel held—

"1. That although it had to be admitted that the bridge and depot had been fired by the Confederates, yet that said fires had been extinguished before the general conflagration took place.

"2. That there was no cotton burning in the streets when the United States army entered the town.

"3. That the shelling of the United States camp occurred at a place called Granby, several miles distant from Columbia.

"4. That although it could not be shown that any express order of General Sherman had existed for the burning and sacking of Columbia, yet the following facts had been proven:

"(*a*) That it was done with his consent and connivance, and that it was his intention to do so.

"(*b*) That he had expressed such a threat.

"(*c*) That his men were aware of his hostile feeling toward the city.

"(*d*) That they were allowed to commit acts of pillage in his presence, and in that of his officers, during the whole of the 17th of February, and previous to the fire.

"(*e*) That he took no *bona fide* steps to prevent the conflagration until it was too late.

"(*f*) That rockets had been sent up as a signal for the commencement of the burning.

"(*g*) That the United States soldiers were seen setting fire to buildings and sacking houses.

"5. That, as it had been admitted by General Sherman that he had perfect control over his troops, the United States were liable for the burning and sacking of Columbia, and ought to make compensation for the losses sustained by British subjects.

"The brief of the United States agent in the case of Brown and Sharp, already alluded to, gives a list of all the claimants interested in this question, as also the character of their claims; and the briefs of the claimant's counsel, in the case of Sarah Watts (No. 249) *v.* The United States (which will be found in the Appendix, Papers Nos. 41 and 42), give sufficient of the evidence on which the prosecution relied.

"With the exception of the cases of D. Jacobs, who got an award of 20,000 dollars for some tobacco, which it was proven was taken away in United States army wagons, and that of J. Deighen, who received an award of 1,510 dollars for a horse and buggy seized under a general order of General Sherman, all the claims arising out of the burning, etc., of Columbia were disallowed by the three commissioners.

"The decision must have been given on one of the following grounds:

"Either Columbia was burned by the Confederates or it was burned by the unauthorized acts of the United States troops.

"A careful review of the evidence points to the latter ground as the most likely one adopted by the commissioners."

Various Claims for Destruction of Property.

"Claims were made 'for property incidentally involved in the destruction of public stores, works, and means of transportation of the enemy,' as in the cases of John K. Byrne, No. 200; Charles Black, No. 128, and A. K. McMillan, No. 250. Also, for timber felled in front of forts and batteries to give clear range for the guns and deprive the enemy of cover, as in the cases of Trook, administrator, No. 58, and of William B. Booth, No. 143. For property alleged to have been wantonly and without provocation or military necessity destroyed or injured in the enemy's country, as in the cases of Anthony

Barclay, No. 5; Godfrey Barnsley, No. 162, and in the Columbia cases.

"In these claims for destruction of property, it may be stated generally that, with very few exceptions, and those mostly insignificant, no awards were made against the United States.

"The claims for injuries by bombardment, the passage of armies, the cutting of timber to clear away obstructions, the erection of fortifications, etc., in the enemy's country, were all disallowed by the unanimous voice of the commissioners.

"The same may be said of the incidental destruction of innocent property involved in the destruction of public stores and works of the enemy.

"In several cases there were allegations of the wanton destruction of property by United States troops, and in some cases satisfactory proof was made of the fact of such destruction by soldiers without command or authority of their commanding officers, and in defiance of orders.

"In the case of Anthony Barclay, No. 5, allegations were made of wanton destruction of property, including valuable furniture, china, pictures, and other works of art, books, &c. The proof was conflicting as to whether the injuries alleged were committed by soldiers or not; but if committed by soldiers, it was plainly not only without authority, but in direct violation of the orders of General Sherman. In the award made in favor of Mr. Barclay, I am advised that nothing was included for property alleged to have been destroyed. * * *

"The claim of Henry E. and Alfred Cox, No. 229, was for a sawmill and its motive power, machinery, etc., destroyed by raiding parties from General Sherman's army, near Meridian, Miss., in February 1864. The expedition by which the mill was destroyed was sent out by General Sherman for the express purpose of destroying the Confederate mills, supplies, railroads, and means of transportation.

"The proofs showed that the sawmill in question had been actually employed in the sawing of railroad ties for the Confederate government, and was available for this and similar purposes.

"On the part of the defense it was claimed that the destruction was a lawful act of war.

"The claim was unanimously disallowed.

"The case of William Smythe, No. 333, was a claim for an iron and brass foundry, machine shop, and machinery, fixtures,

supplies, etc., for same, destroyed by General Sherman in Atlanta, after the capture of that city, and before his advance upon Savannah. The establishment had been employed in the manufacture of shot, shell, and other military supplies for the Confederate government.

"The claim was unanimously disallowed.

"The case of James and Richard Martin, No. 434, was a claim for the value of the British ship *York*, which, in January 1862, on a voyage in ballast from Valencia, Spain, to Lewistown, Delaware, was alleged to have been driven ashore on the coast of North Carolina, one of the insurrectionary States, and while there stranded to have been destroyed by United States cruisers.

"The proofs satisfactorily established that the vessel was actually wrecked without intent of her officers and while on a lawful voyage. An officer of the United States Navy, believing her to have been intentionally beached for the purpose of running in her cargo for the use of the enemy, and that the cargo, with the rigging and furniture of the vessel, was actually available to the rebels, boarded and burned her.

"The commission made an award for her value in favor of the claimants, in which all joined.

"The case of James A. Macaulay, No. 260, was a claim for certain cotton, the cargo of the steamship *Blanche*, which was alleged to have sailed from the port of Lavaca, Texas, in June 1862, and on her voyage to Havana to have been pursued by the United States war vessel *Montgomery*, commanded by Lieutenant Hunter, to have run aground on the coast of the island of Cuba, and while so aground to have been boarded by the crew of the *Montgomery*, set on fire, and, with her cargo, totally destroyed.

"The case was unanimously disallowed for lack of proof of the material allegations in the memorial."

Am. and Br. Claims Commission, treaty of May 8, 1871, Hale's Report, 50.

Cotton Claims.

"A large number of claims was brought for cotton destroyed by the United States forces at various points in the insurrectionary States. Among these were the cases of Brown and Sharp, No. 33; John Cairns & Co., No. 39, and several others, for cotton destroyed at Camden, South Carolina; of George Collie, No. 458; Christopher Atkinson, No. 380, and others, at Columbia, South Carolina; of Samuel Hall Haddon, No. 107, in Screven County,

Georgia; of Alexander Collie, No. 376, at Oxford, Georgia; of A. R. McDonald, No. 42; John C. Forbes, No. 300, and others, in Arkansas and Louisiana; and various other claims for like alleged destruction at different points.

In several of these cases the proof was clear and undisputed that the cotton was destroyed under express orders of the commanding officers, and for the purpose of preventing it from falling into the hands of the enemy, and of weakening the resources of the enemy. In other cases questions of fact were in dispute, as to the fact of destruction by the United States forces; as to such destruction, if committed, being by order or authority of any competent officer; as to the title of the claimants to the cotton alleged to have been destroyed; and as to whether the cotton, when destroyed, was within the enemy's country.

"The question as to the right of the United States to destroy cotton of private owners in the enemy's country was discussed by the counsel of the United States in his arguments filed in the cases of S. H. Haddon, No. 107, and of Brown and Sharp, No. 33; and to some extent in several other cases.

"On the same subject arguments were filed by Her Majesty's counsel and by counsel for the respective claimants in the cases of S. H. Haddon, No. 107; Brown and Sharp, No. 33; David Jacobs, No. 236; Martha M. Calderwood, No. 360; John W. Carmalt, No. 89; Wood & Heyworth, No. 103; James Borron, No. 144, and in some other cases.

"On the part of the United States it was maintained that a belligerent might lawfully in the enemy's country destroy any property, public or private, the possession or control of which might in any degree contribute to sustain the enemy and increase his ability to carry on the war. That the occasion for such destruction and its extent must always be left solely to the discretion of the invading belligerent, who is of necessity the sole judge as to the requirements of his military position, and of the necessity or propriety of the destruction of property, and of the extent to which such destruction shall be carried. That the actual ownership of such property within the enemy's country by the subjects of a neutral power, whether domiciled within the enemy's country or not, did not relieve such property from its liability to such destruction. That cotton in the insurrectionary States was peculiarly and eminently a legitimate subject for such destruction, from its relation to the

enemy's government, as the great staple from which were derived the principal means of that government for the carrying on of the war, which was the principal basis of its credit, the source of its military and naval supplies, and on which it relied to maintain its independent existence and to carry on the war against the United States. That the control of this staple as to production, sale, and exportation, had been, to a large extent, assumed by that government. That by the laws, military orders, and practice of the Confederate States and their authorities, the destruction of cotton, whenever likely to fall into the hands of their enemies, was enjoined and practiced, and that this practice of the Confederate Government and its officers had received the express and formal approval of the British Government as a legitimate practice under the laws of war.

"Proofs were made in the case of Wood and Heyworth, No. 103 (proofs for defense, pp. 16, 20, 24, 37 to 47, 51 to 65), of the statutes of the Confederate Government in regard to their control of this staple, and in regard to its destruction when necessary to prevent its falling into the hands of the enemy; of the practice of the Confederate Government in controlling its production, sale, and exportation; of the acts of its president and other executive and administrative officers in this regard, and of the military orders and practice under the same for its destruction when exposed to capture by the enemy. Other proofs in regard to this practice of destruction by the Confederates were made in the cases of James Cumming, No. 94; A. R. McDonald, No. 42, and various other cases.

"The counsel for the United States, in his arguments, cited the letter from Earl Russell to Lord Lyons of 31st May 1862, from the British Blue Book relating to the United States, 1863, vol. 2, p. 33, in which his lordship said:

"'Mr. Seward, in his conversation with your lordship, reported in your dispatch of the 16th instant, appeared to attribute blame to the Confederates for destroying cotton and tobacco in places which they evacuate on the approach of the Federal forces. But it appears to be unreasonable to make this a matter of blame to them, for they could not be expected to leave such articles in warehouses to become prize of war, and to be sold for the profit of the Federal Government, which would apply the proceeds to the purchase of arms to be used against the South.'

"He cited also Vattel (Am. ed. of 1861). pp. 364 to 370, §§ 161 to 173; the case of Mrs. Alexander's Cotton in the Supreme

Court of the United States (2 Wall. 404, 420); and the opinion of Sir Hugh Cairns and Mr. Reilly, given in March 1865, on the application of the Canadian Government, and published in the 'Saint Albans Raid,' compiled by L. N. Benjamin, Montreal, 1865, page 479, as follows:

"'Though in the conduct of war on land the capture by the officers and soldiers of one belligerent of the private property of subjects of the other belligerent is not often in ordinary crises avowedly practiced, it is yet legitimate.'

"In the arguments filed by Her Majesty's counsel in the cases of Brown and Sharp, No. 33, and Samuel H. Haddon, No. 107, it was maintained that, by the modern law of war and the practice of civilized nations under it, private property of noncombatants on land is exempt from seizure, confiscation, or destruction, and that this principle was fully recognized, in theory at least, by the United States in the exercise of their belligerent rights in the late civil war; that the article of cotton, the property of noncombatants, was no exception to this general principle, this in fact having constituted the great mass of the property the proceeds of which were allowed to be recovered in the Court of Claims; that as to noncombatant citizens the United States recognized the rule of the exemption of their private property from capture and destruction; and that as to neutral aliens, peaceably residing in the United States, upon the faith of treaties of amity and commerce, at least an equally favorable doctrine must be applied; that if, in any case, the capture or destruction of such property became a military necessity, such capture or destruction was accompanied by liability to compensation.

"Her Majesty's counsel cited the case of the United States *v.* Klein, in the Supreme Court of the United States (13 Wall. 128); also the case of Mitchell *v.* Harmony, in the same court (13 How. 115); also the case of U. S. Grant *v.* United States (1 C. Cls. 41); also Brown *v.* United States (8 Cranch, 110); also Lawrence's Wheaton, Part IV, c. 2, pp. 586–626, 635*n*, 640*n*; Halleck, p. 546, § 12; Calvo, §§ 434, 436, 443, 444, 450; Vattel, pp. 368–9, § 173.

"All the claims for cotton destroyed in the enemy's country, with a single exception (that of A. R. McDonald, No. 42), were disallowed by the unanimous voice of the commissioners. * * *

McDonald's Case.

"In the case of A. R. McDonald, Nos. 42 and 334, the commission made an award in favor of the claimant, Mr. Commissioner Frazer dissenting. In that case the cotton was alleged to have been purchased by the claimant principally in Ashley County, Arkansas, under permits issued by the proper officers of the United States Treasury, under the statutes regulating trade in the insurrectionary States, and the regulations of the Secretary of the Treasury made pursuant to said statutes, and to have been destroyed in the same region by United States forces under the command of General Osband in February, 1865. These statutes and regulations only authorized trade in the insurrectionary States within the lines of military occupancy of the United States forces; and it was contended on the part of the claimants that the issuing of such permits by the Treasury officers was controlling evidence that the region covered by the permits, and within which the cotton was alleged to have been purchased and destroyed, was actually within the military lines of the United States.

"On the part of the United States it was claimed that the evidence conclusively showed that at the time of the issuing of the permits in question, and of the alleged purchases under the same, as well as at the time of the alleged destruction, the region where the cotton was situated was entirely outside the lines of military occupancy of the United States, and within the control, civil and military, of the Confederate Government; that the permits in question were irregularly and unlawfully issued; that they gave no authority to the claimant to purchase within the district in question; that the cotton was purchased, if at all, within the enemy's country, and under collusive arrangements between the claimant and the Confederate cotton bureau; that the permits, even if valid when issued, afforded no protection to the cotton when actually within the enemy's lines at the time of its destruction; that the claimant, by his unlawful dealings with the enemy, had forfeited any possible right which he might have had under his alleged permits, and that the claim was, to a large extent, fraudulent, both as to the alleged purchase and destruction.

"The entire claim of this claimant amounted, including interest, to over $3,000,000. The award was for the sum $197,190, including interest. I am advised that, in the making of this

award, the majority of the commission did not intend to depart from the principle held by them in the other claims for cotton destroyed, but that they regarded the permits as controlling evidence that the region where the cotton was situated was within the lines of Federal occupancy."

Am. and Br. Claims Com., treaty of May 8, 1871, Hale's Report, 52. See, also, Howard's Report, 49, 55, 409, 413, 425, 429, 433, 448.

Property destroyed or pillaged: Turner's Case.

"The claimant alleged and brought evidence to prove that he was, in May, 1862, a resident of Richmond, Virginia, and owned jointly with his brother, James Turner, a landed estate in the county of New Kent, Virginia.

"That during that month the United States forces, under command of General McClellan, then marching against Richmond, seized the property of the claimant and his brother, and occupied the dwelling and other houses upon the estate as a hospital for a period of seven weeks, during which time stores of medicines and other supplies had accumulated on the premises.

"On the retreat of General McClellan's army, it being deemed impossible to save the valuable stores so accumulated, to prevent their falling into the hands of the enemy the residence and other houses were fired and burned to the ground.

"He also alleged that wood had been cut on his property for the use of the Army in the construction of military roads, etc., to the value of $300. He alleged the entire damage to have been $7,600, for one-half of which only he claimed to be allowed, his brother, the joint owner of the property with him, being a naturalized citizen of the United States.

"The United States agent demurred to said claim on the following grounds:

"1. That the claimant was a resident within the enemy's country, and within the theater of actual war.

"2. That the alleged injuries to his property were the ordinary casualties of war, and that the United States was not responsible for such injuries.

"Her Majesty's counsel submitted that this demurrer should be overruled on the following grounds:

"1. That if the facts of the case were proved the United States were under obligations to make compensation.

"2. That the claimant was entitled to have his case determined upon its facts and merits.

"The commissioners overruled the demurrer. * * *

"When the case came up on its merits the United States agent held that the claim should be disallowed on the grounds already enumerated in his demurrer, as also for the following additional reasons:

"1. That the proofs showed that the claimant had been employed by the Confederate Government as a foreman of the Tredegar Iron Works, where arms were manufactured for the Confederacy, and therefore had not been neutral.

"2. That the destruction, &c., was a lawful act of war in an enemy's country, for which no compensation was due.

"3. That the claimant was not entitled to any other remedies than are offered to loyal citizens of the United States residing where he did, and that said citizens had no remedy for such losses.

"Her Majesty's counsel held:

"1. That this case was precisely within the principles settled by the United States Court of Claims in the case of W. S. Grant *v.* The United States (Court of Claims Report, Vol. I. p. 41.) The said judgment was expressly founded as well upon the principles of the public law as upon that of the Constitution of the United States, which declares that private property shall not be taken for public use without just compensation.

"The destruction of Grant's property to prevent its falling into the hands of the enemy was held to be a taking of private property for public use.

"2. That the claimant was entitled to an award of 3,800 dollars currency, with interest, from June 1862.

"The three commissioners signed an award of 3,056 dollars gold in favor of the claimant."

John Turner v. *The United States*, No. 44, Am. and Br. Claims Com., treaty of May 8, 1871, Howard's Report, 27, 345. Hale (Report, 55) says:

"An award was made in favor of the claimant, in which I am advised that the majority of the commission included an allowance in respect of the destruction of the house in question. Mr. Commissioner Frazer joined in the award; but in his computation of amount included nothing for the house. In no other case was any award made for the mere destruction of buildings within the insurrectionary territory not permanently reclaimed to the possession of the United States; and this award was therefore an exceptional one and not within the principle by which the commission was governed in other cases.

"The cases of A. R. McDonald, Nos. 42 and 334; of John Turner, No. 44, and of J. & R. Martin, No. 434, were the only cases in which awards were made for the mere destruction of property within the insurrectionary States."

Sterling's Case.

"Thomas Sterling, a native of Scotland, alleged and filed affidavits and correspondence to prove—

"1. That he emigrated to the United States in 1833.

"2. That he remained on his farm in King and Queen County, near Richmond, Virginia, during the whole war.

"3. That the wagon train of General Grant's army encamped on said farm in April 1864.

"4. That the soldiers of said train remained in said camp for one week, having been delayed in crossing the river at this point, and that while so encamped they destroyed all his growing crops, as also everything he possessed, the value of said property being estimated by him at 6,270 dollars.

"By the documents filed with the memorial it was shown—

"1. That the claimant had sent this claim to Her Majesty's minister at Washington in December 1865 for presentation to the United States Government.

"2. That on receipt of the same by the United States authorities the Secretary of War detailed Captain Remington, of the United States Army, to investigate said claim, and that on the 17th of February 1866 the above officer represented that the facts of the case were as alleged by the claimant, but that the value of the property destroyed had been overestimated, and that his losses did not exceed the sum of 3,865 dollars.

"3. That after the above report had been made the Judge-Advocate-General wrote an opinion on the 17th of April 1866, to the effect: 'That the War Department had uniformly declined to entertain claims, even when presented by loyal citizens, for spoliations or depredations committed by the armies operating in the rebellious States during the war; that this rule must be strictly adhered to until the sovereign power of the country should by express law ordain distinctly the treatment which this class of demands should receive and that aliens had no right to complain if they were treated in the same manner as United States citizens.'

"4. That this opinion was sent by the United States Secretary of State to Her Majesty's minister on the 7th of June 1866.

"Her Majesty's counsel argued:

"1. That the United States, through their officers, had admitted the correctness of the claim.

"2. That the sovereign power of the country had recognized the obligation of such claims and had provided a remedy by the Southern Claims Commission, so far as loyal citizens of the United States were concerned, and that the treaty of Washington had given the commissioners of the mixed commission jurisdiction in similar claims brought by British subjects.

"3. That aliens were not allowed to plead before the Southern Claims Commission.

"The defense contended:

"1. That the claimant and his farm were within the enemy's country, and in the track of the invading army.

"2. That no allegations of wanton injury were made or sustained.

"3. That the destruction of the claimant's property was the ordinary and inevitable destruction consequent upon the march of an invading army.

"4. That Congress had never recognized the obligation of such claims, and that the Southern Claims Commission, created under the act of March 3rd, 1871, had no jurisdiction in claims for 'property destroyed,' but only in those 'for stores and supplies taken or furnished during the rebellion for the use of the Army of the United States.' Also, that said commission had no power to award any money, but was solely organized to take proofs and report as to claims of a certain nature.

"The following is the decision of the commissioners in the above case:

"'WASHINGTON, D. C., *February 13, 1872.*

"'No. 12.—Thomas Sterling *v.* The United States.

"'The acts done upon which this claim is based seem to have been the ordinary results incident to the march of an invading army in a hostile territory, with possibly some unauthorized acts of destruction and pillage by the soldiery, with no proof of appropriation by the United States. Under such circumstances there is no ground for a valid claim against the United States.

"'The claim is therefore disallowed.

"'L. CORTI.
"'RUSSELL GURNEY.
"'J. S. FRAZER.
"'*Commissioners.*'"

Thomas Sterling v. *The United States*, No. 12, Am. and Br. Claims Com., treaty of May 8, 1871, Howard's Report, 29, 347, 348, 350. Hale (Report 45) says: "In the case of Thomas Sterling, No. 12, were included as we

claims for property destroyed by the United States Army in its marches and encampments in the State of Virginia, as for horses, carriages, cattle, hogs, flour, corn, and bacon alleged to have been taken and carried off by the soldiers. The proofs showed nothing beyond the disappearance of the property in the presence of the United States Army."

In connection with the foregoing case of Sterling, Hale (Report 44), under the heading, "Claims for property alleged to have been taken and appropriated by the United States forces within the enemy's country, not appearing to have been taken under any regular requisition or order for military use, or by command of any authorized officer," says:

"These claims were numerous and of great variety in regard to the circumstances of the alleged taking. It is somewhat difficult to draw the precise line of distinction by which the majority of the commission were guided in their decisions. It may, perhaps, be said generally that the commission (Mr. Commissioner Frazer dissenting) made awards in favor of the claimant whenever it appeared by satisfactory evidence that the property so taken was a legitimate subject of military use and was actually applied to military uses, even though such application was not made through the regular and ordinary channels. On the other hand, where the property was in its nature not a proper subject of military use, or, being such, was not applied to military use, or where the taking appeared to be mere acts of unauthorized pillage or marauding, the claims were disallowed.

"In the case of the Misses Hayes, No. 100, milliners, at Jackson, Mississippi, a claim was made for a stock of millinery goods and like property, alleged to have been taken by soldiers of the United States Army on the first capture of Jackson in May 1863. The acts complained of appeared, if committed by the United States soldiers, to have been acts of pillage merely, and the claim was unanimously disallowed.

"In the case of Michael Grace, No. 132, Elizabeth Bostock, No. 133, Thomas McMahon, No. 136, and others, at Savannah, being claims for property alleged to have been taken and appropriated by United States soldiers, the same appeared to have been by acts of unauthorized pillage, and were rejected.

"In the case of Bridget Lavell, No. 130, Ann O'Hara, No. 135, William H. Bennett, No. 137, and William Cleary, No. 220, at Savannah, awards were made, Mr. Commissioner Frazer dissenting, for property taken by the United States forces, though without proof of the intervention of an authorized officer, the property being in the nature of commissary's and quartermaster's supplies, applicable to the proper use of the Army, and actually, though perhaps irregularly, appropriated to Army use.

"In the case of David Jacobs, No. 236, large claims were made for watches, jewelry, silks, and other valuable goods,

liquors and tobacco, alleged to have been taken by General Sherman's army at Columbia, on the capture of that city, as well as for the destruction of other property by the burning of that city.

"An award was made, Mr. Commissioner Frazer dissenting, for the tobacco taken from this claimant, on proof that it was carried off in army wagons, tobacco being allowed as an army ration. All the other claims for property taken from this claimant were disallowed.

"In the case of Watkins and Donnelly, administrators, No. 329, an award was made against the United States, in which all the commissioners joined, for property pillaged by United States soldiers in the night from a country store in Missouri, a State not in insurrection, upon proof showing great neglect of discipline on the part of Colonel Jennison, the commanding officer, and his neglect and refusal to take any steps for the surrender of the stolen property or the punishment of the offenders when notified of the facts, and that a part at least of the stolen property was then in possession of his troops."

Donaldsonville Cases: Dr. Meng's Case.

Dr. Meng, a citizen of France, claimed compensation for the destruction of two houses and their contents at Donaldsonville, Louisiana, on the west bank of the Mississippi River. It appeared that during the civil war in the United States Dr. Meng resided at Donaldsonville and owned the property in question; that Admiral Farragut was then in command of the naval forces of the United States on the lower Mississippi, and opposite to the parish in which Donaldsonville is situated; that his transports and other vessels having been fired upon from the banks of the river in the neighborhood of Donaldsonville, Admiral Farragut, believing that the town furnished a rendezvous for the parties engaged in the attacks, determined to destroy it; that on August 8, 1862, in his capacity as commander, he notified the residents of Donaldsonville that he would on the day following destroy the town, and that on the 9th of August he caused fire to be set to some of the buildings, which resulted in the destruction of a part of the town, including the buildings owned by this memorialist, and for which he claimed compensation.

By mutual understanding this case was placed at the head of a class of cases which rested upon the same facts and which were collectively known as the *Donaldsonville cases*.

Counsel for the memorialist in his opening brief cited the proclamation of the President of August 16, 1861, in which he excepted from the proclamation such parts of the States de-

clared in rebellion as might maintain a loyal adhesion to the Union, "or may be from time to time occupied and controlled by the forces of the United States engaged in the dispersion of the said insurgents." It was claimed that at the time of the destruction of Donaldsonville that portion of the State of Louisiana was occupied and controlled by the forces of the United States; and reference was made to the language of General Butler, as quoted in the case of the *Venice*, 2 Wallace, and to the letter of May 12, 1862, to Mr. Adams, minister at London, in which Mr. Seward, then Secretary of State, said: "You may now assume that the Mississippi River, in its whole length, is restored to the Federal authority." The proclamation of General Butler of November 9, 1862, was also cited, in which he spoke of the district west of the Mississippi River as "lately taken possession of by the United States troops." Upon these authorities and upon oral testimony it was contended by counsel for the claimant that Donaldsonville was within the lines of the Army and of the territory of the United States; that the act of Admiral Farragut in ordering the destruction of the city was not warranted by the rules of war, nor justified by the necessities of the situation; and that the Government of the United States, being responsible for the acts of its officers, must make compensation to the sufferers.

Argument for Claimants.

The argument of counsel for the claimant was specially directed to the support of two propositions:

"First. That Donaldsonville at the time of its destruction by Admiral Farragut was within the Federal lines and under Federal authority; hence was not in enemy territory.

"Second. That trade had been established between Donaldsonville and the city of New Orleans, and that that section of Louisiana had been restored to all its rights under the Constitution."

The history of the controversy between the United States and Great Britain, relating to acts of retaliation by the army of Great Britain for the destruction committed by the army of the United States in Upper Canada in the year 1814, was referred to as sustaining the position of counsel for the claimant that nations were liable for the destruction of property under circumstances such as existed at Donaldsonville in 1862. Counsel for the claimant then proceeded to say:

"Such were the positions taken by the United States, and we think correctly taken.

"We may anticipate the objection counsel for the United States will make to the introduction of this correspondence, to wit, that these cities

and villages were not destroyed for any violation of the rules of civilized warfare; that their citizens had not fired upon the transports or kept up an irregular war upon the British fleet. Perhaps not. But it will be seen that they were destroyed in retaliation for similar acts of uncivilized warfare on our part in Canada. Therefore, it appears that the same excuse was offered, 'the places were burned in retaliation;' and that is the excuse given by Admiral Farragut.

"As said by the Secretary of State such acts are inhuman and are not justified by the principles and rules of civilized warfare. The authorities all say that the destruction of towns and cities can be justified only by the imperative necessities of war; only where they are necessary to insure the success of the army and become an important element in securing an honorable peace, or where the conduct of the citizens is inexcusable and it can not be stopped by taking possession of the place or places. Under any other circumstances such conduct 'is the act of a savage.'

"The testimony in these cases shows beyond a doubt that there was no excuse for the destruction of Donaldsonville. It was shown that the firing upon the fleet was not the work of the citizens of Donaldsonville, but that of irresponsible guerillas whom the citizens could not control; that the firing was not from the city, but from below and above the place. These facts were fully and truthfully communicated to Admiral Farragut. He knew at the time that there was no enemy in Donaldsonville; that he had complete and undisputed control of the place; could at any time take peaceable possession of it, and that there was no one to dispute his authority. One witness swears that there was no enemy there; in fact, that there were but two or three male citizens in the place; and yet, with the place under his absolute control, he burnt the city for the act of a few guerillas who were strangers to the place and without a residence or interest in it.

"A more inexcusable and barbarous act was not committed during the entire war. The city was not hostile, it was not in the hands of or under the control of the enemy, it was declared to be within the Federal lines, there was no occasion to bombard it to dislodge an enemy, it was disarmed and in the hands of a few Union men and women, and there was not only no one to dispute the authority of the United States, but the commander of her navy was urged to take possession of the city and thus protect all from the occasional and irregular acts of guerrillas. By the rules of war the United States military and naval forces were bound to exercise their authority, take possession of the place, and protect its own citizens and alien residents residing within its territory under treaty stipulations from the acts of freebooters and plunderers. So long as a district or city was under the authority of the rebels, or those in arms against the United States, the United States was not, and is not, liable for the injuries or wrongs committed by her enemies; but the moment her authority was reestablished her liability followed, and she became responsible for the acts of her military or naval forces. This principle was declared in Gumbo Case (2 Knapp, 369). That case involved the liability of France for damages done after she had retaken the Dutch West Indies from Holland, and the Privy Council held France liable for all acts done after she had taken possession. In the claim of Nelson, the English and American commission held the same doctrine.

"It follows that as Donaldsonville was within the Federal lines, and under the control of the United States forces, they were bound to protect the citizens, and their refusal to do so was an act for which the government is liable."

Argument of Counsel for the United States.

Counsel for the United States in reply cited the language of General Butler, as quoted in the case of the *Venice*, in which he said, speaking of the rebels: "They have retired in the direction of Corinth, beyond Manchat Pass, and abandoned everything in the river as far as Donaldsonville, some seventy miles beyond New Orleans." As to the statement in the letter of Mr. Seward to Mr. Adams, the commission was asked to observe that the phrase "You may now assume that the Mississippi River, in its whole length, is restored to the Federal authority," was not even in form a declaration of the fact, and that whatever might have been the purpose of Mr. Seward, history justified the statement that the river was not restored in its whole length until July 1863, after the fall of Vicksburg and Port Hudson. In further support of the position that Donaldsonville was not within the control of the armies of the United States in August 1862, the report of General Butler of the 27th of October of that year was cited, in which he said: "General Weitzel landed at Donaldsonville and took up his line of march on Sunday, the 26th of October. About nine miles beyond Donaldsonville he met the enemy in force. A sharp engagement ensued, in which he lost eighteen killed and sixty-eight wounded." It was contended by counsel for the United States that the proclamation or order of General Butler of November 9, 1862, in which he created a department of that portion of the State of Louisiana lying west of the Mississippi River, and declared that it had been "lately" taken possession of by the United States troops, was the first official notice of the occupation and possession of that portion of Louisiana in which the town of Donaldsonville was situated which bound the United States Government, and that it was in itself conclusive proof that up to that time the territory covered by the proclamation was enemy territory. As to the oral testimony, it was contended that the individual views and opinions of witnesses could not control the official acts of the military and civil authorities of the country; and, consequently, that Donaldsonville, in August 1862, was enemy territory.

In refutation of the position taken by counsel for the claim-

ant that Admiral Farragut was not justified by the Rules and Articles of War and the principles of public law, in the circumstances then existing and known to him, in issuing the order which in its execution caused the destruction of the town of Donaldsonville, counsel for the United States submitted these views to the commission:

"The destruction of Donaldsonville by Admiral Farragut is justified upon two grounds: First, as an act of retaliation, and, secondly, as a reasonable and proper means of defense. The counsel for the claimant assumes that the right of retaliation in war and upon the theater of actual hostilities can not be justified by the rules of civilized war, and upon page 10 of the claimant's brief appears this statement: 'Treating the question as if Donaldsonville remained outside of our lines, yet the admiral had no right, under international law, to bombard or burn the town without making his government liable for the damage done.' It is unnecessary to characterize this statement or consider its value as a legal proposition, inasmuch as it is sufficient to cite the authority of this honorable commission in the case of Virginie Dutreix against the United States, No. 524. In that case the counsel for the United States filed a demurrer, and upon the ground that the 'injuries complained of were the result of the ordinary operations of war and the bombardment of an enemy's town.' After argument the commission sustained the demurrer and disallowed the claim. That decision was signed by all the members of the commission, and the counsel for the United States might with safety here rest the defense. Upon pages 10, 11, and 12 of the brief of the counsel for the memorialist, authorities are cited and quotations made from those authorities upon the idea that they support the proposition already quoted from the brief of the counsel for the claimant. These authorities fail to support the position assumed. They all recognize the right of a belligerent to punish his adversary by the bombardment of a town or the destruction of private property under general orders, and not for pillage or gain. This remark is also applicable to article 28 of the Rules and Articles of War: 'Retaliation will never be resorted to as a measure of mere revenge, but only as a means of protective retribution, and, moreover, cautiously unavoidable; that is to say, retaliation shall only be resorted to after careful inquiry into the real occasion and character of the misdeeds that may demand retribution.' Nor is any support given to the position of the counsel for the claimant by the correspondence between the Government of the United States and the representatives of Great Britain, quoted on pages 13–17 of his brief. From this correspondence it appears that the British Government adopted what were called measures of retaliation against the inhabitants of the United States for the wanton destruction committed by their army in Upper Canada in the year 1814, and that the United States Government complained of those acts of retaliation; but the correspondence is conclusive to the point that the representatives of the Government of Great Britain maintained the right and justice of the proceeding. It is also a matter of history that no provision was made in the treaty of peace for the compensation of persons who suffered by the depredations of the British forces, and no compensa-

tion was ever made to the losers from the treasury of Great Britain. The right to destroy the property of persons resident in enemy's territory and upon the theater of war, and as a measure of retaliation for injuries inflicted by the army of the enemy, rests upon the rule everywhere recognized that the army and people are alike enemies, and that the entire body politic, the army, the civil officers, and the citizens, are each and all responsible for the hostile acts of each and all.

"The counsel for the United States claims that Admiral Farragut was, by virtue of his commission, and by the power of command vested in him, fully authorized to judge whether the destruction of the town of Donaldsonville or a portion thereof was justified by the circumstances then existing and known to him, and that it is not competent for this tribunal to now inquire whether his decision was or was not a proper decision."

Counsel for the United States also referred to the case of Mrs. Alexander's cotton, 2 Wallace, 419, in which the Supreme Court of the United States said:

"We must be governed by the principle of public law, so often announced from this bench, as applicable alike to civil and international wars, *that all the people of each State or district in insurrection against the United States must be regarded as enemies until, by the action of the legislature and executive, or otherwise, the relation is thoroughly and permanently changed.*"

At the final hearing counsel for the United States submitted these observations:

"The allegation in the memorial of Dr. Meng is that on the 9th of August 1862, by the order of Admiral Farragut, who was then in command of the naval forces on the Mississippi River, between a place known as Port Hudson and the city of New Orleans and to the open sea, certain property in the town of Donaldsonville, on the west side of the river, was set on fire and destroyed, and that of this property the claimant was the owner of certain buildings, three in all, for which he claims compensation. His citizenship in France is admitted. The State of Louisiana passed what was called an ordinance of secession in the month of January 1861, and became one of the members of the Confederacy, which was organized into a government, with its capital at Montgomery, Alabama, the 22d of February 1861. The seat of government was afterwards removed to Richmond, Va. On the 25th day of April 1862, after the occupation of the islands below New Orleans, in the Gulf of Mexico, near the mouth of the Mississippi River, Admiral Farragut obtained possession of the city of New Orleans. General Butler, who was then in command of the land forces, arrived in New Orleans the 30th of April 1862, and the 1st of May he issued his proclamation declaring the city of New Orleans under martial law. I believe that is the only proclamation relating to jurisdiction which was issued by the general of the army or by the President of the United States previous to the events of the 8th and 9th of August 1862, with which we are now dealing. What we have claimed in our brief, and what we shall attempt to maintain here and now, is that at the time when this destruction took place the town of Donaldsonville was of the enemy territory. These eleven States that were organized into the so-called

Confederacy were recognized as a belligerent government, or as a belligerent for the purposes of war, by the proclamation of the Queen of England of the 13th of May 1861. That proclamation was followed by the proclamation of the Emperor of France in June of the same year. As far as those governments were concerned, and especially as far as the Government of France was concerned, there was a distinct official public recognition of the organization called the 'Confederate States,' and an admission of those States into the family of states, not for all purposes, but for the purpose of war. Therefore it does not lie within the scope of the reason of the case that the Government of France should deny that at the time the proclamation was issued by the Emperor of France all this territory was enemy country as far as the Government of the United States was concerned.

"Next, then, President Lincoln the 16th day of August 1861, which was nearly a year before these events took place, issued a proclamation which did in effect recognize these States, with certain exceptions, as a belligerent power, and they were so treated in all our relations with them during the existence of hostilities. In pursuance of an act of Congress, to which he refers, he says: 'I do hereby declare that the inhabitants of the said States of Georgia, South Carolina, Virginia, North Carolina, Tennessee, Alabama, Louisiana, Texas, Arkansas, Mississippi, and Florida (except the inhabitants of that part of the State of Virginia lying west of the Alleghany Mountains, and of such other parts of that State and the other States hereinbefore named as may maintain a loyal adhesion to the Union and the Constitution, or may be, from time to time, occupied and controlled by the forces of the United States engaged in the dispersion of said insurgents), are in a state of insurrection against the United States, and that all commercial intercourse between the same and the inhabitants thereof, with the exceptions aforesaid, and the citizens of other States and other parts of the United States, is unlawful, and will remain unlawful, until such insurrection shall cease or has been suppressed.' That proclamation, declaring these States to be in a state of insurrection against the Government of the United States, was to operate until the insurrection was suppressed; and the insurrection was not suppressed until the month of April 1865, when the forces of Gen. Lee surrendered to Gen. Grant at Appomattox Court-House, in the State of Virginia. By that proclamation Louisiana was in a state of insurrection until the suppression of the rebellion in 1865, and during all that period it was enemy territory by the act of the Government of the United States, enemy territory by the proclamation of the Government of Great Britain, enemy territory by the proclamation of the Emperor of France."

Argument in Reply.

In reply, and in support of the position taken by counsel for the claimant, Mr. Morse, assistant counsel for the French Republic, made the following statement:

"A few months after the commencement of the war Fort St. Philip and Fort Jackson, which commanded the entrance to the mouth of the Mississippi River, below New Orleans, about a distance of one hundred miles, were captured by the Federal fleet under Admiral Farragut, and the city of New Orleans fell into possession of the Federal Government, and re-

mained so until the close of the war. With the fall of New Orleans, practically all that portion of the Mississippi River not commanded by very formidable forts fell also into the possession of the Federal Government, and the gunboats and transports of the Federal Government had free passage up to a point called Port Hudson, which is about seventy miles above Donaldsonville, and on the east or left bank of the river, where there was quite a formidable fort, garrisoned by Confederate troops, which for many months successfully resisted the Federal fleet and army of occupation. But from Donaldsonville to New Orleans all the country on the right and left banks of the river, which was immediately commanded by the guns of the Federal fleet, was in absolute possession and control of the Federal Government. Occasionally, however, partisan rangers or detached bodies of armed men, alleged to be Confederate soldiers, would come from the interior of the country, and, striking the roads which followed the Mississippi River just inside of the levee, would make attacks sometimes on the steamboats and sometimes on the transports. Some time after the Federal occupation of the lower Mississippi by the United States an earthwork was thrown up on the environs of Donaldsonville, at the confluence of the bayou and the river. This was 'Fort Barrow,' which was erected on the north and west bank of the bayou and river, and was some time occupied by a small body of Federal troops. The location of this earthwork, which is shown on maps filed in these cases, was outside of the village of Donaldsonville. This fortification was at one time named 'Fort Butler.'

"The capture of New Orleans occurred late in April 1862, and the occurrences out of which this claim originated took place on the 9th of August of the same year. The formidable Federal fleet had been for several months in undisputed possession of this portion of the river, and of course of the territory immediately contiguous, and all this portion of Louisiana [referring to the map] had been declared by President Lincoln as exempt from the insurrectionary districts. Proclamations Aug. 16, 1861 (12 Stats. p. 1262) and July 1, 1862 (12 Stats. p. 1276). When the war was commenced the whole State was declared in insurrection, but with the capture of New Orleans and the restoration of federal jurisdiction in certain portions of the territory, notably Ascension parish, and other parishes on both sides of the river, those localities were declared by the proclamation of President Lincoln not to be within the insurrectionary districts, and therefore not likely to be treated as 'enemy territory.' As a matter of fact, trade was uninterrupted between Donaldsonville and the city of New Orleans. But at the same time the transports and sometimes steamboats had been, as alleged by the United States, fired upon with small-arms from points above and below and near Donaldsonville; and the United States has also introduced evidence that there was a baby cannon at one time at Donaldsonville, which was discharged at a transport or a federal steamboat; and occasionally detachments of armed men would appear on horseback and discharge a volley from small-arms at a passing transport or federal steamer. I do not believe there is any charge or proof that anybody was killed on steamer or transport by the guns discharged either near Donaldsonville or in the vicinity. I do not think there is any evidence on this point, at least as far as I have read the testimony."

Award. An opinion was given by a majority of the commission, Baron de Arinos and Mr. Commissioner Aldis, disallowing the claim, in these words:

WASHINGTON, *Nov. 2d, 1883.*

"All the property described in the memorial, except item 13, for three horses, saddles, and bridles, was destroyed or burnt by the bombardment or burning of Donaldsonville by Admiral Farragut, on the 9th of August 1862.

"The question whether the Government of the United States is bound to make compensation to the claimant for his property so destroyed or burnt has been very fully discussed by counsel and carefully considered by the commission.

"We deem it unnecessary to go into a detail of the facts which we consider as proved by the evidence, or of our views of the principles of international law and of the laws of war applicable to the facts, and which determine our decision.

"We deem it sufficient to say that the acts of bombardment and burning by Admiral Farragut were lawful and justifiable acts of war, caused by the firing of the Confederate military forces, with the complicity of the inhabitants of Donaldsonville, upon the transports of the United States passing upon the river, and that the Government of the United States is not bound to make compensation for the damage caused by such burning and bombardment.

"As to the item 13, for the horses, saddles, and bridles, the only evidence to prove the taking by the United States military authorities is the statement of the claimant (p. 17): He is asked: 'What became of the horses?' He answers: 'The soldiers took them; the same soldiers.' As these soldiers came from and returned to the ship in a skiff, it is difficult to believe that they took the horses. The proof of the taking of the horses is not sufficient to justify an allowance."

Donaldsonville cases (*Dr. Denis Meng* v. *United States*, No. 567), Boutwell's Report, 159: Commission under the convention between the United States and France of January 15, 1880.

Dissenting Opinion. From the foregoing decision, M. Lefaivre delivered the following dissent:

"The commissioner for France regrets not to be able to join in the decision of his colleagues in the case of Denis Meng.

"He bases his dissenting opinion upon the following reasons:

"The destruction of property situated at Donaldsonville, on the banks of the Mississippi River, was ordered on the 9th of August 1862, by Admiral Farragut, as appears from his own declarations, in view of securing his transports against the firing from the opposite side, which was attributed (and all inquiries seem to justify this imputation) to Texan guerrillas.

"Arguments and briefs have been submitted to the commission for the purpose of justifying the destruction ordered by Admiral Farragut, and the commission readily recognized in this officer the right of securing his

communications by all means consecrated by custom and the immemorial traditions of war.

"Having disclaimed any appreciation or censure respecting this measure in itself, the majority of the commission also admitted the following principle: 'That the destruction of Donaldsonville might have been caused by military necessities without the United States Government being exempted from liability for ulterior indemnities to the victims—that is, to the injured property owners—provided the destruction of their dwellings could not be considered as an act of retaliation prompted by their complicity in attacks upon the Federal transports.'

"The question being thus reduced to these terms, it remained only to consider whether the proofs and testimony showed with sufficient clearness an active participation of the population of Donaldsonville in the incriminated acts of hostility.

"In the judgment of the commissioner for France, not only the few inhabitants left by the war at Donaldsonville had not taken any part in the attacks incriminated by Admiral Farragut, but, on the contrary, it is proved that they made the most meritorious efforts with the Confederate officers and the Confederate governor of the State of Louisiana to prevent the continuance of the attacks, and even appealed to Admiral Farragut for effective aid and protection against the excursions of the guerrillas. Inasmuch as the French commissioner differs so fundamentally from this decision of the commission, he considers it useless to enter into a hypothetical discussion as to how Dr. Meng's horses were taken from him.

"In the judgment of the French commissioner the majority of the commission have not substantiated their charge of complicity by the testimony of a single witness, and he has sought in vain through the voluminous records of the Donaldsonville cases for any proof in support of this grave accusation, which is brought forward as the justification of the deliberate burning of the houses of unoffending foreign citizens.

"The principal witnesses who have testified in these cases on behalf of the United States and of the claimants are Reynaud, Collin, Bercegeay, Rodrigue, Guigon, Février, Billon, Rougeau, and Claverie. They all declare, from personal knowledge, that the citizens of Donaldsonville took no part whatever in the firing upon the Federal transports. It appears from their testimony in claims numbered 112, 184, 331, 496, and 567, among others, that the firing was done exclusively by a band of Texas guerrillas, who were encamped several miles away from the town; that Commodore Farragut's threat to burn the town caused great anxiety and consternation; that he was appealed to for protection by the mayor and the few remaining inhabitants, who told him that they could not control the guerrillas, though they would do what they could to prevent them from continuing these attacks (p. 112 of No. 196; 41, 49, 116, and 129 of No. 331; 29 of No. 112; 43 of No. 35; 51 of No. 567); that the captain of the guerrillas and the governor of Louisiana were successively implored to take into consideration their danger and defenseless situation, and to cause the firing from the banks of the Mississippi to be stopped. In a word, it is clear beyond controversy that everything that could possibly be done by the few male adults of Donaldsonville, who appear to have been mostly old men and foreigners, exempt from Confederate conscription, was hon-

estly and in good faith done by them to put a stop to the hostile acts of the Texas guerrillas and to demonstrate their innocence and their non-complicity in these acts.

"The people of Donaldsonville were completely at the mercy of Commodore Farragut and the vessels of his fleet. The town lay between New Orleans and Baton Rouge, at both of which places the Federals had a large military force. No Confederate troops were in the vicinity, except Captain McWhorter's handful of Texas guerrillas. The business relations of the town were with New Orleans, and the inhabitants had every motive of interest and reason to placate the Federal authorities. Is it reasonable to suppose that they deliberately invited the destruction of their homes by futile attempts to retard the advance of the Federal fleet? Could there be anything more ludicrous and pitiful than this attempt to picture to us a handful of decrepit Louisianians and foreign tradesmen arming themselves with rusty shotguns and muskets and marching down in solid array to the river front to repel, at the risk of the destruction of their town if they failed, the advance of the man-of-war *Brooklyn*, a screw steamer of 2,070 registered tonnage, carrying 26 guns, and one of the largest vessels of the United States Navy?"

Jardel's Case.

Remy Jardel, a French citizen, who resided at Donaldsonville, Louisiana, in June 1863, claimed compensation for a dwelling house and bakery, which were destroyed by fire set to certain buildings in Donaldsonville, by order of Major Bullen, on the 29th day of that month. It appeared that after the attack on the transports of the United States, which gave rise to the destruction of property in Donaldsonville in August 1862, by order of Admiral Farragut, as reported in the case of Dr. Meng, the United States military authorities caused a small fort to be erected above Donaldsonville, at the junction of the Bayou Lafourche with the Mississippi River, with a view to the protection of the transports on the river against attacks from the town. On June 28, 1863, this fort was occupied by a force of about 180 men, commanded by Major Bullen, of the Twenty-eighth Maine Volunteers, when, at about 1 o'clock in the morning, it was attacked by a body of Confederate troops, estimated at from 2,000 to 5,000. The principal attack was from the open country on the west and northwest sides of the fort, but the firing was begun from behind buildings in Donaldsonville, on the opposite side of the Bayou Lafourche. The contest lasted till daylight, when the attacking party retired to a distance beyond the reach of the guns in the fort. Major Bullen, apprehending a second attack, sent notice to the inhabitants of Donaldsonville that he should destroy

all the buildings in the town within range of the fort, and on the morning of the 29th a party was sent across the bayou to set fire to buildings in the vicinity. Many were destroyed, and among them the dwelling house and bakery of the memorialist.

Argument for the United States.

Counsel for the United States maintained that the destruction of the property was a justifiable act of war: that it took place upon the theater of war and in the territory of the enemy. He laid down the following proposition: Where two nations are at war, and the theater of war is upon the territory of one of the belligerents, and the belligerent upon the defensive, in actual battle, without having given special authority for the destruction of the particular property, either by specifying that property or by specifying a class to which it belongs, destroys the property of its own citizens or of alien residents, that government is not liable for the destruction; but if, in preparation for the battle, it orders the destruction of a class of property, in which is the property of A, or it orders the destruction of the property of A, whether it be a month before a battle or a day before a battle, or if, during the battle, it orders for any particular purpose the destruction of particular property of its own citizens, it is liable for the value of the property so destroyed. If, however, an army is engaged in operations upon the territory of the belligerent no liability of that sort arises. Everybody in that country is an enemy, and whether the occupying army destroys property by specific declaration or whether it destroys property in actual hostilities it is alike free from all liability.

Argument of Counsel for France.

Counsel for the French Republic contended, in reply, that the conclusion reached by the diplomatic agents of the two governments in the Chourreau case[1] excluded all consideration of the question whether Donaldsonville was within the enemy's territory or not, and that the destruction of the property of the inhabitants of Donaldsonville after the battle was an unjustifiable act, for which the Government of the United States was responsible.

Award.

A majority of the commission, Baron de Arinos and Commissioner Aldis, delivered, November 2, 1883, the following opinion:

"Without considering in detail the evidence in this and the

[redacted]

[1] Supra, II, 1145.

similar cases and the facts proved thereby or stating the principles of international law and of the laws of war applicable to such facts and which determine our decision, we deem it sufficient to say that the destruction and burning of the dwelling house, bakery, and outbuildings of the claimant in Donaldsonville, on or about the 28th of June A. D. 1863, by the United States military forces under Major Bullen, then in command of Fort Butler, was a lawful and justifiable act of war; and that the Government of the United States is not bound to make compensation for the damage caused thereby.

"The claim is therefore disallowed."

Dissenting Opinion.

M. Lefaivre dissented, on the following grounds:

"This destruction took place after the battle of the 27th and 28th of June (night of the 27th and morning of the 28th), during which Fort Butler's garrison victoriously repulsed an attack of the Confederates. So this property was not destroyed under the pressure and for the immediate necessities of actual battle. It was but a strategic measure, taken deliberately and in a period of relative tranquillity; it was an extension of the military zone for the purpose of facilitating the accuracy of the firing, or in order to be able to discover more easily a future attack of the enemy. According to the unanimous opinion of international writers and congresses, and to the jurisprudence adopted by the commission itself, such a measure creates for the injured proprietors not participating in the battle ('for the innocent sufferers') a *right to indemnity*.

"In order to refuse Jardel the benefit of this principle, it should be shown that the inhabitants of Donaldsonville took part in the battle of the 27th of June, and thus justified the retaliation of the garrison, or that his house (Jardel's) was completely destroyed during the battle, either by the bombardment of the fort or by fire. None of these points appear in the evidence or testimony.

"1st. The only cause of grievance of the officers and soldiers of Fort Butler against the inhabitants of Donaldsonville were their sympathies for the cause of the Confederates and the insulting remarks, uttered principally by women, when the patrol passed by. But none of them were proved to have taken an active part in the battle. This view can be established with entire certainty.

"2d. The testimony of many Federal soldiers and officers shows that no house in Donaldsonville was destroyed during the battle prior to the systematic destruction of the 29th of June. 'It was existing houses and not ruins which were destroyed.' Admitting even the fact that a certain number may have been damaged by projectiles during the battle, this partial destruction gives the military authorities by no means the right to afterward destroy a lot of buildings without indemnity. The amount of these previous losses has not even been estimated. We can only guess at their amount, and, in absence of positive proofs, it seems strange that the benefit of the uncertainty should enure to those who destroyed the property rather than to the innocent victims of the war. A contrary tendency prevails to-day in international settlements. The commissioner on behalf of

the French Government regrets that the commission, by its decision, did not agree to this progressive tendency of international rights."

Remy Jardel v. *United States*, No, 333, Boutwell's Report, 174: Commission under the convention between the United States and France of January 15, 1880.

Dutrieux's Case.

Virginie Dutrieux, a citizen of France, was the owner of two houses in Charleston, South Carolina. During the bombardment of that city by the forces of the United States these houses were struck by shells and either destroyed or injured materially, for which the memorialist claimed compensation in the sum of $6,000. Upon this statement of facts counsel for the United States interposed a demurrer on the ground that "the injuries complained of were the result of the ordinary operations of war and the bombardment of an enemy's town." It was admitted in the opening brief of counsel for the claimant that, "viewed from the standpoint of international law, * * * there was no remedy for the destruction by a belligerent, through the ordinary operations of war, of the property of a loyal citizen or an alien lying within the field of the war." By Article IV. of the convention, however, the commissioners were required to make solemn declaration that they would "impartially and carefully examine and decide, to the best of their judgment and according to public law, justice, and equity, without fear, favor, or affection, all claims within the description and true meaning of Articles I. and II. which shall be laid before them on the part of the governments of the United States and of France, respectively." And counsel for the memorialist claimed that "public law" was distinguishable from "international law," and that it was the intention of the two governments that all equitable claims on the part of the citizens of either against the other should be recognized by the commission.

Counsel for the United States contended that the words "public law" were equivalent to the words "international law;" that the commission was authorized to allow such claims only as were recognized by international law, and that the destruction of the property of persons, resident in the theater of war, by the necessary movements and acts of the belligerents was not the subject of compensation. Counsel for the United States referred to the proceedings of the British and American Claims Commission under the Treaty of Washington, and especially to the case of Cleworth, in which the commissioners said:

"The United States can not be liable for any injury caused by the shells thrown in the attacks upon Vicksburg."

On behalf of the claimant it was said by counsel:

"Some of these claims, it is conceded, will be allowed. But how? Can it be claimed that the convention intended to abrogate 'the common law of war' as to certain classes of claims and leave it in force as to others? If that was the intention, why was it not expressed? Why leave it to the commission to conjecture what classes of claims not tenable under 'the common law of war' should and what classes of such claims should not be held to be within the intent of the convention? The convention is the most liberal ever adopted; it gives the commission jurisdiction in case of all injuries, without qualification, arising out of acts committed by the authorities of the respective governments during the certain periods specified and within the territorial limits designated. If injuries arising from *the ordinary operations of war*, though such operations were had by the authorities of government, had been intended to be excluded, why was not a provision to that effect inserted in the convention? There was no such intention; the injuries of which each government complained to the other arose almost entirely out of acts done in the ordinary operations of war; acts for the damages arising from which the political departments of the respective governments, *in the absence of convention*, would not and could not demand redress. It was to remedy the injuries thus done that the enlightened parties to the convention, in the broad, civilized spirit of the day, agreed to forego setting up the narrow, jealous objections which earlier and less advanced ages would have sanctioned as justifiable obstacles in the way of common justice; the 'enlightenment' of each party in the premises being, however, chiefly due to the potent existence of counterclaims."

In reply counsel for the United States maintained that "all agreements and contracts are entered into with the law of the land in view, and are governed by it. All treaties are made subject to the principles of public law as they exist at the date of the treaty, and if it be desired to introduce a new and hitherto unrecognized principle an explicit statement to that effect must be made and incorporated in the instrument."

The demurrer was sustained and the claim was disallowed.

Virginie Dutrieux v. *United States*, No. 524, Boutwell's Report, 157: Commission under the convention between the United States and France of January 15, 1880.

Giles's Case.

William Ogden Giles, an American citizen, was the owner of a factory situated at Pantin, between the walls and the outer fortifications of the city of Paris. The factory was erected in 1869 for the purpose of carrying on the business of preserving wood for railroad ties. In 1870, during the siege of Paris by the Germans, the factory with its contents was destroyed, for which

Giles claimed compensation in the sum of 52,722 francs and 80 centimes. By the evidence it appeared that during the siege of Paris the property of Giles was injured and portions of it taken by franc-tireurs, the guard-nationale, and marauders. Following this partial destruction of the property, an order was given by General Trochu for the evacuation of what was called the "zone militaire," in which the factory of Giles was situated. This order was dated the 8th of September 1870. The 10th of September, two days afterward, the *Moniteur Universel* announced the destruction of the buildings in the "zone militaire" by fire as a very expedient measure.

It was claimed by counsel for France that the military zone around Paris was limited by the law of 1821 to 150 meters; that Giles's buildings, which were at a distance of 450 meters, could not have been included in it; and that the report of the chief of engineers showed that no property was destroyed in that vicinity.

It was also claimed by counsel for the French Republic that the acts complained of, if committed, were the unauthorized acts of soldiers and marauders; that no authority for them had been given by any civil or military officer of the French Government, and that by the terms of the convention and the decisions of the commission the government was not responsible therefor; and that as to the order of General Trochu it did not direct the destruction of the works, but merely the abandonment of the buildings within the "zone militaire." The destruction of them subsequently, either by the French army for the purpose of preventing them from being used by the German army for shelter and protection, or by the German army in its attack upon Paris, did not, it was maintained, impose upon the French Government any liability.

The claim was disallowed by a majority of the commission, consisting of Baron de Arinos and M. Lefaivre. The commissioner on the part of the United States, dissenting from the opinion of the majority, said: "It fully appears that the building of the claimant was torn down and used for fuel by the national guards, franc-tireurs, and marauders. The injury by marauders I do not think ought to be allowed, but that done by the national guards and franc-tireurs I think ought to be allowed."

William Ogden Giles v. *The Republic of France*, No. 12, Boutwell's Report, 202: commission under the convention between the United States and France of January 15, 1880.

Chourreau's Case.

Memorialist, a citizen of France, claimed compensation from the United States for a quantity of cotton and other articles of personal property, valued at $4,000, which were shown to have been destroyed by fire set by United States soldiers. There was evidence tending to show that the property in question was at the time of its destruction situated in the theater of war, in a portion of the country marched over and ravaged by the forces both of the United States and of the Confederacy; and on this ground it was argued on the part of the United States that the claim was not within the treaty between the United States and France of January 15, 1880, because the acts complained of were not committed within "the territorial jurisdiction" of the United States. This question was disposed of by agreement between the two governments, as is elsewhere shown.[1] Apart from the question of jurisdiction, it was contended on the part of the United States that that Government was not liable for losses "arising from depredations committed in places where the armies were present, whether such depredations were by the soldiery or by camp followers, inasmuch as the acts were not only without authority, either civil or military, but were in violation of the rules and articles of war, and of the orders of the military commanders." Upon the merits of the case the Commission made an award in favor of Chourreau of the sum of $970.

Joseph Chourreau v. *The United States*, No. 43, French and American Claims Commission, treaty of January 15, 1880, Boutwell's Report, 134.

Bertrand's Case.

The claimant's memorial contained a schedule of articles alleged to have been taken or destroyed by the Army of the United States in April, 1864, at his residence in the parish of Natchitoches, Louisiana.

It was claimed by counsel for the United States that as the property was destroyed upon the theater of war and while hostilities were flagrant the Government of the United States was not liable for the damages sustained by the memorialist.

The commission made an award in favor of the claimant in the sum of $4,800, which was understood to be in compensation for a quantity of cotton that was destroyed by order of the officers of the Army, through fear that, if not destroyed, it would fall into the hands of the Confederate authorities.

The commissioner for the United States assented to the

[1] Supra, II, 1145.

award upon the ground that the rule established in the case of Chourreau justified and required the allowance to Bertrand.

Bertrand v. *United States*, No. 345, Boutwell's Report, 147: Commission under the convention between the United States and France of January 15, 1880.

Labrot's Case.

Auguste Labrot was in 1862 the owner of a tract of land in the county of Kenton, State of Kentucky, on the west bank of the Licking River, on which stood a grove of locust trees. A portion of the Army of the United States was encamped in the neighborhood, under the command of Gen. Lew Wallace. Upon the advice of an engineer, General Wallace ordered the destruction of the grove for the purpose of giving free range to the guns in the defense of the position.

As the property was situated in a State which recognized the jurisdiction of the national government, and as the destruction of the property was due to a specific order of the general in command and for the benefit of the public service, the liability of the government to compensate the owner for the value of the property destroyed was admitted by counsel for the United States.

It was contended by special counsel for the claimant that the grove was of great value, as it added to the beauty of the landscape, and that the estate was injured to the amount of $6,000 by its destruction. Counsel for the United States contended that the value of the grove, which consisted of three acres of locust trees, represented to have been about twelve inches in diameter and thirty to forty feet in height, could not have exceeded $400.

An award was made by the commission in the sum of $1,500.

William Means, executor of Auguste Labrot, v. *United States*, No. 272, Boutwell's Report, 189: Commission under the convention between the United States and France of January 15, 1880.

Cases of Bercier & Laborde, and of Phillippi.

It appeared that the claimants were the owners of 107 bales of lint cotton, of the aggregate value of $14,029.63, in the city of Mobile, Alabama; that 42 bales were stored in the City Warehouse, 25 at the Okalona Press, and 40 at the Union Press; and that in consequence of an explosion of fixed ammunition, which occurred May 25, 1865, the warehouses and their contents were destroyed by fire. The testimony showed that upon the fall of Mobile, April 12, 1865, the commander of the

United States army placed guards around certain warehouses in which cotton was stored, and that the owners were excluded from the warehouses, and had no opportunity either to protect the cotton or to remove it. The warehouse keeper in his testimony said: "There were guards of soldiers put over all the warehouses of cotton in the city of Mobile, acting under the authorities of the government of the United States army, then in possession of the city." Of the cotton so held, more than 9,000 bales, including that of the claimants, were destroyed by the explosion which took place on May 25. The cause of the explosion was the accidental dropping of a shell by a soldier, the shell exploding and setting fire to the buildings in the neighborhood.

Upon the same state of facts the same question was raised in the case of *Phillippi* v. *The United States*, No. 129. In the argument of that case counsel for the United States presented the following views:

"The testimony shows that upon the fall of Mobile, which took place April 12, 1865, the commander of the United States army placed guards around certain warehouses in which, as was understood, cotton was stored. It does not appear that possession was ever taken of the cotton by any examination of it, or by assuming the custody of it in the sense of taking the keys of the warehouses or displacing the warehouse keepers who may have had the warehouses in charge. As far as the record discloses the transaction, the commanding general did only that in reference to the warehouses that officers of the army were accustomed to do upon the theater of war—protect as far as they were able private property from depredation by the mob or by soldiers, and from the accidents and casualties of war.

"It is to be considered that at that time the war was flagrant, peace not having then been declared nor established. The order of General Canby of the 21st of April, 1865 (No. 30), shows conclusively that it was the policy of the government to respect private property and to transfer the question of ownership to the civil authorities.

"In contemplation of law there was no seizure of the Phillippi cotton.

"In the case of Pelham *vs.* Rose (9 Wall., p. 106) the court says: 'By the seizure of a thing is meant the taking of a thing into possession, the manner of which, and whether actual or constructive, depending upon the nature of the thing seized; as applied to subjects capable of manual delivery, the term means caption—the physical taking into custody.'

"And they say further: 'In the case at bar a visible thing capable of physical possession is the subject of the libel.' In the case of Phillippi the cotton was a visible thing capable of physical possession and manifestly the subject of caption, which in law means the actual taking, as the seizure of a person. In order to make the Government of the United States liable in the case at bar, two things must appear: (1) That an order was issued by the officer commanding at Mobile, or by some officer duly author-

ized in the premises, directing an actual seizure in the sense in which the word is defined by the Supreme Court in the case mentioned, and (2) an execution of that order by the actual taking of the property in the same sense.

"Upon the evidence neither of these two conditions is found to exist. There is no evidence that any order was issued by General Canby, or by any other officer duly authorized thereto, to make caption of the cotton; and, secondly, there is not only no evidence tending to show that caption of the property was made, but the evidence is conclusive that no act touching the condition of the cotton was performed by any officer or soldier of the army of the United States.

"Inasmuch as this claimant chose to make an investment in that species of property which was employed by the Confederate authorities in sustaining its credit abroad and maintaining its armies at home, and inasmuch as she was within the jurisdiction of the United States, and therefore had legal knowledge of the laws and regulations for the conduct of the war, and inasmuch as she chose to mix that property with other property of the same kind, belonging either to the Confederate government or to persons citizens of the United States, and then subject to its authority, she can not now complain that the army of the United States was employed to guard and protect that property in mass, for the twofold purpose of preserving it from destruction and of securing to the Government of the United States whatever rights of property might ultimately, upon investigation, be established in its behalf.

"The destruction of the warehouses and cotton was an accident, and one of the incidents of war by which property was lost, and the loss must rest where it fell.

"The Government of the United States never attempted to appropriate this property to its own use, but only to guard and protect it for the time being.

"In this view of the case the counsel for the United States maintains that even if it should be the judgment of the commission that the claimant is a French citizen, it is yet true that the Government of the United States is not liable under the treaty for the loss, it not having arisen from any act of the civil or military authorities of the Government of the United States, but, on the contrary, from an accident and an incident of war over which neither the civil nor military authorities of the Government of the United States had any control, and which, indeed, they were powerless to prevent."

In the Phillippi case special counsel for the claimant submitted in reply the following argument:

"Upon the express terms of the treaty we maintain that the property of this nonresident neutral was protected by the principle of 'public law, justice, and equity.'

"The property was lawfully acquired by her. She was in full possession of it in a warehouse which *pro hac vice* was hers. She was dispossessed by the military authority on 12th of April, and excluded from all control over it, and this continued to 25th of May, when the explosion took place, which destroyed it. In all this time, seeing the danger to

which the property was exposed, she may have made such disposition of it by removal or sale as would have avoided loss to her. It is no answer to say that it is uncertain she may have done either.

"The seizure of all the warehouses, containing 17,073 bales of cotton, was of advantage to the government, as it enabled it to secure such portions as belonged to the hostile organization and to those who sustained it. All that was not destroyed was delivered by the provost-marshal to Captain Sam'l Lappin, and by him transferred, as the law directed, to the special agents of the Treasury.

"If we are right in the contention that the property of the claimant was protected by the principles of 'public law, justice, and equity' applicable to the case, then, upon undisputed law, the depriving her of the custody and control of it charges the government with the responsibility of restoring the property or accounting for its value.

"It is of no consequence to the claimant that the loss has been occasioned by one cause or by another. If her cotton had been part of that testified to have been shipped, and had been lost by the perils of the sea; or if, after delivery to the Treasury agent, he had sold it and converted the proceeds to his own use, in either case it would be no answer to say the government has not received any benefit from the seizure.

"It is on this view of the case we have not deemed it essential to go into the investigation of the facts attending the great explosion, by which so much property was destroyed and so many lives lost, for the purpose of demonstrating that it resulted from the grossest negligence.

"The claim now made is for cotton, but it stands on the same ground under the treaty, and must therefore be regarded in the same manner as if it were for so many bushels of corn or of wheat.

"Neither the abandoned nor captured property act, nor any other act of Congress, differs cotton from any other product.

"We conclude by saying that if by 'the humane maxims of the modern law of nations the private property of *noncombatants* is exempt from capture as booty of war,' it needs no argument for the position that, *a fortiori*, such exemption must be extended to the property of a *nonresident neutral*."

The counsel in the case of Bercier and Laborde claimed that—

"From the day of the capture of Mobile said cotton has been treated by all parties as captured cotton, by the general in command, by his quartermaster, by the quartermaster in New York, to whom General Canby gave notice that he had ordered all cotton captured in Mobile to be sent, by the Secretary of War, when he ordered General Van Vliet to turn it over to the Treasury agent, and finally by the Court of Claims in ordering the proceeds to be paid over to the claimants, and by the Secretary of the Treasury when he reported to Congress on the subject. In giving the above judgments of the Court of Claims, the Secretary says to Congress, 'Statement C contains a list of awards of the United States Court of Claims for the proceeds of captured or abandoned property under the act of March 12, 1863, presented to and paid by the Treasury Department up to June 30, 1876.'"

In both the foregoing cases the claim was disallowed, upon the ground, as it was understood, that the Government of the United States was not liable for the pecuniary losses caused by the explosion of the 25th of May 1865.

Oscar Bercier & François Laborde v. *United States*, No. 56, Boutwell's Report, 148: Commission under the convention between the United States and France of January 15, 1880.

Castel's Case.

"Neutral property in a belligerent's territory shares the fate of war the same as that of subjects or citizens. If injured or destroyed in battle or siege, in the absence of circumstances evincing wantonness or culpable neglect on the part of the government within whose jurisdiction it is, the public law furnishes the owner no redress against such government. The case is not altered if the owner happens to be an officer of a neutral power.

"The house and contents of José Castel, who is represented to have been a citizen of the United States and its consul at Puerto Cabello, were injured in battle, or siege, with fighting through several days, between the federal and government forces, near the close of the Venezuelan civil war, in 1863.

"We find nothing in the evidence sent us to justify the finding of the old commission that the loss of a part of the effects 'might and should have been avoided,' in any such sense as to create a liability against Venezuela. No such claim was made by Castel. There does not appear, and it is not claimed, that there was wanton or avoidable injury done. The line, however, between what is avoidable and what not, occurring during an engagement, if such be ever discernible, we would not undertake to draw. There is no showing of injury before or after the conflict.

"The claim, which is for $3,863.75, as of 1868, and on which the sum of $2,000 was before awarded, is disallowed.

"We have reached this conclusion upon the hypothesis that Castel was, as represented, a citizen of the United States and its consul. It is doubtful, however, whether he ever was such citizen. Three of his witnesses speak of him as a French subject; and the records in the State Department show he was only acting vice-consul of the United States, which he might have been, although a Frenchman as to citizenship."

Little, commissioner, for the commission, *José Castel* v. *Venezuela*, No. 26, United States and Venezuelan Claims Commission, convention of December 5, 1885.

Shrigley's Case.

Claimant, a citizen of the United States, claimed $12,717.50 as damages from Chile for the destruction and appropriation of his property. It appeared that during the civil war in Chile in 1891 he removed his family from his residence at Miramar, leaving the house in charge of his servants; that on August 14, 1891, certain troops of the Balmaceda Government, under command of their officers, occupied the premises and despoiled and carried away property to a considerable amount; that on the night of August 23 the house was again taken possession of by the Balmaceda forces, who put the servants out in order to occupy it themselves; that horses of the regiment were quartered in the garden and park; that trees, plants, and fences were destroyed, and the house completely sacked.

The agent of the United States, maintaining the liability of Chile, cited Wharton's Digest, sec. 223, pp. 579, 580, and 598; Wharton's Digest, sec. 225, p. 599; *ibid.* sec. 225, p. 599; Halleck's Int. Law, II. p. 37; *Willett* v. *Venezuela*, Venezuelan Report, pp. 96–112; *Jean Jeanneaud* v. *The United States*, Report of the French Claims Commission, p. 132; *Joseph Chourreau* v. *The United States*, French Claims Commission, pp. 134–146; *Bertrand* v. *The United States*, French Claims Commission, p. 147; *Meng* v. *The United States*, French Claims Commission, p. 189.

The agent of Chile contended that claimant must show beyond a reasonable doubt not only that he was in possession of the property which he specified as having been lost, but also that it "was taken or destroyed by the Chilean army, acting under the orders of duly authorized officers, or that it was taken by the Chilean army under such circumstances that the officers of the army were bound in good faith to have prevented the pillage."

The commission unanimously rendered the following decision:

"This claim leads us to the consideration of two questions—one of law, the other of fact.

"In regard to the first, we must determine to what point Chile must be considered liable for the acts of her troops or soldiers.

"In view of the decisions rendered by similar commissions that have met at this capital, as a result of the treaties signed by the United States and Mexico, Great Britain, and France,

we are of opinion that the following propositions can be accepted as correct:

"(*a*) Neutral property taken for the use or service of armies by officers or functionaries thereunto authorized gives a right to the owner of the property to demand compensation from the government exercising such authority.

"(*b*) Neutral property destroyed or taken by soldiers of a belligerent with authorization, or in presence of their officers or commanders, gives a right to compensation, whenever the fact can be proved that said officers or commanders had the means of preventing the outrage and did not make the necessary efforts to prevent it.

"(*c*) Acts of simple marauding or pillage practised by soldiers absent from their regiments and from the close vigilance of their commanders do not affect the responsibility of governments. Such acts are considered as common crimes, subject only to ordinary penalties.

"In view of these principles, and having before us the evidence submitted by both parties, we consider that the claimant, W. S. Shrigley, is entitled to compensation for the losses suffered, and we award him the sum of $5,086, in United States gold coin."

W. S. Shrigley v. *Chile*, No. 4, Am. and Chilean Claims Commission, treaty of August 7, 1892, Shield's report, 38; opinions of the commission, 139.

An award on precisely similar grounds was made in the case of *Jennie R. Read* v. *Chile*, No. 13.

Case of Du Bois.

Edward C. Du Bois, a citizen of the United States, made a claim against Chile growing out of the acts of the military authorities of that government in Peru in 1880 and 1881. Du Bois claimed at that time to have had possession as mortgagee of such part of the Chimbote, Huaraz and Recuay Railroad as was then completed and in operation, and to have had on hand at Chimbote a large quantity of machinery, implements, and material for the construction of the rest of the road. The evidence showed that on September 10, 1880, "General Patricio Lynch of the Chilean army entered the harbor of Chimbote with certain Chilean ships and took possession of said town and said railroad; that the town was not fortified nor was any resistance made to his landing, nor were there any Peruvian soldiers within hundreds of miles of said port; that the soldiery under the command of General Lynch began an indiscriminate, unjustifiable, and unprovoked appropriation, destruction, and despoliation of the memorialist's property,

notwithstanding notice was given that he was an American citizen; and that General Lynch on departing gave orders for the destruction of the locomotives and rolling-stock of said railroad, and a large amount of lumber and ties were by his orders burned and destroyed. Claimant caused inventories of the property destroyed and taken away, both of his individual property and the railroad property, to be made out by parties cognizant of the amount and value thereof, and duly protested against the said illegal acts of said troops. It also appears that afterwards, in December 1881, the Chilean forces, under command of Capt. Jorge Montt, again visited Chimbote and took possession and removed all rails, cross-ties, and other railroad property left there; and again, in January 1882, the said Chilean forces took and carried away all rails, plates, bolts, etc., belonging to the railroad and in the memorialist's possession, against all of which claimant duly protested."

There was also evidence introduced by the claimant to show that the destruction and carrying away of this property was not necessary as a military operation, but was wanton and without excuse.

Claimant asked judgment for the amount due him by the Government of Peru on account of the construction of the road, and for the value of his individual property taken and destroyed; and he claimed under the laws and usages of Peru 15 per cent profit on his contract to build the road, which profit he alleged that he would have made but for the destruction committed by Chile. The total claims and interest amounted to $2,451,155.58.

Chile offered evidence tending to show that claimant had no individual property on this railroad, and that the destruction and carrying away of the property was a legitimate act of war, as it belonged to Peru.

Briefs were filed by the private counsel for the claimant and by the agent for Chile, and the case was fully argued by the agents for the United States and Chile, and assistant counsel for Chile.

A majority of the commission, Messrs. Claparède and Goode, decided:

"That the Government of the Republic of Chile should be held responsible for the wanton and unnecessary destruction of the claimant's property at Chimbote by General Lynch, in command of the Chilean forces, and we find that claimant is

entitled to recover damages from the Government of Chile in the sum of $155,232 United States gold coin."

Edward C. Du Bois v. *Chile*, No. 2, convention of August 7, 1892, Shields's Report, 20; opinions of the commission, 193.

Mr. Gana dissented, maintaining that the railroad and other things in question were the property of the Government of Peru and consequently that the commission had no jurisdiction of the case, to say nothing of the fact that Chile had the right to seize and appropriate the property of her enemy.

3. APPROPRIATION OF PROPERTY.

Case of the "Splendid."

The brig *Splendid*, the property of citizens of the United States, was taken possession of by the Mexican authorities at Vera Cruz on August 3, 1829, and used for the transportation of troops. The commissioners allowed the sum of $2,093.67 for the seizure and employment of the brig, being the fair price of the services rendered by the vessel and crew, with interest at the rate of 5 per cent.

Commission under the convention between the United States and Mexico, of April 11, 1839. A similar decision was made in the case of *John Kennedy and Ferdinand E. White* v. *Mexico*, for the use of the bark *Ursula* for the transportation of troops in 1829 from Vera Cruz to Tecoluta.

Belden's Cases.

John Belden, a citizen of the United States, owned a house at Matamoras, in which, in 1836, his clerk and agent rented three rooms to the general of the Mexican forces at that point for his personal occupation. Subsequently, without the consent of the owner or of his agent, and in disregard of the contract, the whole house was filled with troops and converted into barracks. The umpire awarded as rent for the use of the house, and as compensation for damage done to it by the occupation, the sum of $16,815.29.

Commission under the convention between the United States and Mexico, of April 11, 1839.

The house above mentioned continued in the occupation of the Mexican forces till May, 1846, when it was taken possession of by the United States Army under General Taylor. The claimant therefore presented another claim to the commissioners under the act of Congress of March 3, 1849. The commissioners rendered the following decision:

"The evidence in the case very clearly shows that the possession of the claimant's property by the authorities of Mexico was wrongful, and in addition to compensation for the use of

it the government is clearly liable for any injury done to the property whilst in possession of it. The claimant urges that he is now entitled to compensation for the use and value of his property from the 11th of April, 1839, because he says it is to be presumed that the umpire, being concluded by the stipulations of the convention of that date, could not make an award for any injury or damage accruing to claimants after that period, and he also deduces as proof of that presumption a certain discrepancy between the sum allowed by the American commissioners and the award made by the umpire. But this board is of opinion that nothing in the case before the former commission appears to raise such a presumption. The * * * amount of damages which should be awarded was a disputed point between the members of the joint commission, but it does not appear that any question was raised as to the time up to which these damages should be computed. The claimant himself, by his memorial, demanded that the damages should be computed for five years. The first possession of the premises by the Mexican authorities was shown to have been in October, 1836, and the claim was presented to the joint commission in September, 1841. The American commissioners, however, computed damages for five years and five months—that is, up to February, 1842, inclusive. * * * This matter, however, is put at rest by the claimant himself, for in his evidence in the case he shows that his attorneys * * * demanded in his behalf rent from the date of the award only, that is from the 25th of February 1842. * * * This board is therefore of opinion, and does decide, that the aforesaid claim of John Belden for the forcible use of and the injury done to his property in the town of Matamoras, from the 25th of February, 1842, to the 17th day of May, 1846, by the Mexican troops, is a valid claim against the Republic of Mexico and does accordingly allow the same."

The commissioners subsequently awarded Belden $5,342.87—principal, $4,208.33; interest, $1,134.54.

Saulnier's Case.

On May 18, 1846, General Bravo, commanding the Mexican military forces in Vera Cruz, issued on order, agreeably to the decree of the national government, requiring all Americans to leave Vera Cruz within eight days. The ground of this order was the existence of hostilities between Mexico and the United States. Among the persons affected by it was Elisha H. Saulnier, an American merchant at Vera Cruz, who, in the prosecution of his commercial operations, had left Vera Cruz for New York in March, 1846, being at that time indebted to the Mexican Government for duties on previous importations to the amount of about $4,000, for which he had given bond with sureties. Notice of the order, however, was given to the clerks and agents

whom he had left in charge of his business in Vera Cruz, and a demand was coincidently made upon them for payment of the duty bonds, which had not then matured. They had no means of meeting this demand but by the sale of the goods. Other creditors, probably alarmed in consequence of these proceedings, also claimed the benefit of a lien which by law they had upon the property of the claimant. To enable the agents of Saulnier to pay the debts thus pressed upon them, though not due, his property, represented to be of the value of about $48,000, was sold at auction and produced only about $7,000. A claim for the loss was presented to the commissioners under the act of Congress of March 3, 1839.

The commissioners said that the principal question to be decided was whether the sale of the goods was to be regarded as voluntary on the part of the agents of the claimant or as compulsory and forced upon them by the illegal exactions of the Mexican authorities. They found upon the testimony that the sale was of the latter character, but they observed that it was not easy to determine the extent of the resulting losses. It appeared by the proofs "that the depreciation of the value of property in Vera Cruz at the time was attributable to the war which had broken out between the countries," and there was "no reason to believe that the claimant could have realized the estimated value of his property if he had been allowed all the advantages which he was entitled to under the treaty of 1831. That treaty allowed him only six months to close his affairs, even if he had been in Vera Cruz at the outbreak of hostilities.[1] He would not have been permitted to extend his mercantile pursuits, nor to remove his goods into the interior. * * * A good deal of the injury was "attributable to the state of war, depreciating the value of property, breaking up commercial pursuits, and in various ways bringing distress upon the community where it unhappily exists." The commissioners subsequently awarded as principal $12,000, and as interest $2,950—in all, $14,950.

Hollenbeck's Case.

On the occasion of the attack of Walker's filibusters on Castillo Viejo, February 15, 1857, the Costa Rican forces, as part of their operations for the defense of the place, set fire to a building,

[1] The commissioners elsewhere expressed the opinion that the right under the treaty to *remain* in the country for the purpose stated did not include the right to *return* for that purpose.

in consequence of which a hotel belonging to Thomas Townsend and John E. Hollenbeck, citizens of the United States, caught fire and burned down. Compensation was awarded to the owners for the value of the hotel. The lessees, who also were citizens of the United States, received an award for the value of personal property destroyed in the same fire.

Bertinatti, umpire, convention between the United States and Costa Rica of July 2, 1860.

Garza's Case.

Numerous claims were presented to the mixed commission under the convention between the United States and Mexico of July 4, 1868, for indemnity for the seizure of cattle belonging to citizens of Mexico in Texas by the military authorities of the United States in 1863, 1864, and 1865. The typical case was that of the *Heirs of Pedro José de la Garza* v. *The United States*, No. 736, which the agent of the United States moved to dismiss on the ground (1) that the proofs of citizenship were defective; (2) that the claimant was at the time of his alleged injuries "domiciled within the territorial limits of the State of Texas, with which State the United States was then at war, and was therefore an enemy of the United States" and could not "claim against the United States" for the cattle taken or destroyed by troops of the United States within the hostile territory; and (3) that, if the claimant was not domiciled in Texas, he owned land there, and the property alleged to have been taken or destroyed was the growth and produce of the soil of enemies' territory and, as such, enemies' property in the sense of the law of nations. Other grounds were laid, resting in matters of evidence.

The umpire, Sir Edward Thornton, after referring to the voluminous and contradictory character of the evidence in the case of Garza, said:

"There still remains, however, strong evidence on behalf of the claimants that a certain amount of live stock belonging to De la Garza was killed and used or taken by troops of the United States, who were under the orders of Colonels Davis and Haynes. The umpire does not think that this fact is refuted by the evidence produced by the defence, or that it is incompatible with that evidence. But he is of opinion that it is satisfactorily proved that the amount of the claim is immensely exaggerated, and that it is impossible that it could have reached anything like the sum claimed. The value and number of the animals really used or taken must to a certain extent be con-

jectural; but, as far as the umpire can judge, he thinks that $6,000 would not much exceed nor be much less than the amount due. The umpire therefore awards that there be paid by the Government of the United States on account of the above-mentioned claim the sum of six thousand dollars ($6,000) in gold coin of the United States, with an annual interest of six per cent, from the 30th of November 1863 to the date of the final award."

Case of the "Indus."

In the case of *Charles H. Wheeler and Ansel B. Anderson, owners of the American brig Indus*, v. *Mexico*, No. 187, before the commission under the convention of July 4, 1868, it was represented that the brig was cleared from Tampico, Mexico, for Tabasco December 16, 1862. Being detained, however, by low water on the bar at Tampico, she was taken possession of by the French forces then in those waters and held until January 14, when they abandoned her to her captain and crew, having in the meantime employed her in their naval operations. On the following day she was seized as prize by the military forces of Mexico, under Gen. Juan José de la Garza, who, without any judicial proceedings, detained the brig till the 2d of the following March, when he expelled the officers and crew and on the next day sold her at public auction. On the 6th of April the Mexican Government was appealed to by the American minister, and three days afterward ordered the vessel to be restored, but the order was too late and was not carried into effect. The commissioners, Mr. Wadsworth delivering the opinion October 6, 1870, held that the question of prize or no prize was not at issue. They said: "Under the treaty of 1831 between the United States and Mexico, and the law of nations, the latter government had a choice to send the vessel before the established courts for prize causes in the country, or to release the property and indemnify the owners. That government preferred the latter course, but was disappointed by the hasty and wrongful conduct of General Garza. We think the claimant is entitled to an award." They awarded $10,000 for the vessel and contents, $1,400 for demurrage, $1,500 for the crew expenses and loss, and $100 costs, making $13,000 in all, with interest from March 2, 1862.

Case of Putegnat's Heirs.

"General Avalos, commanding at Matamoras, in the service of the Mexican Government, during the siege of that place in October 1851 by Carvajal, seized the storehouse in which Putegnat's

goods were on sale at the time, turned the storehouse into a fortification, from whence to resist and annoy the enemy, and forbade the removal of the goods to a place of safety. In the course of the contest the house was set on fire by the shells of the enemy and was destroyed.

"In determining whether there is a liability in this case on the part of the Government of Mexico to pay the value of the goods thus destroyed by the enemy, I shall proceed upon the conclusion, which I draw from the facts in the case, that the goods were lost because of the seizure of the house and the order forbidding their removal. I shall treat the case as a seizure of the house and goods by General Avalos for the public service, and their destruction by the enemy as a necessary consequence of the nature of the service to which, for the public benefit, the goods were subjected. I shall assume that if the government would be liable for the house destroyed by the enemy's fire, it would be liable for the goods also, perhaps much more so, as they might have been removed to a place of safety in a few minutes, since the quantity was not large.

"I conceive that the Government of Mexico is not liable for property destroyed by the enemy during the siege of a town without any complicity on its part; nor for property necessarily and incidentally destroyed by the government in its fire upon an enemy. To make the government responsible, the property must be taken by its authority to be used against the enemy (to assist an attack or make good a defense, for instance) or destroyed or carried away to prevent the enemy from using it. This is what Vattel calls taking deliberately or by way of precaution. 'As when a field, a house, or a garden, belonging to a private person is taken for the purpose of erecting on the spot a town rampart or any other piece of fortification, or when his standing corn or storehouses are destroyed to prevent their being of use to the enemy, such damages are to be made good to the individual, who should bear only his quota of the loss.' (Book 3, chap. 15, p. 402. See also Grotius, book 3, chap. 20, sec. 7.) Property taken or destroyed for the public use lawfully by the civil or military authorities must be paid for by the government. (Mitchell *v.* Harmony, 13 Howard, 115; Hale *v.* Lawrence, 3 Zabriskie, 728; Grant *v.* U. S., 1 Court of Claims, 41.)

"There cannot be much doubt about the general principles. Is there any doubt about their application in this case? The

enemy destroyed the property indeed, but only after the government had taken it for public use, by being used by the government, and because it was so used. It will be found to be an immaterial fact that the enemy destroys the property after the government has found it necessary to seize it and use it against the enemy. The horses, wagons, etc., impressed by the government forces for use against the enemy or in the public service in general, although only a temporary use was intended, must be paid for, although destroyed or captured by the enemy. It is the seizure of private property for the public use and its loss or destruction while so employed, whether by the enemy or the government, that entitles the owner to payment. Even if it be morally certain that the enemy would himself take the property and use it, depriving the owner of it forever, still its destruction by the government entitles the party to compensation. (See Grant's case, *supra;* and observations of Ch. J. Taney in Mitchell *v.* Harmony, *supra.*) We must hold, even in such a case, that the public has received the value of the property, by embarrassing its enemy by its destruction, and is bound to make just compensation. It can never be just that the loss should fall exclusively on one man where the property has been lawfully used or destroyed for the benefit of all.

"I think these people are entitled to an award of the value of the goods and interest. It is therefore awarded that the Government of Mexico pay to the Government of the United States, in the currency of the latter, $2,000, with interest at the rate of 6 per cent per annum from the first of September 1851 to the close of the labors of this commission, and $100 costs for and on behalf of claimants."

Wadsworth, commissioner, delivering the opinion of the commission, August 2, 1871, *Jno. P. Putegnat's Heirs* v. *Mexico*, No. 24, convention between the United States and Mexico of July 4, 1868, MS. Op. I. 618. The same principle was applied by the commissioners in the cases of *Mariano Treviño Garza* v. *Mexico*, No. 892, MS. Op. I. 333; *David C. Bardin* v. *Mexico*, No. 457, MS. Op. II. 163; *Samuel L. Smith* v. *Mexico*, No. 456, MS. Op. II. 164.

Elliott's Case.

"General Corona had undoubtedly a right to appropriate Elliott's property, if necessary for the defense of the country against the French invaders, or to devastate it, if the war required it. The demands of war are even more absolute than those to save one's life, and, nothing appearing to the contrary, he was

obliged to do it. But in all such cases it is expected that the government will repay for the injuries done as much as may be in its power, so that claimant seems to be fairly entitled to a compensation, however highly he may have estimated his losses in his valuation."

Lieber, umpire, April 24, 1871, *Benjamin Elliott* v. *Mexico*, No. 460, Am. Docket, convention of July 4, 1868.

Bowen's Case.

"The umpire considers that the claimant is entitled to compensation for the damage done to his house during its occupation by General Jauregin, and for the wounds which the claimant received when that general was attacked by Carvajal. General Jauregin was doubtless justified in self-defense in taking refuge in Bowen's house; but it was certainly his doing so which brought Carvajal's attack upon the house during which the claimant was wounded. The umpire therefore considers that he is entitled to compensation on both these accounts."

Thornton, umpire, *Smith Bowen* v. *Mexico*, No. 442, convention of July 4, 1868, MS. Op. III. 586.

Case of Bartlett & Barge.

"The necessities of war, in the umpire's opinion, excuse the seizure of such property by the authorities, provided it be paid for, and the government can not be held responsible for the consequential damages which may arise from such seizure."

Thornton, umpire, *Bartlett & Barge* v. *Mexico*, No. 381, convention of July 4, 1868, MS. Op. IV. 606. The claim was based on the seizure by General Cortina, for the use of the Mexican Government in war, of horses and mules employed by the claimants in running a stage from Matamoras to Bagdad. The umpire awarded the value of the property taken, with interest at 6 per cent from the date of the seizure to the final award. S. P., *Cordillera Gold and Silver Mining Co.* v. *Mexico*, No. 734, Thornton, umpire, MS. Op. VI. 419.

Cole's Case.

"The umpire is of opinion that the Mexican Government is undoubtedly liable for farm produce of all kinds, cattle, horses, mules, and other animals, farming implements, and other property belonging to the claimant seized under the authority and by the orders of Mexican officers, and made use of by the Mexican army."

Thornton, umpire, July 15, 1876, *John Cole* v. *Mexico*, No. 948, Am. Docket, convention of July 4, 1868, 6 MS. Op. 497. S. P., Thornton, umpire, *Bartolo Hicks* v. *Mexico*, No. 487, MS Op. VII. 458; *Francis Nolan* v. *Mexico*, No. 337, MS. Op. VII. 411; *Jacob Campbell* v. *Mexico*, No. 454, MS Op. VII. 449.

Marks's Case.

A claim was made for the value of goods in bales and packages taken from claimant's store by the military forces of Mexico for barricades, and never returned or paid for. The military force in question, said the umpire, was acting under orders of General Ruiz, who had been appointed governor of the State of Tamaulipas by the Mexican Government, and actually held that position at the time of the occurrence. The umpire held that "the exigencies of war might have justified the seizure of the goods with a view to defense against the attack made upon the town, but the claimants are clearly entitled to compensation for the property taken from them in this way."

Thornton, umpire, *Jonas Marks* v. *Mexico*, No 639, convention of July 4, 1868, MS. Op. V. 346, VI. 375. In *Joseph W. Hale* v. *Mexico*, No. 58, the claimant had a sawmill and other property which were occupied and used by General Corona and other Liberal commanders in 1860. They also destroyed the mill. Sir Edward Thornton awarded as compensation $20,000, with interest from June 1, 1860. He made a similar award to a claimant "for the damage done to his garden in the country by transforming it into a fortification." "This measure," said Sir Edward, "was taken by the orders of the Mexican Government; but though the construction of such works may be a matter of necessity, a private individual who may suffer from it ought to be compensated for the damage done him." (MS. Op. VII. 400.)

Lacoste's Case.

The embargo in time of war of a warehouse belonging to a person who had fallen under suspicion affords no ground of claim on the part of a neutral whose property, being in such warehouse, was detained there by the embargo for upward of two months while the authorities were engaged in investigating the question of the ownership of such property, the ownership being in doubt.

Thornton, umpire, September 4, 1875, *J. B. Lacoste* v. *Mexico*, Nos. 222 and 717, convention of July 4, 1868, MS. Op. VII., 402.

Case of Armendariz.

In the case of the *Heirs of Pedro Armendariz* v. *The United States*, No. 398, a claim was made for the value of lands in New Mexico, constituting the reservation on which Fort Craig stands. These lands were included in the cession of territory to the United States under the treaty of Guadalupe Hidalgo, by which the United States engaged to protect holders of land in their titles. Under the rules established by the United States for that purpose, the heirs of Armendariz petitioned to be and were recognized as the owners, and their title was confirmed by an act of Congress of June 21, 1860. Prior to this

time, viz, in 1853, the military authorities of the United States had leased the lands of the heirs at a nominal rent, and in 1859 the lease was renewed. In 1864, however, it again expired, and the heirs then demanded a rent of $6,000 a year. On this basis no agreement was made, and the Quartermaster-General sent Armendariz's deed to the General Land Commissioner of the United States, who, on October 25, 1864, gave an opinion to the effect that the title of the heirs was deficient and that the land belonged to the domain of the United States. In consequence of this opinion, the Quartermaster-General on the 12th of the ensuing November notified the agent of the heirs that, such "being the decision of the government officer in charge of the public lands, all further consideration of the case was entirely unnecessary." A diplomatic presentation of the matter by the Mexican minister at Washington elicited on the 18th of July 1865 an exposition of the views of the General Land Commissioner. Prior to this, however, on January 27, 1865, the general in command in New Mexico entered into a new lease with the heirs at $2,000 a year. On the 23d of December 1866 the heirs claimed the rent due up to that time, but it was not paid; and all the papers were sent to the War Department at Washington. The War Department referred them to the Quartermaster-General, who in turn transmitted them to the Third Auditor of the Treasury, who, entertaining an adverse opinion to the heirs, advised that the papers be sent to Congress, which was done. By Congress no action was taken. The claimants preferred to the commission a petition for an award for the value of the lands and their use.

The agent of the United States took the ground that the case involved questions essentially judicial, and that no award should be made to the claimants while those questions were pending undetermined.

The commissioners on May 1, 1871 (MS. Op. II. 306), concurred in treating the entry of the United States under claim of title and the survey and establishment of a military reservation as an appropriation of the private property of Mexican citizens by the United States for public use, and required the United States to make compensation. Without reference to the leases, the authority of the military authorities to make which was in question, they awarded $14,200 to pay for the use and absolute appropriation of the lands, considering the title of the claimants as tolled and vested in the United States

Costa's Case.

A claim was made for the destruction of property and for the imprisonment of the claimant by General Figueroa. The umpire said that at the time a state of war existed, and that claimant was found by the troops of General Figueroa in a part of the country which was under the control of and protected by the enemy. The umpire was therefore of opinion that that commander, availing himself of the rights of war, committed no violation of them in taking possession of the property belonging to a person residing in the enemy's territory. But as there was no proof that the claimant had committed any violation of neutrality, the umpire did not consider that General Figueroa was justified in taking him prisoner and in subjecting him to the treatment which he suffered, and in requiring him to leave the Mexican territory. On the last ground the umpire awarded $2,000, without interest.

Thornton, umpire, *James A. Costa* v. *Mexico*, No. 560, convention of July 4, 1868, MS. Op. IV. 49. The umpire followed this decision in the case of *Alfred F. Marshall* v. *Mexico*, No. 650, MS. Op. III. 414, IV. 54, which was also a case of destruction of property and of arrest by General Figueroa.

Simonson's Case.

A claim was made for the value of some salt seized by the Mexican authorities. Mr. Wadsworth, the United States commissioner, said:

"The government does not show any right in January, 1867, to confiscate salt sold to the parties in 1865, by one of the belligerents in firm possession at the time. Undoubtedly sales by a belligerent of his personal effects, fairly made, within his own or a neutral jurisdiction, will pass the title. In 1867 the government sold the salt, and sold it to pay its troops. That was the trouble. I have observed that most seizures, sacks, and pillages were made by troops that had not been paid. That was the usual resource of the Spanish troops of Alva and the Duchess of Parma in the Netherlands. When their pay was behind and they could not wait any longer, they took a city and plundered it. The people called such an affair 'a Spanish fury.' In this case the city of Tehuantepec on the 7th of January 1867 was sacked and burnt, and the population driven to the woods, Simonson's property going with the rest, and Woolwich's store suffering particularly. So the cargoes of salt were sold off in lots to pay the troops, and finally closed out to one purchaser. In my opinion the claimant is entitled not only to 1,000 cagas, but one-half of 6,666 cagas, at their value, with 6 per cent interest."

It appeared that the salt was delivered by the imperialists to the claimant in repayment of money which he had advanced

to them. The umpire, Sir Edward Thornton, held that under the circumstances the Mexican authorities were justified in seizing the salt in question, and that the Mexican Government could not be made responsible for the loss alleged to have been suffered by Simonson.

H. B. Simonson v. *Mexico*, No. 643, convention of July 4, 1868, MS. Op. IV., 619.

Carpiette's Case.

"In the case of '*Prosper Carpiette* v. *Mexico*,' No. 817, the umpire is of opinion that the Mexican Government had a perfect right in the first instance to seize the goods for which the claimant demands compensation, because there is no doubt that they originally belonged to and were sold by the enemy, a fact of which the claimant could not have been ignorant. They were sold, too, so short a time before the enemy was forced to evacuate the City of Mexico that there can be little doubt that the sale was effected because the enemy foresaw the occurrences which were about to take place. Indeed, this is more evident from the nature of the goods themselves, which had been used for a hospital, and which certainly would not have been parted with if the enemy had supposed that he was still likely to hold the capital for some time. There was nothing retroactive in the decree issued by the Mexican authorities. It merely declared the fact already known to international law that property thus having belonged to the enemy and having been acquired from him, under the circumstances above mentioned, fell to the conqueror. The claimant was invited by the Mexican authorities to prove the innocent character of the property which he had purchased. He failed to do so, but preferred to appeal to this commission. The umpire considers that he thus neglected to avail himself of the remedy which was before him, and has no right to be heard before this commission."

Thornton, umpire, June 16, 1876, convention of July 4, 1868, MS. Op. VI., 465.

Willis's Case.

Claimant kept a hotel in Mexico, at which the wife of a French general boarded. In September 1866 this officer was killed, and his widow got in arrears for board to the amount of $120. These arrears certain French officers then present paid by the delivery to Willis of four saddles and five reams of paper. Not long afterward the French were driven out of

the city, and the Mexican forces demanded the delivery of the saddles and paper as enemy's property. Claimant declined to deliver them up, and they were taken from him; and on the 10th of April 1867, apparently without any judicial trial, he was fined $500 for secreting enemy's property. He declined to pay this fine and a levy was made on his property to satisfy it. The commissioners having differed in opinion, the umpire, Sir Edward Thornton, decided that the claimant was justified in receiving the saddles and paper for the payment of a debt legally due to him, and that there was no evil intention on his part and no attempt to conceal the possession of the property. The fine was unjust in itself, and was rendered more so by the manner in which it was levied, claimant not having been condemned to pay by a court of justice, and not having had an opportunity to defend himself against the charges on account of which he was fined. The umpire awarded the amount of the original debt, and of the proceeds of the property, with interest.

Stillman D. Willis v. *Mexico*, No. 89, convention of July 4, 1868, MS. Op. III. 161; IV. 587.

Brach's Case.

"The claim is on account of the seizure of a debt due by Guadalupe Gonzales to the house of Brach, Schonfeld & Co. This debt was seized by Col. Servando Canales, who was then governor of the State of Tamaulipas, on the ground that it was due to the above-mentioned house established in Matamoras, then occupied by the enemy. It amounted to $7,129.15. Now it was no fault of the neutral house that the enemy had occupied Matamoras, and that he found the house established there, and that it continued to do business there, which it had certainly a right to do. The debt of Gonzales was property belonging to the neutral house, which the Mexican authorities had no right to seize. They had not even the excuse that it was found in territory occupied by the enemy."

Thornton, umpire, *Rudolph Brach* v. *Mexico*, No. 462, convention of July 4, 1868, MS. Op. VII. 455.

Case of the "James Douglas."

"In the case of Catharine J. Johnson, executrix, No. 449, the memorial alleged that the claimant's testator was the sole registered owner of the British schooner *James Douglas*, which vessel, while on a voyage from Cuba to New York, met with disaster which led to her being abandoned by the master and crew;

that she was subsequently fallen in with by a United States vessel of war, which took her into the port of Beaufort, North Carolina, where she was appropriated to the use of the United States Government; that on application to that government for her restoration the Secretary of the Navy gave directions that the vessel be surrendered to her owner on his renouncing all claims for the use of the vessel by the United States; that, notwithstanding these orders, the vessel had never been restored to her owner, but was still in the port of Beaufort under the control of the officials of the United States. The claimant claimed damages $7,000 besides interest.

"The proofs showed that after the vessel was brought into port, and before any claim was interposed on behalf of her owner, some use had been made of the vessel by the Navy Department; that the claim of the owner was interposed through the British legation, and that the United States Government at once offered to surrender her on payment of a reasonable salvage to the officers and crew of the vessel which brought her in. Some objection being made to the payment of the salvage asked, the United States Government directed her surrender without salvage, on the claimant's waiving claim for compensation for the use that had been made of her while in port. No objection was made to this condition, and no further claim was ever advanced by any person for the vessel. She remained lying at Beaufort waiting requisition of her owner, and nothing further was ever heard of the matter until the filing of the memorial before the commission.

"The commission (Mr. Commissioner Gurney dissenting) made an award in the following words:

"'We think it does not appear that the United States appropriated the vessel, and we regard it as yet being the claimant's property. The claim is therefore disallowed.'"

Am. and British Claims Commission, treaty of May 8, 1871, Art. XII. Hale's Report, 172.

Henderson's Case.

"The claimant, a native of Scotland, having come to the United States in 1850, a cultivator and dealer in cotton, in the parish of West Feliciana, Louisiana, owned 112 bales of cotton, which were stored on the Bienvenue and Carmina plantations, Louisiana, and were seized by the United States Army, under the command of Major-General Banks, on the 10th and 12th of

June, 1863, and were used by him for the construction of fortifications during the siege of Port Hudson.

"Receipts were given by the quartermaster of the United States Army for said cotton.

"The petitioner claimed $25,710.12 and interest, taking the rate of 51 cents per pound, which he gave evidence to show was the market value of such cotton in New Orleans at the time of seizure.

"Her Majesty's counsel contended that the claimant was entitled to compensation, as the Constitution of the United States prescribed that no person should be deprived of his property without due process of law, nor should private property be taken for public use without just compensation.

"The United States counsel argued that the cotton had been taken for strictly military use in the enemy's country, and that it stood on the same footing as timber cut for military roads or growing crops destroyed by the necessary passage of an army, and that the United States were not bound to give compensation. He also pointed out that Mr. Converse, of whom the claimant had purchased part of this cotton, had only paid ten cents a pound for it in Confederate currency in January, 1862, and that at that time no considerable depreciation of Confederate currency below gold existed.

"Commissioners Gurney and Corti signed an award of $7,914 gold in favor of the claimant."

Henry Henderson v. *The United States*, No. 41, Am. and Br. Claims Com., Treaty of May 8, 1871; Howard's Report, 40, 365, 368. See also Hale's Report, 44.

Dissenting Opinion. Mr. Frazer, the United States commissioner, filed the following dissenting opinion:

"Henderson, in whose behalf Great Britain makes this claim, is a British subject by birth, and has taken no steps towards becoming naturalized in this or any other country. He became domiciled near Port Hudson, in the parish of West Feliciana, in 1850, employed in cultivating and dealing in cotton, and has ever since resided there. There is no room to doubt that it was his voluntary and permanent domicil. It is not even alleged that he maintained a personal neutrality during any period of the rebellion, and there is no proof whatever of that fact. In June, 1863, he owned in that neighborhood 112 bales of cotton. After twenty-seven days of effort, by continuous fighting, General Banks, commanding the United States forces investing the fortified town of Port Hudson, held by rebels, found himself unable to carry the works by assault, and thereupon commenced a regular siege of the place. Cotton found in the neighborhood, including Henderson's, was, without discrimination, seized by the United States forces and used almost exclusively in the construction of fortifica-

tions, a purpose to which cotton in bales is known to be well adapted in the emergencies of a siege. The officer who took Henderson's cotton gave papers as follows:

"'Received, Bienvenue plantation, West Louisiana, from the plantation of Jed. D. Smith fifty-one (51) bales of cotton by order of Colonel S. B. Holabird, seized by order.

"'T. K. FULLER,

"'*Capt. 75th N. Y. Vols., A. A. Q. M.*

"'JUNE 10, 1863."

"'JUNE 12, 1863.

"'I have taken, by order of Colonel S. B. Holabird, for the United States Government, 133 bales of cotton from the Carmina plantation, West Louisiana.' (Signed as above.)

"The fortifications and works of the besiegers were extensive, being equal to a continuous line of over seven miles. After the fall of Port Hudson, the cotton was gathered up, cleaned and sold, and the proceeds applied to the use of the troops of the United States.

"Under these facts, the majority of the commission determined that Henderson has a valid claim against the United States for the value of his cotton, and an award is made in favor of Great Britain accordingly. I can not join in this award; and the principles of public law involved in it and contravened by it seem to me so very important and so well settled that I feel it my duty respectfully to state the reasons which control my action now, and may control it in other cases:

"1. That a foreigner domiciled in the United States, voluntarily remaining in a hostile part of it in rebellion against it, that part recognized by the country of his origin as a belligerent, thus choosing to trust himself to its protection—thus being, in law, an enemy of the United States, without even pretending that he was in fact neutral, may be recognized as entitled to maintain a claim against it for property appropriated by its invading armies, when no citizen of the United States could, under like circumstances, claim such consideration, is a proposition to which I must enter an earnest and emphatic dissent. I state it, but I will not argue it. If it has any support in equity, justice, or the public law, then I am greatly in error.

"2. The cotton was the property of an enemy of the United States, so recognized by every writer upon international law, and so held by all tribunals, both American and British, as well as international, in every reported case involving the question. The mixed commission, constituted under the convention of 1853, between the two countries, so held in Laurent's case. Indeed, it went further, and held that an unnaturalized Englishman, voluntarily domiciled in a country at war with the United States, was not even to be regarded as a British subject—thus going a little too far, as I think.

"But the property of Henderson was as liable to capture as the property of Jefferson Davis himself, or any rebel in arms. I believe this is not questioned. That the property itself was a proper subject of capture on land under the modern rules by which civilized nations govern themselves in war, seems to me to be quite as clear.

"The legislation and the known practice of the rebel authorities made it so. They made cotton the basis of their public credit, by a policy

which aimed to deal largely in it on government account—to purchase it even before it was grown, and hypothecate it as security for the payment of loans, with the proceeds of which they did, to a large extent, supply themselves with arms and munitions of war, and with a fleet of armed vessels to infest the ocean and destroy American commerce. They committed it to the flames, whether owned by friend or foe, rather than permit it to reach the markets of the world otherwise than through their own ports—thus endeavoring by warlike operations to secure to themselves a monopoly in supplying the foreign demand, that they might thereby constrain nations abroad to aid them in their struggle. In short, cotton was a special and formidable foundation of the rebel military power. It was more important than arms or ships of war, for it supplied these and all else besides. It was more potent than gold, for it not only commanded gold, but it largely enlisted in behalf of the rebels the interest of foreigners, whose manufacturing industry was in a measure paralyzed, because this staple was needed to keep it in motion. The necessities and purposes of war, therefore, required its capture at every opportunity more imperatively than the capture of munitions and implements of war; indeed, that necessity was quite as pressing and certainly as humane as the killing of men in battle, for it was no less efficient as a means of accomplishing the subjugation of the rebel armies and reestablishing the national authority. It is to me astonishing if there is a difference of opinion upon this subject.

"The Supreme Court of the United States, recognizing to the fullest extent all the limitations which the practice of nations has lately engrafted upon the right of capture upon land, so held in the case of a loyal American widow. (See the case of Mrs. Alexander's cotton, 2 Black.) This is high authority, especially when it is remembered that that august tribunal has certainly exhibited no tendency whatever to give undue license to military authority or warlike operations. Complaint, if any, has been altogether in the other direction. But I would be quite content, in the absence of any authority, to trust the question with the common sense of all civilized nations, so long as war, in any form, shall be recognized as a lawful method of deciding differences. If the capture was rightful by the laws of war, it would be a novelty in international law that its exercise involves an obligation to make compensation.

"3. But another point remains, which in my judgment is absolutely conclusive against any award on account of this claim, if the rules of international law should control the determination of the question. Henderson was voluntarily and permanently domiciled in one of the rebellious States—the territory held by the so-called Confederate States recognized by Great Britain as a belligerent. By that act of recognition all British subjects were bound. If they chose to remain in that part of the world, they voluntarily took the chances of war and entrusted their interests to the protection of that organization. They must look to it for protection from the results of war; and now that it has, by the fortunes of war, been exterminated, the country of their origin has no right (save possibly in exceptionally flagrant cases) to intervene in their behalf, as against the United States for indemnification. This, I think, is as clearly established as a rule of international law as anything can be. It was so held in Laurent's case, *supra*. It was so declared by the American Secretary of

State in reference to the bombardment of Greytown, and was then assented to by the English Government under the advice of the law officers of the Crown.

"The attorney-general on that occasion declared in Parliament that *every jurist admitted it.* He said 'the principle which governed such cases was that the citizens of foreign states who resided within the arena of war had no right to demand compensation from either of the belligerents.' (See Wheaton, International Law, 173, note by Lawrence.) This rule is so much in the interest of the peace of nations that it should be steadfastly maintained.

"A right to interfere is so intimately associated with the duty of doing so that any relaxation of this principle would but multiply occasions of war and afford too many opportunities for that armed intervention in the quarrels of others which is sometimes sought in vain by ambitious rulers."

Ward's Case.

"The claimant alleged that he was born in the parish of Ballamquord, county of Galway, Ireland; that he resided in the city of Richmond, Virginia, from the 13th of April 1861 until July 1863, when he went to Wilmington, North Carolina, and remained there until after the close of the war. Wilmington was captured by the United States Army, under Major-General Schofield, on the 22nd of February 1865.

"Claimant alleged that on the 3rd of March 1865 he was owner of two bales of first-class cotton, weighing in all 1,005 lbs., and that they were worth at the rate of fifty cents per pound at the time they were taken.

"He alleged that on the above-mentioned date one P. C. Hayes, a lieutenant-colonel and provost-marshal of the United States Army, took the two said bales from him, and that they were used for beds in the United States hospital for the comfort of the sick soldiers belonging to the United States Army. He also alleged that he had never taken any steps towards being naturalized in any other country than that of his birth, and that he had remained neutral during the war.

"He claimed $507.50 as indemnity for his losses.

"In support of his allegations he filed an affidavit of a certain Sarah Ward, who therein states that she saw the two bales of cotton taken, and reported the fact to Major-General Schofield, United States Army, who gave her a letter to Dr. Plunkett, the hospital surgeon, ordering the latter to give a receipt for the two bales taken from Thomas Ward.

"She annexed to her affidavit the original receipt which she alleges was given her by the said Dr. Plunkett, and which is in the following form:

"'OFFICE, PROVOST-MARSHAL-GENERAL,
"'*Wilmington, North Carolina, March 3, 1865.*

"'Received of Thomas Ward two bales of cotton.

"'P. C. HAYES,
"'*Lieutenant-Colonel and Provost-Marshal-General,*
"'*United States Army.*

"'The above cotton was used for beds in this hospital for the comfort of the sick (2nd division hospital, 23rd army corps), amounting to 525 lbs., 480 lbs.

"'F. C. PLUNKETT,
"'*Assistant-Surgeon," etc.*

(Indorsed:)

"'WILMINGTON, *March 11, 1865.*

"'Respectfully referred to Superintendent Special Agent.

"'E. L. HAYES,
"'*Treasury Agent, B. B. General.*'

"As to nationality, claimant files a certificate given to him by the acting British consul at Richmond, dated the 12th of August 1862, to the effect that he is a British subject and has never forfeited his allegiance to the Queen of England.

"As to neutrality, he filed a paper, dated Wilmington, North Carolina, September 4th, 1863, and signed 'Robert S. Radcliffe, captain,' etc., and in which paper the words 'T. Ward, exempted,' are written.

"The United States agent immediately after the memorial and accompanying paper were filed made a motion to dismiss the case for insufficiency of proof, and took some exceptions to the testimony.

"These motions were overruled by the commissioners, and as the United States agent raised the same objections in his final brief it is not thought necessary to report on said motions.

"The claimant offered no other testimony than that already described, which accompanied the memorial, and the United States filed no proof at all against the claim.

"When the claim came up for final hearing the United States contended:

"Firstly. That the affidavit of Sarah Ward was simply an *ex parte* affidavit, taken before a notary public in Richmond, and was not such a document as the thirteenth article of the treaty bound the commissioners to receive and consider.

"Secondly. That the certificate of the British consul at Richmond as to the nationality of the claimant was not com-

petent evidence, as the information on which he relied to base his certificate was not shown.

"Thirdly. That the certificates of Lieut. Col. Hayes and Dr. Plunkett were not evidence to prove the facts therein stated, as it should have been no part of their duty to give such receipts, and it was not shown why they did so.

"Fourthly. That the memorial could not be considered competent evidence to prove the claim of the petitioner; that it was simply his pleading to be supported by proofs.

"Fifthly. That there was no proof of the value of the cotton.

"Sixthly. That there was no proof of the title of the claimant to the cotton, such as evidence of purchase, etc.

"Her Majesty's counsel argued—

"Firstly. That the receipts filed by claimant were the very evidence furnished him by the United States officials at the time of taking the property, and that no proof had been brought by the United States to show either that they were not genuine or that the officers who gave them did not have the authority to do so.

"Secondly. That the affidavit of Sarah Ward was such a document as should be considered by the commissioners.

"Thirdly. That the certificate of the British consul at Richmond was given in the due course of his official duty as consul, and is entitled to all the presumptions which attach to such an official act, and makes a sufficient case, *prima facie*, that the claimant is a British subject.

"The commissioners rendered the following decision:

"'No. 1.—Thomas Ward *v.* The United States.

"'Without expressing any opinion on the effect to be given to the evidence of Thomas Ward and Sarah Ward, the commissioners are of opinion that the receipts and vouchers given by acknowledged officers of the Army *at the time* show that the cotton was taken from the claimant for the use of the United States. This we think sufficient, in the absence of all countervailing proof, to show the taking by the United States. Nothing appears to indicate that it was taken as enemy's property, and the question of the right so to take is therefore not involved. It was taken nine days after the capture of Wilmington, North Carolina, by the United States, and the possession of the place ever after continued in the United States. We are not, upon the facts before us, prepared to hold that, at the time of the taking of the cotton, the place was enemy's territory. We agree, therefore, that the claimant

is entitled to compensation for the property, the amount being the average value of cotton usually produced in that neighbourhood, with interest at six per cent per annum until January 31st, 1873.

"'We therefore award that the sum of $620.44 be paid by the Government of the United States to the Government of Her Britannic Majesty in respect of the claim of Thomas Ward.

"'L. CORTI.
"'RUSSELL GURNEY.
"'JAMES S. FRAZER.'

"It will be seen by the above opinion that the commissioners awarded the claimant interest at the rate of six per cent. With very few exceptions interest at the above rate was included in all the awards made thereafter."

Thomas Ward v. *The United States*, No. 1, Am. and Br. Claims Commission, Treaty of May 8, 1871, Howard's Report, 36, 359, 360. See also Hale's Report, 41.

Crutchett's Case.

"In the case of James Crutchett, No. 4, claim was made for the use and occupation of a factory building of the claimant in the city of Washington, which was, from July 1861 to the end of the war, occupied by the United States as barracks, quarters, and offices for troops and officers, and also for large resulting damages to the claimant's business by this occupation of the buildings and removal of the machinery, &c.

"The proofs showed that the premises were taken possession of by the United States under the right of eminent domain for military use, and that partial payments of the rent had been made to the claimant, who had been for many years domiciled in the city of Washington.

"The counsel of the United States filed a demurrer to the memorial, specifying, among other grounds, that the claimant and his property, thus domiciled and situated, were subject to the exercise of the right of eminent domain over the property by the United States; and that for the exercise of such right and the occupation of the property full compensation could be had by the claimant under the municipal laws and authority of the United States; and that such acts were, therefore, not the subject of international reclamation.

"On the argument of the demurrer the counsel for the United States contended that the claimant, domiciled within the United States, was subject to all the burdens and liabilities of other inhabitants of those States, and could claim no

better position or superior rights in regard to the United States than a native-born or naturalized citizen of those States. That for the occupation of his premises he was entitled, under the Constitution of the United States, to compensation, and that the Court of Claims had full jurisdiction of the case and could have afforded him full redress.

"The counsel cited the letter of Earl Granville to Mr. Stewart (No 23 of parliamentary papers, No. 4, on the Franco-German war, 1871, British state papers); Professor Bernard's 'Neutrality of Great Britain,' etc., pp. 440, 454; also, the note of Mr. Abbott (Lord Tenterden) relating to this identical claim of Mr. Crutchett, id. 456; also, the case of William Cook before the commissioners under the convention of 1853 between the United States and Great Britain (United States Senate documents, first and second sessions, Thirty-fourth Congress, vol. 15, No. 103, pp. 169, 463); also, the case of the United States *vs.* O'Keeffe, in the Supreme Court of the United States (11 Wall. 178); and the cases of Waters (4 C. Cls. Rep. 300); Russell (5 id. 120); Filor *v.* United States (9 Wall., 45); also, Campbell's case (5 C. Cls. Rep. 252), and Provine's case (id. 455).

"On the part of the claimant it was contended that, while the claimant was entitled to compensation for the use of his property under the Constitution of the United States, the jurisdiction of the Court of Claims in the case was taken away by the act of Congress of July 4, 1864 (13 Stats. at L. 381), citing Filor *vs.* United States (9 Wall. 45).

"The demurrer was overruled, and an award was subsequently made in favor of the claimant for the value of the use and occupation, in which all the commissioners joined.

"The case of William H. Lane, No. 9, was a claim for occupation by the United States of a building of the claimant in Memphis, in 1864; that of Eleanor W. Turner, No. 34, was a claim for like occupation of a house in New Orleans by the United States military authorities; and that of Eliza B. Nelson, No. 140, was a claim for like occupation of a building at Helena, Arkansas; all said occupations being while the respective places were permanently held by the United States. Awards were made in favor of the claimant in each case, Mr. Commissioner Frazer dissenting in Nos. 34 and 140."

Am. and Br. Claims Com., treaty of May 8, 1871, Hale's Report, 46. The case of Crutchett is stated in Howard's Report, 33.

Wilkinson's Case.

"This was a claim of a British subject residing on Matagorda Island, Calhoun County, State of Texas, for 10,500 pounds of fresh beef taken from him for the use of the United States Army in the latter part of 1863 and the beginning of 1864.

"He claims the sum of 525 dollars currency.

"As evidence of his claim he filed three vouchers given to him for said beef. These vouchers are all in the same form, and purport on their face to have been given under the order of the United States Department of War. Two of them are signed by United States Lieutenant S. Wright, acting assistant commissary of subsistence; the third by United States First Lieutenant Artemus Adams, acting commissary of subsistence in charge of depot. On each of them there is an endorsement which is as follows:

"'Pay to the order of George McColloch Wilkinson the within amount.'

"Each voucher is accompanied by an affidavit of the claimant to the effect that he is the original owner of said vouchers.

"There is another endorsement on these vouchers by A. B. Eaton, commissary-general of subsistence, dated April 25th, 1866, which is as follows:

"'This account having arisen prior to the surrender of the rebel forces in Texas, a State in insurrection, under the decisions and orders governing this office, it is without authority to order its payment until Congress shall, by appropriate legislation, provide for the same by law.'

"The defense held:

"1. That G. McColloch Wilkinson was evidently the real owner of the vouchers, and that the claimant could not prosecute a claim originally his, but which he had transferred to another party.

"2. That the claimant being domiciled in the enemy's country was entitled to no further relief than loyal United States citizens found resident in the same territory, and that the decision of the Southern Claims Commission does not bind Congress to pay claims of this nature.

"3. That Congress would no doubt reverse the decision of the Southern Claims Commission, admitting only claims of United States citizens, and allow aliens to plead before said commission.

"4. That the claimant not having claimed interest, it should

not be included in any award made in his favor, as the United States Government never paid interest on similar claims brought by their own citizens.

"Her Majesty's counsel held:

"1. That the claimant had presented his claim to the proper authorities and had been refused payment, not because the claim was incorrect or fraudulent, but on account of the existing regulations of the United States War Department.

"2. That the United States Government had provided their own citizens with a remedy through the Southern Claims Commission for claims of this nature, *excluding aliens.*

"3. That the treaty of Washington had provided this Mixed Commission for the settlement of claims of like nature brought by British subjects.

"4. That the claimant was entitled to the whole amount he claimed, with interest from the date of seizure.

"The three commissioners signed an award of $782 gold in favor of the claimant."

John Wilkinson v. *The United States*, No. 28, Am. and Br. Claims Com., Treaty of May 8, 1871, Howard's Report, 32, 351, 353. Hale (Report 42) says: "In the case of John Wilkinson, No. 28, the claim was for beef taken from the claimant on Matagorda Island, Texas, by a commissary of the United States in 1863, and for which vouchers in the usual form were given. The claimant was domiciled and his property situated within the insurrectionary State of Texas, and apparently not within the actual military lines of the United States at the time of the taking. The vouchers were all signed by an authorized officer and recited, 'I have taken for military purposes from John Wilkinson,' the property described, and that the same was necessary for the public service, and would be accounted for in the officer's monthly returns.

"On the part of the United States it was claimed that the taking was a capture under the right of war, and that no liability for payment arose against the United States.

"An award was made in favor of the claimant, in which all the commissioners joined.

"The same principle was applied in all other cases of like character."

Braithwaite's Case.

"Claimant alleged and filed evidence to prove—

"1. That he was a native of England, and a resident of the State of Kentucky, United States, during the whole war.

"2. That on the 6th of August 1864 a company of United States soldiers, under the command of a lieutenant, forcibly took possession of and pressed into the service of the United

States a horse belonging to him of the value of $150 without offering him any compensation.

"3. That it being the cropping season, he lost at least $50 more by the seizure of his horse.

"The United States agent, in his brief, stated:

"1. That the claimant being domiciled in the State of Kentucky, which State had never been declared in rebellion, stood upon the same footing as native citizens of the United States, and that the taking of the horse was a seizure from which clearly an obligation to make compensation accrued on the part of the United States.

"2. That at the time of the seizure of his property he could have presented his claim to the quartermaster-general of the army for payment, and that having failed to do so, and through said failure not having exhausted the ordinary remedies given him by the municipal laws and regulations of the United States, he had no standing before this international tribunal."

The commissioners unanimously awarded $225 in gold.

Jonathan Braithwaite v. *The United States*, No. 31, Am. and Br. Claims Com., treaty of May 8, 1871, Howard's Report, 31; Hale's Report, 42.

Brook's Case.

In connection with the foregoing case of Braithwaite, Hale (Report, 43) says:

"In the case of Samuel Brook, No. 99, the claim was for certain tarpaulins taken by an authorized officer for the use of the United States, at Memphis, Tennessee, in June 1862 shortly after the capture of that city by the Federal forces.

"An award was made in favor of the claimant, Mr. Commissioner Frazer dissenting upon the question of the sufficiency of proofs, but the commissioners all agreeing as to the principle involved.

"It may be stated generally that the commission were unanimous in the allowance of claims for property coming under this head when taken within the loyal States or within those portions of the insurrectionary States permanently occupied by the Federal forces, except when something in the nature of the property or in the conduct of the claimant took him out of the condition of neutrality. Thus, for instance, in the case of Robert Davidson, No. 66, the claim was for gun carriages and other artillery apparatus, manufactured by the claimant for the use of the Confederate Government, and remaining in his possession at the surrender of New Orleans, together with material for use in the same manufacture, which was taken and appropriated by the Federal forces, under the orders of General Banks, some months after the capture of New Orleans. The claim was unanimously disallowed.

"Where, however, the taking of the property by the Federal

forces and the domicil of the claimant were within the enemy's lines, or in those portions of the enemy's country not reclaimed from the enemy, the majority of the commission, on satisfactory evidence that the property was taken by authority, or actually appropriated to military use, made awards in favor of the claimants, Mr. Commissioner Frazer dissenting, on the ground that one domiciled in the country of the enemy was himself an enemy in law, whether an actual enemy or not; and by well-settled principles of public law his sovereign had no right in such cases to intervene in his behalf against the ordinary treatment of him as an enemy. In the principle thus held by Mr. Commissioner Frazer I am advised that the presiding commissioner agreed; but in view of the fact that the United States had, by the establishment of the Southern Claims Commission, made provision for the compensation of its own citizens domiciled within the enemy's country 'who remained loyal adherents to the cause and the Government of the United States during the war,' for property taken in like manner (16 Stat. at L. 524, § 2) he was of opinion that neutral aliens in like situation should be entitled to the same degree of compensation, and, if British subjects, to a standing before the commission for that end.

"Upon this question Mr. Commissioner Frazer held that any provision made for the payment of such claims to citizens was not in discharge of an obligation imposed by the public law, but was a matter of favor, and could carry with it no obligation on the part of the Government of the United States to extend like compensation to others not embraced within the class which it had selected.

"In the case, however, of John Kater, No. 19, claimant was allowed for two horses taken by Sheridan's army on its raid through the valley of Virginia in August 1864, all the commissioners joining in this award, General Sheridan's order of August 16, 1864, directing the seizure of mules, horses, and cattle for the use of the Army, having in effect promised compensation for such property to loyal citizens."

Rochereau's Case.

The commercial firm of Eugene Rochereau & Co., composed of Eugene Rochereau, Albin Rochereau, and William T. Hepp, citizens of France, was engaged in business at New Orleans, where the junior members, who were personally charged with the management of the business, resided. Eugene Rochereau resided in France, and was not personally engaged in the firm's affairs. In March 1862 the authorities of New Orleans adopted an ordinance by which the mayor was authorized to issue bonds of the city to the amount of $1,000,000. The object was stated in the preamble of the ordinance in these words:

"Whereas the safety of the city of New Orleans being imper-

illed by the existence of the war now raging, and the presence of our enemies at the approaches of the city renders it of the greatest importance to the vital interest of the city, not only to the city but to the whole Southern Confederacy, that immediate and ample means should be placed at the disposition of the public authorities to repel invasion, and for the prompt and efficient defence of the city of New Orleans and its approaches, be it therefore

"*Resolved*," etc.

These bonds the banking house of Abat, Generes & Co., of New Orleans, purchased to the amount of $210,000, and the firm of Eugene Rochereau & Co. purchased of Abat, Generes & Co. bonds of the nominal value of $20,000.

After the capture of the city by the forces of the United States an order was issued by General Butler by which all the purchasers of the bonds were required to pay an assessment of 25 per cent. This assessment was levied in August 1862. Again, in August 1863, a like assessment was levied by General Banks. The assessment was at first levied upon Abat, Generes & Co., but subsequently, by order of General Butler, Rochereau & Co. were required to pay to Abat, Generes & Co. the sum so assessed, and it was then paid by the last-named house to the military authorities, and used for the support of the destitute inhabitants of New Orleans.

It was contended by counsel for the French Republic that the assessment made by General Butler was arbitrary in its nature and contrary to the rules of international law, and that the sufferers were entitled to compensation from the United States. This argument was specifically made in behalf of Eugene Rochereau, who had presented a claim for compensation.

On the part of the United States it was contended that the purchase by Rochereau & Co. was an act by which aid and comfort were given to the enemies of the United States within the period mentioned in the convention.

Two points were made by counsel for Eugene Rochereau: (1) That the purchase of the bonds by Rochereau & Co., who were not the original subscribers, could not be treated as an act of aid and comfort to the enemies of the United States; and (2), that as to Eugene Rochereau, who was then in France, and was not cognizant of the purchase, the act of the resident partners, even if inhibited, could not be imputed to him. It was also maintained by counsel for the memorialist that alien residents and all other persons had a right to carry on their

legitimate business, and that the payment of taxes to the insurrectionary or usurping government had been held by the Supreme Court of the United States to have been fully justifiable; that the right to trade within the limits of either belligerent gave the alien resident the right to buy or invest in the securities of either without a violation of his neutrality; that the purchase of the bonds of the city of New Orleans in open market was not a violation of any law at the time; that the success of the United States in its attack on New Orleans did not convert acts lawful at the time of their commission into crimes, and that General Butler had no right to punish persons for trading with the Confederates at a time when the United States was unable to enforce its authority and render protection.

Counsel for the United States called attention to the bond, which set forth on its face that it was "issued in conformity with ordinance No. 5949 of the city council, approved 3d of March 1862." He maintained that the reference to the ordinance constituted a notice, both in law and in equity, to everybody to whom the bonds were offered to examine the authority by which they were issued; and that if Rochereau & Co. had performed their duty and examined the ordinance they would have seen that the purpose for which the loan was offered was the defence of New Orleans against the United States. In support of the position that the purchaser was bound, upon suggestion of record, to examine the title to property which he proposed to purchase, and that if he neglected to make the examination he had no remedy over against the vendor, counsel for the United States cited *Brush* v. *Ware*, 15 Peters 93; *Oliver* v. *Price*, 3 Howard, 409, and *Hanover* v. *Woodruff*, 15 Wallace, 439–442.

The commission on December 15, 1883, rendered an opinion as follows:

"The claimant was in France when the bonds for the defence of New Orleans were issued and purchased by the partners of his firm in New Orleans.

"He had no knowledge thereof till he was informed that General Butler had imposed the assessment on his firm.

"We think the claimant was not guilty of giving aid and comfort to the enemies of the United States, as he knew nothing of the purchase.

"In the judgment of the majority of the commission General Butler had the right, as an act of military necessity and in time of war, to levy the assessment on the enemies of the

United States and on those giving aid and comfort to the enemies of the United States.

"The commissioner on the part of France does not concur in the view of General Butler's power as regarded by his colleagues.

"We allow the claimant the amount of his share of the assessment paid August 11, 1862, being $714.28, with interest at 5 per cent from August 11, 1862, and the further sum of $714.28, with interest at 5 per cent from September 7, 1863."

Eugene Rochereau v. *United States*, No. 220, Boutwell's Report, 124, commission under the convention between the United States and France of January 15, 1880.

Case of Dubois.

"Charles J. Dubois *v.* United States, No. 723.—This claim rested upon the same facts as that of Eugene Rochereau *v.* The United States, No. 220, with the exception that the memorialist was a resident of the city of New Orleans, and there purchased the bonds issued by said city.

"The claim of Dubois was disallowed.

"The decisions of the commissioners in the two cases justify the conclusion that the purchase of the bonds of the city of New Orleans, issued in the manner and for the purpose set forth in the record, was an act of aid and comfort to the enemies of the United States, but that those purchasers only were responsible who had knowledge of the transaction at the time, and whose circumstances were such that they were bound to make an examination of the record of the city of New Orleans." (Boutwell's Report, 128.)

Case of Drez.

"Arthemis Drez *v.* United States, No. 503.—This case is distinguishable from the cases of Eugene Rochereau *v.* The United States, No. 220, and Charles J. Dubois *v.* The United States, No. 723, in the fact that the claimant, a resident and citizen of France, had an agent in New Orleans with whom he had placed funds for investment. That agent made a purchase of the New Orleans bonds issued under the ordinance of the 3d of March 1862. When Drez received information from his agent that the purchase had been made, he instructed him to sell the bonds. It does not appear from the record whether his instructions were due to the opinion that the investment was an unsafe one or to the opinion that the bonds were not a proper subject for investment.

"It was claimed by the counsel for the memorialist that the

decision in the case of Rochereau *v.* The United States, No. 220, justified and required an award in favor of the claimant.

"On the part of the United States it was claimed that the agents of Drez were clothed with general power to act, and that the principal was bound precisely as he would have been if present.

"The commission made an award to the amount of the assessment imposed by the military authorities." (Boutwell's Report, 128.)

Willet's Case.

W., a citizen of the United States, "domiciled" in Venezuela, held a lease of a warehouse at Caracas, in which he conducted a mercantile business. In 1859 the government set up and supported by the Unionists, in order to defend itself against the Federalists, who were trying to get possession of the capital, occupied the warehouse in question and converted it into a kind of fort, and continued in possession of it for several years, destroying or consuming in the meantime everything of value in the building. Apart from a small sum for use and occupation, and a draft which was not paid, W. received nothing from the government. On a claim for indemnity the following decision was rendered:

"Objection was taken by Venezuela based upon the proposition that the warehouse was lawfully seized and occupied by her military forces for defensive purposes, and that the subsequent pillage and destruction of the stock of goods was a necessary and unavoidable incident of such seizure and occupation, and that the damage occasioned by it in consequence must be treated as *damnum absque injuria*, and therefore remediless. In this view we do not concur. Admitting fully the doctrine that the safety of the state is the supreme law, and that the property and person of the citizen are subject to be taken for the public service whenever the exigency is sufficient to justify it, of which the state itself, by the necessity of the case, must be the only judge, yet we can not perceive that there was any necessary connection between the seizure of the warehouse for purposes of defence and the consequent pillage and destruction of the property which ensued. Besides, while the seizure of the building was lawful in the first instance for the purpose of repelling an attack or guarding the arsenal, which was in the near neighborhood, no reason has been assigned for its continued use and occupation as barracks long after the emergency had ceased to operate.

"The Government of Venezuela recognized the justice of this proposition by admitting a claim on this account, and

making payment in part. Indeed, we believe that such claims are universally recognized as constituting exceptions to the general rule which protects governments from making indemnity. It was also contended that a citizen of one country domiciled in another could have no greater rights than the citizens of the country where he chose to cast his lot; and that as a citizen of Venezuela would have had no claim on the justice of his government for reclamation in such a case as this, neither could the original claimant, who was a citizen of the United States. But from what we have said there ought to be no doubt that the Government of Venezuela would have respected such a claim if made on the part of one of her own citizens, and therefore the contention assumes what we do not admit to be true. On the whole, therefore, we are of the opinion that an allowance ought to be made in this case on the basis heretofore laid down; that is to say, for 50,000 pesos, on which we will allow interest at 5 per cent from the 2d of August 1859, deducting, of course, whatever sum Venezuela has paid on account of any of the certificates founded on the original award. The peso will be estimated at seventy-five cents, expressed in the gold coin of the United States of America."

Findlay, commissioner, for the commission, *Estate of William E. Willet* v. *Venezuela*, No. 21, United States and Venezuela Claims Commission, convention of December 5, 1885.

Case of Wells, Fargo & Co.

"The claimant, a Colorado corporation, avers that it received from the American Bank Note Company, a New York corporation, for carriage to the city of Lima, Peru, 28 cases, said to contain valuable stationery, to be delivered to the order of Messrs. Prevost & Co., Lima, Peru, the agents of said American Bank Note Company, the contents of said cases being valued at $34,700; that said cases were duly forwarded to Peru, and while off the port of Chimbote, on the 17th of September 1880, the Chilean corvette *Chacabuco* took the said 28 cases by force from the vessel on which they were shipped. Protest was duly made before the U. S. consular agent at Chimbote. Twenty-four of said 28 cases contained forms or emblems of paper money, and 4 contained postage stamps; that said property had not passed to the ownership of Peru, but remained in the Bank Note Company until they were received and accepted by the authorized officials of said republic; that by reason of said seizure claimant was compelled to make payment to the American Bank Note Company of the value thereof, $34,700, and received an assignment and subrogation of the said company's interest in the property so seized. The claim was duly made through the State Department of the United States; that

the emblems and forms of paper money thus seized by Chile, aggregating over 7,000,000 soles, were put in enforced circulation in Peru by Chile, who required all persons to accept such money at its full face value in exchange for supplies, goods, and property used by the forces of Chile; that a similar case of money destined for Chile was seized in transit by the forces of Peru, but on demand by the Government of the United States the property was returned by Peru and delivered to Chile by claimant.

"Claimant asks judgment for the value of said property and interest, amounting in all to $58,389.97.

"By stipulation, signed by the agent of the Republic of Chile and the agent of the United States, at the request of the claimant, a compromise award was entered in this case in the sum of $29,194.98, United States gold coin."

Wells, Fargo & Co. v. *Chile*, No. 10, United States and Chilean Claims Commission, convention of August 7, 1892. Shields's Report, 74.

4. Captured and Abandoned Property.

Act of March 12, 1863.

"Claims for property taken under the abandoned and captured property act of March 12, 1863 (12 Stats. at L. 820):

"This act provided in effect for the turning over of property captured or seized as abandoned by the military and naval authorities of the United States to agents, to be appointed by the Secretary of the Treasury, for the sale of such property, and the payment of the proceeds into the Treasury; and provided that the owner of such property might, within two years after the suppression of the rebellion, bring suit for the proceeds in the Court of Claims, and, on proof of his ownership and right to the proceeds, and that he had never given aid or comfort to the rebellion, should be entitled to recover the net proceeds. The act was undoubtedly intended to apply particularly to cotton and the other staple products of the Southern States. To such products only it was in practice applied.

"Many claims were brought before the commission for property, principally cotton, taken under this act. Most of the claims thus brought had been prosecuted in the Court of Claims, some of which were still pending in that court; some were pending on appeal in the Supreme Court; in some the Court of Claims had given judgment in favor of the claimants for the net proceeds, the claimants now claiming here that such

amount was less than the full value of their property, to which they claimed themselves entitled; and in some judgment had gone against the claimant in the Court of Claims, and no appeal had been taken. In some cases the claimants were domiciled within the insurrectionary States, and in others within the British dominions. In a few cases no suit had been prosecuted in the Court of Claims. The agent of the United States interposed demurrers in several cases, including all the different classes above named.

Argument for the United States.

"On the argument it was contended for the United States that the right of capture, by a belligerent, of private enemy's property on land was permitted by the laws of war; that that right was specially applicable to the case of a great staple like cotton, upon which the enemy principally depended for his military and naval supplies, and for his credit and means to carry on the war; that by the abandoned and captured property act of 12th March 1863 the United States had in no respect abandoned or waived this right, but that that act constituted merely an act of grace in favor of individuals who might show themselves personally free from complicity with the rebellion; that under that act neutral aliens stood upon the same footing with loyal citizens, and were entitled to the same rights given to such citizens by the act, and subject only to the same disabilities; that the owner of property thus captured within the enemy's country had no right of reclamation against the United States, except that given by the act, and that that remedy must be pursued in the form given, and before the tribunal specified in the act.

"He cited Vattel, book 3, c. 9, §§ 161, 163, 164; Twiss, vol. 2 (war), pp. 122 to 124; Rutherforth, book 2, c. 9, § 16; Mrs. Alexander's Cotton, 2 Wall. 404; the United States *v.* Padelford, 9 id. 531; the United States *v.* O'Keefle, 11 id. 178; 1 Kent's Com. pp. 92, 93.

Argument for Great Britain.

"On the part of Her Majesty's counsel representing the claimants, it was contended—

"1. That the personal property of the inhabitants of the insurrectionary States, whether citizens or aliens, neither by its locality nor by its character as product of the soil, was the lawful subject of capture as prize and booty of war.

"2. That in this respect the article of cotton is not distinguishable from other property.

"3. That the Government of the United States has never claimed or asserted title to such personal property as prize and booty of war, but, on the contrary, by legislation has impliedly disclaimed such title.

"4. That the property for the destruction or appropriation of which these claimants demand indemnity never ceased to be their property, but continued such, notwithstanding the fact of war and the fact of seizure or appropriation by the military authorities of the United States.

"5. That their right to be indemnified for such seizure or appropriation does not depend in any degree upon any municipal legislation of the United States either recognizing the right or providing a remedy complete or partial, but rests upon principles of the public law, recognized as well by the United States as by all other civilized nations.

"6. That therefore the act of March 12, 1863, neither gave any right which the parties had not before by settled principles of public law, nor purported to give a remedy commensurate with that right under the public law. That act was purely a municipal measure, dictated by considerations of domestic policy.

"7. That therefore it is wholly immaterial to the determination of these international claims whether those parties had or had not a remedy under that statute, or did or did not avail themselves of such remedy. The Court of Claims in no degree exercised the functions or fulfilled the duties of this tribunal, whose obligations under the treaty and the public law must be discharged according to its own judgment and conscience in cases coming within the treaty, whether the Court of Claims, in executing the act of 1863, exercised or not a wholly distinct jurisdiction conferred upon it by that statute.

"8. If under that statute the claimant has obtained a partial indemnity, the United States can only claim a credit for so much of the indemnity as the party has received in that form. In no other way, and to no other extent, can the proceedings in the Court of Claims affect the awards in these cases.

"He cited 1 Kent's Com. 91; Mrs. Alexander's Cotton, 2 Wall. 404; United States *v.* Klein, 13 Wall. 128; United States *v.* Padelford, *supra;* Brown *v.* United States, 8 Cranch, 110; Grant's Case (decisions C. Cls. October term, 1863); Vattel, book 3, c. 5, § 75; c. 7, § 109.

"The arguments of the respective counsel were filed in the cases of James B. McElhose, No. 225, and of Thomas Arkwright, No. 302. Many other cases were submitted under the same arguments.

"The commission unanimously sustained the demurrers in the cases in which suit had been brought in the Court of

Claims, whether still pending in that court, or on appeal, or previously decided, and dismissed those cases.

"In the case of Elizabeth Knowles, No. 175, and other cases in which no suit had been brought in the Court of Claims, the commission (Mr. Commissioner Frazer dissenting) overruled the demurrers and took jurisdiction of the claims upon their merits. Mr. Commissioner Frazer read a written opinion upon the questions involved in these cases."

Am. and Br. Claims Commission, treaty of May 8, 1871, Hale's Report, 47. See also Howard's Report, 45, 48, 370, 375, 383, 394, 404.

The opinion of Mr. Frazer on the cases under the abandoned and captured property act was as follows:

"The capture or destruction of property on land belonging to individual enemies is justified by the modern law of nations, if there be military reasons for it; in the absence of good military reasons, such captures are generally without the support of the public law. When such reasons do exist, such capture or destruction is, in the nature of things, quite as proper as the capture or destruction of such property on the high seas.

"The latter is maintained because an enemy's commerce and navigation are 'the sinews of his naval power,' to take or destroy which is, therefore, a legitimate act of war. (Wheat. Int. Law, Lawrence, 626.)

"'The sinews' of his *military* power on land must, in view of the natural law, be equally the subject of capture or destruction by an invading army. Cotton was held to be such by the Supreme Court in the case of Mrs. Alexander's Cotton (2 Wall. 404). The reasoning of the opinion of the Chief Justice in that case is, I think, unanswerable.

"The war of the American rebellion was a civil war—an immense one, too—and the Government had all the rights of war which it would have had if its enemy had been an independent nation. Even the rebel organization was recognized by Her Majesty's government as a belligerent—*i. e.*, having the rights of war—and certainly that government is thereby estopped from denying, and indeed never has denied, that belligerent rights also belonged to the Government of the United States. Every act of war recognized as lawful by the public law between independent states at war was, therefore, lawful on the part of the United States, and involved no cause for reclamation on the part of neutrals. On this ground only, as a lawful belligerent act, could a blockade be maintained. The subject is discussed very fully by the Supreme Court in the Prize Cases, 2 Black, and I think the reasoning of that court is conclusive.

"Neutral's property in the enemy's territory stands exactly on the same footing as any other property found there. Indeed, a neutral domiciled there *is* an enemy in the view of the public law. He may be compelled to serve the enemy as a soldier even, and his property must contribute to the support of the enemy's hostile operations without reference to his national character. I think that all authorities—British, Continental, and American—are in accord upon the proposition that the belligerent right of capture of movable property on land is in no respect affected by the nationality of its owner.

"Whatever is lawfully done in the exercise of belligerent rights can

not involve any liability contemplated by the treaty; it can not possibly be a tort.

"The belligerent right of capture must not be confounded with the right of eminent domain, which is a civil right, exercised in virtue of sovereignty. The two are wholly distinct and rest upon different grounds.

"Grant's Case (C. Cls. 1863), cited by Her Britannic Majesty's counsel, was not a destruction of enemy's property. It was not in the enemy's lines, nor in a seceding State. It was a destruction of property in Arizona, within actual possession of the United States, to prevent its falling into the enemy's hands, and by the Constitution of the United States compensation for it was secured, and this only did the court decide.

"But are we to be told that the Government of the United States is compelled by its Constitution to pay its rebellious citizens for their property destroyed as a lawful, *belligerent* act? Has its Constitution thus tied its hands as against a rebellion? Might the rebels, without liability, exercise all recognized belligerent rights against it, including the capture of the property of British subjects found in the loyal States, and yet it do the like only subject to the duty of making compensation?

"From all this absurdity there is no escape if the belligerent right of capture and destruction shall be confounded with the sovereign right of eminent domain. And indeed captures on the high seas must then go into the same general category.

"In fine, a constitutional provision—the condition of compensation for property taken for public use—intended only to restrain civil administration, would be held to so trammel belligerent rights in time of civil war that effective hostilities against rebels might sometimes be practically impossible.

"Now, Congress saw that the full exercise of the belligerent right of capture on land was, as to cotton especially, of the greatest military importance, and that such capture would, therefore, be extensive, and that it would fall alike on the loyal and the disloyal citizen, and also upon foreign residents in the South who had not actually violated any duty. It was a generous policy to mitigate calamities which a war thus lawfully conducted would nevertheless impose upon persons guilty of no actual wrong. If the capture was a lawful act of war, to restore a portion of the proceeds would be an act of grace and generosity constituting no foundation for a claim for more; and if a particular mode was at the same time provided whereby this partial restitution might be sought, that mode only could be resorted to. The right generously given and the mode of seeking it must go together.

"The act concerning captured and abandoned property, allowing loyal persons to recover in the Court of Claims, was just this act of grace. (Anderson's Case, 9 Wall. 56.)

"My conclusions are:

"1. Capture of cotton of British owners within the rebel territory was not wrongful by international law.

"2. It was not wrongful under the act of Congress.

"3. It was a belligerent right, and not the civil and sovereign right of eminent domain.

"Without the act of Congress no compensation was due.

"5. Only such liability as the act of Congress imposes exists, and it must be sought in the mode prescribed by the act.

"Again, it is a principle of international law established by the practice of all civilized states, and sanctioned by every consideration of expediency and justice, that where a nation has provided an adequate municipal remedy by judicial proceedings for wrongs done by it to foreigners domiciled within its jurisdiction, as well as to its own subjects, no international reclamation can be made, at least until this municipal remedy has been exhausted.

"Upon this principle also this commission should make no award in this class of cases. The Court of Claims was open to these claimants, with jurisdiction to give them reasonable compensation for captures of cotton. There citizens of the United States must go for relief within the time limited by act of Congress; and I cannot assent to the proposition that domiciled aliens have a better claim than citizens.

"I would not be understood to hold that the right of capture of enemy's property on land, as recognized in recent times, is as broad as it is at sea. The military reason for it must be more palpable and immediate. There is a remote possibility that to take the lives of noncombatants—enemies—may weaken the enemy, for these might be forced into the armies of the enemy; so, too, as to an *indiscriminate* capture or destruction of private property. But all this is condemned by the modern law, and I would shudder to countenance a revival of practices so horrible.

"I admit, too, that there may be difficulty in defining the precise limits of the right of capture on land. It cannot be doubted that it may be as broad and general as the practice of the enemy in that regard; for retaliation is fully justified by institutional writers and by the practice of all nations.

"So I suppose it would not be questioned that arms, munitions of war, commissary and quartermaster's supplies, intended for sale to the enemy, might be captured or destroyed. So, too, private manufactories intended to furnish arms to be sold to the enemy, etc. This enumeration might be extended.

"I feel safe in asserting that no nation in Christendom has practically abandoned the right to capture and destroy in all such cases. It is a direct blow at the military power of the enemy.

"So, if an enemy banker has engaged to supply the enemy government with money, may not the cash in his vaults for that purpose be captured?

"This, too, would be a *direct* blow at the sinews of his military power, quite as effective and not less humane than taking of life in battle."

5. CONFISCATION ACTS.

Maxwell's Case: Real Estate.

"This claim was for the value of four lots of ground, numbered 3, 4, 5, and 6, in block No. 12, in the city of Leavenworth, in the State of Kansas, in the United States of America. The injury complained of was the sale of these lots, by the authorities of the United States, by virtue of proceedings instituted in the dis-

trict court of the United States for the district of Kansas, to obtain the condemnation and forfeiture of the same under the provisions of an act of Congress of the United States entitled 'An act to suppress insurrection, to punish treason and rebellion, to seize and confiscate the property of rebels, and for other purposes' (12 United States Statutes at Large, p. 319).

"On behalf of the claimant it was contended that the evidence adduced proved—

"I. That the claimant was a subject of Great Britain by nativity; that in the year 1857 the claimant, while temporarily residing in the United States, became the owner of the lots in question by purchase; that in May, 1860, he returned to England, and has since continuously resided in England or Scotland; that he was never naturalized, and took no steps toward being naturalized in any other country than that of his birth; and that he did not in any way, directly or indirectly, aid or engage with those in rebellion against the authorities of the United States.

"II. That in July, 1863, the attorney of the United States for the district of Kansas filed a libel of information against said lots, in which it alleged that, after the 17th of July 1862, the claimant acted as an officer of the army of the rebels in arms against the United States, and took the oath of allegiance to the so-called Confederate States, and did various other acts in aid of those in rebellion against the authority of the United States; that, without any proof of any of the allegations made in said libel, all of which said allegations were false, a default was entered against the claimant on the 12th of October 1863, and a decree was entered in said district court declaring said lots of ground condemned and forfeited to the United States; that subsequently, to wit, on the 28th of November 1863, said libel of information was dismissed by said district court as to lots 5 and 6; but, notwithstanding said dismissal, the marshal of said district proceeded to make sale of said lots 5 and 6 and executed and delivered a deed therefor to the purchaser, and also sold and executed and delivered a deed for said lots 3 and 4.

"On behalf of the claimant it was maintained—

"I. That the decree of condemnation was wholly void, because no notice of the confiscation proceedings was served on the claimant, who was at the time the same were instituted and continuously since that time had been beyond seas and a

resident of Great Britain, of which country he was a subject by nativity.

"II. That the decree of condemnation was wholly void, because no proofs were produced in support of the allegations made in the libel of information.

"III. That the claimant was entitled to the indemnity asked for, because the evidence now produced before the commissioners showed conclusively that the claimant was wholly guiltless of the offenses, the alleged commission of which was made the basis for the condemnation of his property.

"IV. That the sale by the United States marshal of two lots, after proceedings against the lots had been dismissed, was an injurious act, done under color of official authority, and created a cloud on the claimant's title.

"On behalf of the United States it was maintained—

"I. That the confiscation proceedings *in rem*, and having been conducted in strict accordance with the laws of the United States, could not now be reviewed.

"II. That the claimant's remedy was by application to the courts in which the confiscation proceedings were conducted.

"III. That the illegal sale by the marshal of the two lots which had been released from the operation of the libel did not affect in the least the claimant's title, and imposed no liability on the United States.

"An award was made by two commissioners, as follows:

"'The commissioners are of opinion that the deed executed by the marshal did not transfer any title to lots Nos. 5 and 6, and determine to award the sum of 1,782 dollars, to be paid in gold, by the Government of the United States to the Government of Her Britannic Majesty, in respect of lots Nos. 3 and 4.'

"The American commissioner did not sign the decree, but filed no dissenting opinion."

Peter Maxwell v. *The United States*, No. 385, Am. and Br. Claims Com. treaty of May 8, 1871, Howard's Report, 81. See also Hale's Report, 170.

Hale, in his report, p. 171, says:

"In the case of Peter Maxwell, No. 385, the memorial alleged that the claimant, during the entire war, was a resident of Liverpool. That in the year 1862 proceedings were instituted in the United States court for the district of Kansas for the confiscation of four lots of land situated in the city of Leavenworth, Kans., a State not in rebellion, on the alleged ground that the claimant was a rebel in arms against the United States. The only notice of the proceedings to the defendant was a constructive notice by publication pursuant to the statute. No appearance being had by the now claimant, a decree of confiscation of two of the lots passed by default. As to the other two, the libel was dismissed.

"The proofs before the commission clearly showed that the allegations in the libel as to the claimant being engaged in the rebellion against the United States were unfounded.

"The commission made an award in favor of the claimant for $1,782."

Brugere's Case.

Joseph Brugere, a citizen of France, purchased in May 1865, at public auction, certain real estate in New Orleans which had been condemned under statutes of the United States of August 6, 1861, July 17, 1862, and March 3, 1863, by which the courts were authorized to condemn and confiscate the property of certain persons engaged in rebellion. The record title to the property in question was in the name of John Slidell. The deed to Brugere recited the proceedings of condemnation and sale, and while there were no covenants as to title, made a conveyance in these words:

"Now, therefore, know all men by these presents that the United States marshal aforesaid, in consideration of the premises, and by virtue of the laws in such case made and provided, and under the authority of the acts of Congress of 6th August 1861, and the 17th July 1862, and on the 3d March 1863, in relation to confiscation, does hereby sell, transfer, assign, and set over unto the said Joseph Brugere, as aforesaid, his heirs, administrators, executors, and assigns, all and singular the above-described property, with all the buildings and improvements thereon, rights, ways, privileges, hereditaments, and appurtenances to the same belonging or in anywise appertaining."

By the act of July 17, 1862, it was provided that the act of 1861, authorizing confiscation, should "not be so construed as to work a forfeiture of the real estate of the offender beyond his natural life." And after the death of Mr. Slidell, which occurred in 1871, his heirs instituted proceedings for the recovery of the estate, and the supreme court of Louisiana made a decree, which was affirmed by the Supreme Court of the United States on writ of error, and by which the heirs were awarded possession.

On this ground Brugere made a claim against the United States. He adduced some evidence tending to show that representations were made by the marshal that the sale was of the fee of the estate, and he averred that such was at the time his understanding; and he contended that, in view of the representations made, and of the terms of the conveyance, the United States should be held responsible for the failure of the title which he asserted to the whole estate.

On the part of the United States it was maintained that the

government would not be bound by any representations made by the marshal, nor by any unauthorized covenants which the deed might contain; that the statutes authorizing the confiscation of property were public statutes, and were referred to in the deed; that the memorialist was thus put upon inquiry as to the nature of the estate which the marshal was authorized to convey, and that his failure to make such inquiry rendered him responsible for the consequences of any misunderstanding as to the extent of his title.

The claim was disallowed by the unanimous judgment of the commission.

Joseph Brugere v. *United States*, No. 318, Boutwell's Report, 128, Commission under the convention between the United States and France of January 15, 1880.

6. EMBARGOES OF PROPERTY IN CUBA UNDER THE DECREES OF 1869.

[From the Official Gazette, Havana, February 14, 1869—Translation.]

SUPERIOR POLITICAL GOVERNMENT OF THE EVER FAITHFUL ISLAND OF CUBA.

In use of the extraordinary faculties with which the provisional government of the nation has invested me, I decree the following:

ART. 1. Crimes of *infidencia* shall be tried by ordinary court-martial

ART. 2. Prosecutions already commenced shall follow the legal process prescribed by the laws for the tribunals of justice.

ART. 3. All aggressions, by act or by word, against any of the delegates of the government shall be considered as a crime against the authority, and will subject its author to trial by court-martial.

DOMINGO DULCE.

HAVANA, *February 12, 1869.*

[From the Official Gazette, Havana, February 14, 1869—Translation.]

SUPERIOR POLITICAL GOVERNMENT OF THE EVER FAITHFUL ISLAND OF CUBA.

OFFICE OF THE SECRETARY.

For the better understanding of the decree published yesterday (the 12th of February), it is made known that under the word *infidencia*, which is made use of in article 1, are understood the following crimes: Treason, or *lesa nacion*, rebellion, insurrection, conspiracy, sedition, harboring of rebels and criminals, intelligence with the enemy, meetings of journeymen or laborers and leagues; expressions, cries, or voices subversive, or seditious; propagation of alarming news; manifestations, allegations, and all that, with a political end, tends to disturb public tranquillity and order, or that in any mode attacks the national integrity.

It is also made known that robbery in uninhabited districts, whatever

may be the number of the robbers, and in populated districts, if the number of the robbers be more than three, shall be tried by court-martial, as also the bearers of prohibited arms. And by order of his excellency the superior political governor, the same is published in the Gazette for the general knowledge.

JOSÉ MARIA DIAZ,
The Secretary.

HAVANA, *February 13, 1869.*

[From the Official Gazette, Havana, April 15, 1869.—Translation.]

SUPERIOR POLITICAL GOVERNMENT OF THE PROVINCE OF CUBA.

[Circular.]

Under date of the 1st instant I said to his excellency the political governor of this capital as follows:

"YOUR EXCELLENCY: Your excellency will immediately proceed, without permitting anything to delay you, to embargo all the effects and other property which Messrs. José Morales Lemus, Nestor Ponce de Leon, Manuel Casanova, José Mestre, José Maria Bassora, José Fernandez Criado, Antonio Fernandez Bramosio, Ramon Aguirre, José Maria Mora, Javier Cisneros, Tomas Mora, Federico Mora, Federico Galvez, Francisco Izquierdo, Pentarco Gonzalez, and Joaquin Delgado possess or have possessed in this island; meanwhile that with reference to the latter it shall not be proved that all the requisites established by the laws for the transfer of property shall have been scrupulously complied with."

Which I transcribe to your excellency for your knowledge, and to the end that you proceed immediately to the embargo of all the estates and effects which the individuals included in the foregoing list possess in your jurisdiction.

God preserve your excellency many years.

DOMINGO DULCE.

HAVANA, *April 15, 1869.*

[From the Official Gazette, Havana, April 16, 1869.—Translation.]

POLITICAL GOVERNMENT OF HAVANA.

Having been embargoed by order of his excellency the political governor, the properties belonging to Messrs. José Morales Lemus, Nestor de Leon, Manuel Casanova, José Mestre, José Maria Bassora, José Fernandez Criado, Antonio Fernandez Bramosio, José Maria Mora, Ramon Aguirre, Javier Cisneros, Tomas Mora, Federico Galvez, Francisco Izquierdo, Pentarco Gonzalez, Joaquin Delgado, and Federico Mora, all persons possessing sums of money, effects, or values of whatever class belonging to the said individuals will give account of the same to this political government immediately, being responsible for all concealment or means of eluding the compliance with that disposition, prohibiting to them finally the purchase, sale, payment, transfer, cession, or the making by them of whatever operation that affects or may refer to the ownership of the embargoed property, with the understanding that the infractors are comprehended in the disposition with reference to the offense of *infidencia* contained in the decree of his excellency the superior political governor of

the 13th of February last, and shall be submitted in consequence to trial by court-martial.

DIONISIO LOPEZ ROBERTS.

HAVANA, *April 1, 1869.*

DECREE OF APRIL 17, 1869.

In the exercise of the extraordinary and discretional powers invested in me by the supreme government of the nation, and with a view to the necessity and urgency of executing with all proper legality, solemnity, and publicity the acts resulting from the embargo of property of all kind appertaining to the sixteen individuals referred to in the communication addressed to the political governor of this district on the 1st instant, and of all who may be in the same case, I come to the resolution to decree the following:

1. A board is hereby established to administer property belonging to the sixteen individuals referred to in my decree of the 1st instant which was ordered to be embargoed on the same date.

2. Said administrative council is composed of the political governor of Havana as president; of three members from the corporation of this capital, three from the class of proprietors and planters, three from the class of merchants; one superior officer from the financial department; a secretary, who shall be the secretary of the political governorship, and of such employees as shall be proposed to me by the president of the aforesaid council.

3. The functions of president, members, and secretary of the council shall receive no compensation.

4. All funds collected in consequence of the embargoes shall be deposited in the general treasury, whence receipts shall be issued for the security of the president of the administrative council, the funds being subject to his order.

5. The president of said board will have authority to decide all matters and points offering doubt in the interpretation of my decree of 1st instant, and those of a judicial or legal nature calling for decisions from the established courts shall only be brought to me for resolution.

6. The appointment and removal of individuals to fill the bureaus of the administrative council shall be determined by said president. The salaries of said functionaries and the cost of articles required shall be defrayed from the funds collected.

7. The lieutenant-governors of this province shall remit to the president of the administrative council all items they may acquire in their respective districts relating to property embargoed or to such as may be hereafter embargoed; they shall deliver said property to the same council, together with the inventories, deeds, and other public documents which they may acquire or consider necessary; and they shall execute such orders referring said matters as they may receive from said president.

8. The president of the aforesaid board shall propose to my authority whatever change in the organization of the same, or in the persons composing it, he may consider expedient to make.

DOMINGO DULCE.

HAVANA, *April 17, 1869.*

In conformity with the requirements of my decree of this date, and exercising the extraordinary powers invested in me by the supreme gov-

ernment of the nation, I have resolved to appoint president of the council to administer property ordered to be embargoed belonging to the sixteen individuals referred to in my order of 1st instant, and of as many more as may be in the same circumstances, Don Dionisio Lopez Roberts, political governor of Havana, and members (of the board) Don Juan Atilano Colomé, Don Mamerto Pulido, and Count Posor-Dulces, from the corporation of this capital; Don José Cabargo, Don Juan Poey, and Don Joaquin Pedroso, as proprietors and planters; Don Fernando Illas, Don Bonifacio Jimenez, and Don Segundo Rigal, merchants; Don Agustus Genon, as chief of the central section of taxes and statistics, and Secretary Don Juan Zaragosa, who is secretary of the political governorship of Havana.

DOMINGO DULCE.

HAVANA, *April 17, 1869.*

CIRCULAR OF APRIL 20, 1869.

By the Gazette of the 15th instant you will have been informed of two circulars issued by me, the first on the occasion of receiving by mail and circulating of a paper signed José Morales Lemus, president of the Central Republican Junta of Cuba and Porto Rico, and the second ordering the immediate embargo of the estates and other properties that said Morales Lemus and other individuals possess or may have possessed on this island.

You will have likewise become acquainted with my decree of 1st instant, published in the Gazette of the 16th, as a preventive measure to impede sales of property made with illegitimate ends, and lastly, in the Gazette of the 18th, an administrative committee has been appointed to administer the property embargoed by the decree of 1st instant. These resolutions, well considered and justified by the damages caused by the insurgents, appertain to a system which it is indispensable to follow in order to put an end to the insurrection at once. To obtain this object, and exercising the extraordinary and discretional powers with which I am invested by the supreme government of the nation, I have determined the following:

ARTICLE 1. All persons [as] to whom it may be proved that they have taken part in the insurrection in or out of the island, either armed or aiding the same with arms, ammunitions, money, or provisions, are hereby declared to be comprised in the circular of 15th inst. relative to José Morales Lemus and others.

ART. 2. The persons who within the proper time claimed the benefit of the amnesty and pardon decreed and who in their subsequent conduct have proved their adhesion to the government are excepted from the above resolution.

ART. 3. The persons comprised in article 1st are hereby deprived of the *political and civil rights* which they enjoyed through our laws, the action of this resolution being carried back to the 10th of October, when the insurrection at Yara commenced, or back to the date in which it may be ascertained that they took part in the preparations for the insurrection.

ART. 4. The contracts agreed to by said individuals, from the dates above mentioned, shall be presented to the revisal of the government within three days after the publication of this circular.

ART. 5. The governors and lieutenant-governors will immediately remit said contracts, with their report, to the president of the administrative

council, where, in view of the antecedents, the proper resolutions will be decided upon.

ART. 6. Said authorities shall at once proceed by themselves or through their delegates, to institute a government investigation to prove the crime of the parties comprised in this resolution, giving an account to the president of the administrative council of the commencement of said investigation.

ART. 7. As the guilt of the delinquents shall become established, the embargo of their properties, actions, and rights shall be acted upon, and the governors of the other districts where they may also have property shall be informed, so that those shall be also embargoed.

ART. 8. Each governmental investigating process shall refer to one individual alone, and as it shall be brought to conclusion with the deposit of the property embargoed, the council of administration shall be informed in conformity with the Art. 7th of the decree creating said council.

ART. 9. The governors and lieutenant-governors, who, in their jurisdiction should embargo property of individuals, who had been or are, residents in another jurisdiction, will remit to the president of the administrative council the items referred to in the article quoted in the preceding, and will communicate to the governor from whence the embargo proceeds a statement of the property embargoed, which shall be annexed to the government proceeding.

ART. 10. When the opportunity arrives from the state of the procedure to embargo property, an order shall be issued stating the grounds, and shall be carried into effect by the same lieutenant-governor, or the delegate appointed by him, assisted by the notary or secretary (escribano), and either two or three witnesses, who shall be near relatives of the delinquent, or, if there be none such, his near neighbors. In the absence of a notary, two witnesses shall be employed, according to law.

ART. 11. In the act of the embargo an exact inventory of the property shall be taken, reporting the same in detail, discriminating furniture, real estate, rights, and shares or actions, circumstances being set forth to establish their identity and avoid all mistakes.

ART. 12. The property embargoed shall be deposited in a resident lego (not a lawyer), *llano* (not privileged from rank or class), and abonado (enjoying guaranty for the object), selected by the governor or lieutenant-governor, who shall inform the president of the administrative council of said appointment, and give the depositary a certified copy of the embargo, and of his appointment.

ART. 13. It is left to the judgment of the governor, or lieutenant-governor, as the case may be, to deliver all the property to a single depositary, or to distribute it among several; said authorities bearing in mind that the best possible means should be adopted that the property may not be injured in its nature or productiveness; for which motive, if there should be some creditor (*refaccionista*) (one who provides the necessary means to sustain and bring about the profits of an enterprise), they will endeavor to have the same appointed as depositary (receiver), provided said party deserve the full confidence of the authority.

ART. 14. The depositaries shall take charge of the property in accordance with the inventory, giving receipt before the lieutenant-governor or his delegate, witnesses and the attesting notary, and said depositaries

binding themselves with their persons and property to have said property safely guarded as a judicial deposit, subject to the order of the president of the administrative council.

ART. 15. The depositaries shall preserve and administer the property with all care and diligence, being responsible even for slight faults; they shall not be authorized to sell it for no [any] reason or pretext excepting when the governor or lieutenant-governor should order it in consequence of a resolution of the administrative council; they shall neither be authorized to transfer the deposit to another party, unless for a just cause it should be ordered by the first authority of the district, in which cases the newly-appointed depositary shall take charge of the property in accordance with the preceding article, all of which shall be made known to the president of the administrative council.

ART. 16. The depositaries (receivers) shall keep a faithful exact account, with vouchers of all expenses originated, and of the products yielded by the property, which account, together with the net profits, they will present monthly to the governor or lieutenant-governor.

ART. 17. As soon as the depositary (receiver) shall have sent the net result, the first authority shall order their ingress in the treasury department, with the character of a deposit, subject to the order of the president of the administrative council to whom the formal receipts shall be sent, a certified copy of which shall be left in the proceedings.

ART. 18. The accounts, with their vouchers, shall also be sent to the president of the administrative council, that he may do the needful until their approval, and a copy of the decree of approval shall be sent to the lieutenant-governor, to have it annexed to the procedure.

ART. 19. When the property embargoed should be found to be *haciendas* (estates), cattle, or other requiring culture or collection the depositary shall be authorized to select and appoint, on his responsibility, the manager or clerks strictly needed.

ART. 20. No one who is not by law dispensed from exercising municipal duties can exempt himself from serving the functions of depositary. In proportion to the importance and quality of the property embargoed, and also to the labor required of the depositary, the governor or lieutenant-governor shall report to the president of the administrative council respecting the compensation that the former should receive, which should always consist in a percentage on the sums collected and paid by him, with the understanding that it shall not exceed five per cent for each of said objects, the amount of profits returned referred to in article 16 being exempted from said charge.

ART. 21. The governors or lieutenant-governors shall be answerable in conformity to the laws for the improper selection by them made of depositaries and, therefore, for the errors committed by the latter, especially if through their fault the embargoed property should perish.

ART. 22. The property embargoed shall be answerable in the first place for the expenses incurred for its preservation and management, those to be preferred consisting in current and arrear taxes, and next for debts contracted by the owner of the embargoed property previously to the dates referred to in article 3d.

ART. 23. If the creditor should be one of the individuals referred to in this circular, the payment of the accredited claims shall be made into the

hands of the depositary of the property embargoed of said creditor. If the latter should not be of that class, he should be made to prove his claims before the governor and lieutenant-governor, who shall report to the president of the administrative council, who, when the case shall justify it, shall order the payment. The debts contracted after the dates referred to in article 3d will be made subject to the resolution in articles 4 and 5.

ART. 24. When all or a portion of the property sequestrated or embargoed shall be found subject to an association of creditors before a court, or to a judicial procedure in a failure, the common attorney representing creditors (sindico) may be appointed depositary, but if said *sindicos* or attorneys should have been appointed by the court where the case belongs, then they are of necessity to be appointed depositaries of the embargo under the obligation of fulfilling the enactments of this circular relative to said depositaries.

The attorneys (sindicos) enumerated by said association of creditors (concurso) will not receive the renumeration to which article 20 refers

ART. 25. Once the sentence for the order of payments shall have been given in the court where the creditors are represented, as soon as it shall be ready for execution, a copy of it shall be annexed to the government procedure for the needful objects, and the governor or lieutenant governor shall send a copy to the president of the administrative council.

ART. 26. In cases where the property embargoed in consequence of the government procedure should have been embargoed in advance judicially by order of a court, the new embargo shall be made known to the judge who ordered the first. In this case the depositary already named shall be appointed anew, and also receive the deposit, going over the counting and making another inventory of the property, but with no assignation of stipend, unless he should have been entitled to it by the first appointment committed to him.

ART. 27. If the first embargo should have been established at the request of some one of those to whom this circular refers, when the criminality of said individual shall have been proven in the governmental proceeding, the governor or lieutenant governor shall communicate the fact to the respective judge, who, after having the law expenses apprised, shall suspend the course of the proceedings, sending them to the government authority that it may order the payment of said expenses, and whatever else should be required, according to article 23d.

ART. 28. When the first embargo is made at the request of a party not comprised in this circular the respective judges shall dictate the sentence, according to law, in the shortest possible term, sending a copy of it to the governor or lieutenant-governor for the objects that may be required.

ART. 29. If any person not comprised in this circular should claim as his all or a part of the property embargoed the embargo shall not be raised until his right shall have been proved and until the administrative council shall have issued its decision and to said council report shall be made of the case, with the proceedings.

ART. 30. The governor or lieutenant-governor who, in his jurisdiction, should embargo property of individuals who were or are residents of another jurisdiction will initiate the proceedings with the communication

he may receive for the embargo, executing the same immediately, in conformity with the terms of this circular.

Said proceedings once ended, the governor or lieutenant-governor shall comply with what is required in Art. 9th, keeping said proceedings in the government office for subsequent ends.

ART. 31. When the order for the embargo, referred to in Art. 10th, shall be given, parties possessing money, goods, or values of any kind belonging to the individual concerned in the proceedings shall be summoned through the newspapers or public bulletins to report to the government authority, and be made responsible for any concealment or act intended to evade the said resolutions, it being expressly forbidden to buy, sell, pay, transfer, give, or do aught which may affect or which relates to the ownership of the goods embargoed; with the understanding that infractors shall be attainted in what is determined regarding offenses involving treason in the decree of this superior government, dated 13th of February last, and they shall be consequently subjected to a council of war.

God preserve you many years.

DOMINGO DULCE.

HABANA, *20th of April, 1869.*

Addressed to all governors or lieutenant-governors.

DECREE OF JULY 12, 1873, RAISING THE EMBARGOES.

PREAMBLE.

Animated by the principles of strict legality, which form the unchangeable foundation of democratic teachings, and desirous of realizing in all that pertains to his department the amplest attainable right, the undersigned minister has endeavored, with zealous care since he entered upon his duties, to give paramount attention to the numerous and important questions which, in their relations to the state of insurrection that exists in a portion of the territory of Cuba, may lead to excesses of authority, arbitrary acts more or less grave, or the employment of force against the personality of the inhabitants, all of which are unfortunately too frequent in the history of all internecine struggles.

Upon undertaking to study these questions, in the fulfillment of one of the first duties of his office, the minister of the colonies found, and could do no less than seek to reform, a state of things, in his judgment, completely anomalous, namely, the existence of a great accumulation of property wrested from the hands of the legitimate owners with no other formality than a simple executive order and turned over to an administrative control exercised with great irregularity in the name of the government, to the notable depreciation of the products of those estates, to

[1] The translation here given of the decrees of April 17 and April 20 may be found with the brief of the advocate of the United States, as well as with that of the advocate of Spain, on the subject of embargoes. Another translation, in many respects not very accurate, may be found in S. Ex. Doc. 108, 41st Cong., 2d sess., p. 224 et seq. In the latter the 6th article of the decree of April 20 reads: "Said authorities will immediately proceed by themselves or through their delegates to the formation of *gubernative* judicial proceedings (*expedientes gubernativas*)," etc.

the injury of the families dependent thereon for support, and to the detriment of the public wealth, whose diminution is the inevitable result of a want of regularity and order, and the absence or withdrawal of individual interests in the control and management of property.

Such a condition of things, besides being utterly at variance with a political system whose fundamental basis must ever be justice stern, yet considerate, removed from the rancor of party spirit, and foreign to all motives of passion, could lead to no other result than to embitter mutual resentments more and more by the sad spectacle of misery, the more keenly felt as it has been the more suddenly and unexpectedly brought about, and must, moreover, tend to render profitless a great part of the rich soil of the island, and to introduce disturbance and disorder into the system of production, thus interfering with its due development.

The Cuban insurgents, those in correspondence and relations with them, and those who, more or less openly, lend them protection and aid, thus contributing to prolong a cruel, bloody, and destructive war, doubtless merit energetic suppression and exemplary punishment, and the more so to-day when the government of the republic pledges to all citizens of Spain, on either side of the seas, assured and efficacious guarantees of respect for the rights of all, and offers the means of maintaining their opinions and propagating them and causing their ideas to triumph in the only manner in which ideas can triumph in a social structure raised upon the solid foundations of reason, truth, and right.

But even the need of such punishment can confer upon no government the power to deprive those of its citizens who stray from the right path of their individual means of support, and to enforce upon their families the bitter necessity of begging to-day the bread that abounded but yesterday on their tables as the fruit of their labor or their economy.

Apart from the foregoing considerations, there cannot be found in the law of nations (derecho de gentes) any precept or principle authorizing this class of seizures which bear upon their face the stamp of confiscation; neither under any sound judicial theory is it admissible to proceed in such a manner; nor yet can the exceptional state of war authorize, under any pretext, the adoption of preventive measures of such transcendent importance and whose results, on the other hand, will inevitably be diametrically opposed to the purpose that inspired them.

In consideration, therefore, of the facts thus set forth, the undersigned minister presents for the approval of the council the following draft of a decree:

"MADRID, *July 12, 1873.*

The minister of the colonies, Francisco Suner y Capdevilla, decree:

In consideration of the representations set forth by the minister of the colonies, the government of the republic decrees the following:

ARTICLE 1. All embargoes put upon the property of insurgents and disloyal persons (*infidentes*) in Cuba, by executive order in consequence of the decree of April 20, 1869, are declared removed from the date when this present decree, published in the Madrid Gazette, shall reach the capital of the Island of Cuba.

ARTICLE 2. All property disembargoed by virtue of the provisions of the preceding article shall be forthwith delivered up to its owner or legal

representatives without requiring from them any other justification or formality than such as may be necessary to show the right under which they claim its restoration or for their personal identification.

ARTICLE 3. In order that questions growing out of the preceding provisions may be decided with greater accuracy and dispatch, the Captain-General, superior civil governor of the Island of Cuba, shall forthwith proceed to organize, under his own chairmanship, a board composed of the president of the audiencia as vice-chairman, the intendente of Cuba, the civil governor of Havana, the attorney-general (fiscal) of the audiencia, and the secretary of the superior civil government, who shall act as secretary of the board, having voice and vote therein; and this board shall summarily, and in the shortest possible time, decide upon such applications as may be made by the interested parties without any other appeal than the one that may be taken to the government of the republic through the colonial ministry.

ARTICLE 4. The board of authorities charged, under the foregoing article, with the disembargo and restoration of property of insurgents and disloyal persons, may, whenever it shall appear needful to the more thorough decision of these questions, consult the board of public debt (*junta de la deuda del tesoro*), heretofore charged with the administration of property embargoed by executive order, and may ask and obtain from the tribunals of every jurisdiction and from all other dependencies of the state the data and antecedents which may be deemed needful to such decision.

ARTICLE 5. The minister of the colonies shall issue the necessary instructions for the execution of the present decree, or shall definitely approve those which may be prepared to the same end by the board of disembargoes.

Madrid, July 12, 1873.

FRANCISCO PI Y MARGALL,
The President of the Government of the Republic.
FRANCISCO SUNER Y CAPDEVILLA,
The Minister of the Colonies.[1]

Cases under the foregoing decrees.

The first case in which damages were allowed for the embargo of property under the foregoing decrees was that of Joaquin M. Delgado, No. 31, in which the umpire, Mr. Bartholdi, on February 24, 1875, allowed the claimant $113,360, with interest from May 5, 1869, the date of the embargo, at the rate of 8 per cent for the seizure of his property by the Spanish authorities "in violation of the treaty stipulations." In this case damages were allowed for the deterioration of the embargoed property, in the absence of proof of specific acts of destruction by the Spanish authorities.

On June 26, 1875, the arbitrators awarded the sum of $3,000 for the embargo of property in the case of José de Jesus Hernandez y Macias, No. 41.

[1] For. Rel. 1873, vol. 2, p. 1008.

The next case in which damages were allowed for an embargo was that of Joaquin Garcia de Angarica, No. 13, in which the umpire, Mr. Bartholdi, on November 1, 1875, rendered the following decision and award:

"Inasmuch as there is no doubt about the claimant's American citizenship, and that his new citizenship was notified to the Spanish authorities six months previous to the embargo; that the Spanish Government itself acknowledged that the claimant was innocent of any participation in the insurrection; inasmuch as his property was seized in the month of August 1869 and was not restored to him before the years 1873 and 1874; and inasmuch as the Spanish Government is liable for unjust detention and use of property, as well as for damages which embargoed property always suffers—

"It is my opinion that the claimant has a right to recover damages to the amount of $748,180, with interest at 6 per cent per annum from this day to the day of payment."

In the case of Gonzalo Poey, No. 66, the arbitrators, March 17, 1877, awarded $2,585.60, for an embargo of property.

An award of $1,500 was made by the arbitrators, October 4, 1879, for the embargo of property, in the case of Fernando Dominguez, No. 32. On November 20, 1879, the umpire, Baron Blanc, awarded $13,600 for an embargo, in the case of Young, Smith & Co., No. 96.

Argument of Mr. McPherson.

On January 20, 1881, Mr. McPherson, then the advocate for Spain, submitted to the commission a printed brief in which he reviewed the whole subject of the embargoes and maintained that they were rightful. At this time embargo claims aggregating in amount more than $9,000,000 were pending before the commission. Mr. McPherson's argument was as follows:

1. That "the insurrection of 1868 in Cuba, whatever may have been its international status, was *in fact* a bloody war, which laid waste a large part of the island, and for ten years taxed the powers and resources of the Spanish Government;" that "a nation may acknowledge the existence of a war, although it may at the same time refuse to recognize the parties thereto as belligerents;" that "the United States at the inception of their rebellion claimed and exercised the rights of war against the insurgents, while protesting against the right of foreign nations to recognize them as belligerents;" that "the Secretary of State of the United States, the American minister at Madrid," and "eminent Spanish officials," all "admitted the

existence (in Cuba) of a civil war of great magnitude, although at the same time Spain protested against the recognition by the United States of the insurgents as belligerents;" and "that, therefore, within its own dominions, Spain had the right to use all measures of repression and self-defense justified by a state of war." (H. Ex. Doc. 160, 41 Cong. 2 sess. pp. 16, 20, 35, 43, 46, 136, 157, 164, 165, 168; Dip. Cor. 1873, pp. 999, 1000; *Rose* v. *Himely*, 4 Cranch, 241, 272; Prize Cases, 2 Black, 669.)

2. That "amongst the measures which the fact of war rendered necessary was the embargo which was decreed against the property in Cuba of all persons, whether Spaniards or aliens, believed to be giving aid and comfort to the insurrection;" that this measure "was directed against those connected with the insurrection, not only on account of their complicity with it, but for the purpose of suppressing the insurrection itself;" that the question of the guilt or innocence of the accused was tried, not by the board that was charged with the care of embargoed property, but by courts-martial; that "the proceedings of these courts were so conducted as to allow the defendants every opportunity of defense in person or by counsel;" that notice was given by publication to the defendants to appear, and that, where judgments by default were given, they were not in fact, though they were in form, final, but were subject to be opened at any time on the appearance of the defendant. (See Decrees, *supra;* For. Rel. 1871, p. 734.)

3. That "neither the decrees of embargo nor the administration thereof were contrary to international laws;" that they were sustained by the practice of the United States during the civil war, which practice, as the American courts had declared, was not contrary to law or justice; that in every case, it was believed, before the commission, the owner of the property embargoed in Cuba was absent from it and from the island, and was charged by the Spanish authorities with aiding the insurrection, and that all the property embargoed by the Spanish authorities might, therefore, be considered as coming within the definition of abandoned property given by the statutes of the United States, viz: "Property, real or personal, shall be regarded as abandoned when the lawful owner thereof shall be absent therefrom and engaged in arms or otherwise in aiding or encouraging the rebellion" (13 Stats. at L. 375); that under the acts of Congress of 1862, 1863, and

1864, no inquiry preliminary to seizure was made except such as the officer who directed the seizure might think proper to make for his own satisfaction, and that the judicial proceeding then instituted was carried on by the same officer filing in court a libel charging that the owner of the property so seized was a person engaged in aiding the rebellion; that in the United States the claimant, in order to obtain relief, had to "await the suppression of the rebellion, and then, in a suit begun by himself, and by evidence produced at his own expense, prove that he had never given any aid or comfort to the rebellion, or (as a subsequent act required) to any person engaged therein," while in Cuba, "in every individual case, a proceeding was commenced against the owner of the property, and the expense and the burden of proof was cast, not upon the owner, but upon the government, and the proceedings were not postponed till the rebellion was over, but took place at once;" that, while this "involved the necessity of proceeding to judgment in the absence of the property owner," there was "always a provision made in the judgment that it might be reopened if the defendant should appear;" that "in the similar proceeding in the loyal States under the United States statutes, the failure of the defendant to appear was taken as *conclusive proof* of guilt and the judgment against him was final, while, as regards seizures in the South, his failure to claim his property within two years was equally conclusive against him;" that, as to the objection that the proceedings in Cuba were contrary to the treaty of 1795 because they were carried on before courts-martial, the necessity of considering this objection was obviated by the clause in the agreement of February 12, 1871, which provided that the adjudications of all tribunals made in the absence of the parties interested, which was the case in all the claims in question, should be reviewed by the arbitrators who should make such award, in each case, as they should deem just; that it could not, however, be denied that Spain, like every independent state, had the right to organize its judicial system in any manner it might judge best; that the treaty of 1795 provided that American citizens should be tried "by order and authority of law only, and according to the regular course of proceedings usual in such cases;" that if, therefore, cases of *infidencia* were according to law prosecuted before courts-martial, there was no ground of complaint on that score; that while Mr.

Webster, in his report of December 18, 1851, in the case of Thrasher, noticed that there were in Spain, at the date of the treaty of 1795, ecclesiastical tribunals having power over life and death, whose proceedings were always secret, and against the secrecy of which the stipulation in the seventh article of that treaty, in regard to publicity of proceedings, might, he said, well have been directed, he did not intimate that the jurisdiction of such tribunals could be affected by the treaty, but on the contrary declared that the "definition of crimes, the denouncement of penalties for their commission, and the forms of proceedings by which guilt is to be ascertained, are high prerogatives of sovereignty, and one nation can not dictate them to another without being liable to the same dictation herself;" that Mr. Fish, in his report of March 12, 1872, in the case of Howard, who was tried for *infidencia* by a court-martial, said that the "strong point which prevents the intervention of this Government in behalf of Dr. Howard from becoming efficacious is the fact that he has been regularly tried and found guilty by a duly constituted tribunal in the Island of Cuba;" that it was "the preeminent duty of every government," in the exercise of the right of self-defense, "to maintain its own authority within its own dominions, and to that end to exert every power which the necessity of the case invokes," and that for the measures taken for the discharge of this duty nations are not to be too strictly judged; that the general sympathy of native Cubans with the insurrection, the fact that large numbers came to the United States, "whence many of their number engaged in sending out expeditions to carry aid to the insurgents," and the further fact that, while continuing to hold their property in Cuba and to reside there a great portion of their time, they undertook to transfer their allegiance to the United States, were circumstances that warrant suspicion; that, to justify seizures, suspicion of actual guilt was not always necessary, but that "actual danger might justify a seizure under circumstances which, in the absence of danger, would not warrant it, and that for acts of hostility committed by the claimants, while in the United States, against the Government and people of Spain, seizures of their property in Cuba were justifiable and lawful." (1 Kent's Comm. 48; 3 Wallace, 62; *Lock* v. *United States; The George*, 1 Wheat., 408; Diekelmans' Case, 92 U. S. 520; *Mitchell* v. *Harmony*, 13 Howard, 133; Wharton's Conflict of Laws, §§ 856, 871, 876, 879,

906; Vattel, B. 3, ch. 6, § 95; Grotius, B. 3, ch. 1; Collie's Case, 94 U. S. 258.)

4. That "the embargoes were not in violation of the treaty of 1795, not being prohibited by Article VII. or any other article of that treaty;" that the word *embargo* had both in English and in Spanish a common sense as a term of commerce, and meant the prohibition of ships to leave the country; that, while it had other senses in Spanish, that construction of the text should be adopted which would make both versions agree; that, in the same article, the treaty prohibited *detention* of effects, and provided that in case of seizure, *detention*, or arrest for *debts* or *offenses*, the prosecution should proceed according to the usual course; that, collating these provisions, it appeared that vessels and effects were not to be embargoed or detained for any military expedition or other public or private purpose, yet they might be seized and detained for debt or crime, and in order to give effect to both provisions it must be held that a seizure or detention for debt or crime was not a seizure or detention for a public or private purpose; that the provision in Article VII. of the treaty, which forbade embargoes and detentions "for any military expedition or other public or private purpose whatever," was intended to prohibit the exercise of the ancient prerogative, known as the *Jus Angariæ*, to exact from ships riding in the ports and roads of a country certain services and duties for the transportation of soldiers, arms, and ammunition, in case of some public necessity or exigency; that it had no reference to the embargo of real estate or personal property unconnected with trade and commerce; that the United States, by the acts of Congress of 1807, 1812, and 1813, laid a general embargo on all foreign "vessels and effects," without making an exception in favor of Spain, thus disclosing the construction then given to the treaty; that the protection and promotion of commerce was the object of all the articles of the treaty from 6 to 22, inclusive; that, even giving to article 7 the construction contended for by the claimants, the necessity of taking measures for self-defense worked an exception in favor of the Spanish Government; that, during the excitement attending the Trent affair, in 1861, the British India Government issued two ordinances prohibiting the exportation of saltpeter from that country to any place except Great Britain, and except in British vessels; that, under these ordinances, four American vessels, partly laden with that article, were

detained at Calcutta till the United States, by acceding to the British demands, had removed the threatened danger; that these ordinances were justified by the law officers of the Crown on the ground of self-defense, and that the claims of the owners of the vessels were rejected by the British claims commission; that, both in the act of Congress of July 17, 1862, and in the Spanish decree of April, 1869, touching the embargoes, it was the declared object of those measures not merely to punish persons connected with the insurrections, but also to insure the speedy suppression thereof. (As to the word *embargo*, see Neuman and Baretti's Span. Dict., Jacob's and Bouvier's Law Dictionaries, Sheridan's, Webster's, and Worcester's English Dicts., the Encyclopædia Britannica, 1797, and the New American Encyclopædia, 1859. As to the construction of treaties, *U. S.* v. *Percheman*, 7 Pet. 57. As to the *Jus Angariæ*, Mr. Sagasta to Mr. Sickles, Sept. 12, 1870. For Rel. 1871, p. 711; Azuni, Chap. V.: Beawes, Lex Mercatoria Rediviva, London, 1771, p. 242; Lawrence's Wheaton, Part IV., ch. 1, note 169.)

5. That "the proceedings of Spain against the property in Cuba of native Cubans in the United States was justified by the general hostility of that class to the Spanish Government, and the impossibility of discriminating between friends and enemies, the well founded, and often realized, apprehension of danger from the machinations of the native Cubans in the United States, the views of the United States with regard to the island of Cuba, and the declared sympathy of the President and cabinet with the object of the insurrection." (H. Ex. Doc. 160, 41 Cong. 2d sess. [same as Senate Ex. Doc. 108 same session], pp. 13, 15, 17, 18, 22, 37, 42, 48, 53, 58, 66, 69, 92, 128, 158, 159, 160, 167, 168, 174, 176, 183, 184, 188, 189; Appleton's Annual Encyclopædia, 1869–1870, pp. 209, 210, 211, 213, 216.)

6. That "the decree of July 12, 1873, was merely a change of policy on the part of the Spanish cabinet, and can not be construed as in any sense an admission of the illegality of the measure which it was designed to discontinue;" that while it was true that the report of Mr. Suner y Capdevilla, minister of the colonies, on which the decree was made, contained admissions of their illegality, he was not in power when the decree was made, and it did not appear that the government in making the decree adopted his views in that regard.

7. That "the United States, being bound by the same obligation as Spain under the treaty of 1795, passed general embargo

acts in 1807, 1812, and 1813, and during the rebellion of 1861–1865 passed a series of acts which, in theory and purpose, were exactly similar to the Spanish decrees of embargo, and the proceedings and practice under which were in every respect similar to those under the Cuban decrees, if, indeed, not more harsh in their results." (See this argument, *supra*, 4; acts of Congress, July 13, 1861; July 17, 1862; March 12, 1863; July 2, 1864; case of Miller, 11 Wallace, 301; British Com. (1871).)

8. That "the true and just measure of indemnity, in case of embargo, to claimants whose quality of American citizen shall be recognized by the commission, is that which governs in cases of seizures *jure belli*, and was adopted by the United States in the rebellion of 1861–1865, *i. e.*, the restoration of the property which came into the hands of the government, or, if it has been sold, the net proceeds realized therefrom." (See acts of Congress last above cited; this argument, *supra*, 3, 4, 7.)

Mr. Durant's Argument.

Mr. Durant, the advocate for the United States, replying to Mr. McPherson's brief on the embargo, argued that the agreement of February 12, 1871, by its terms included all wrongs and injuries to persons and property, so that it was unnecessary to inquire whether the word "embargo" in the treaty of 1795 was well applied to a particular class of the wrongs complained of. He contended, however, that the word embargo, which was used in the Spanish as well as in the English text of the treaty, was used in its full Spanish sense. Mr. Fish had so treated it in his protests against the *arbitrary embargoes of property* under Dulce's decrees; and the treaty of 1795 expressly provided that the citizens or subjects of each contracting party, their vessels, or effects, should not be liable to any embargo or detention on the part of the other for any military expedition or other public or private purpose whatever. When Mr. Sagasta sought to limit the effect of the word "embargo," said Mr. Durant, the minister of the United States at Madrid. Mr. Sickles, referring to the language of the treaty, replied that the embargo, if considered as a military measure intended to strengthen one party to the conflict and to weaken the other, would seem to be fairly embraced in the interdictions of the treaty, and if it was considered as a punishment for offenses against the laws, the accused were entitled to a judicial hearing before judgment was pronounced against them. This view,

said Mr. Durant, the Spanish Government did not appear to have controverted, and it was directly acquiesced in by Mr. Martos, Mr. Sagasta's successor. It thus appeared to have been the understanding of both governments that the embargo or sequestration of the property of American citizens in Cuba was a violation of the treaty of 1795, and by the agreement of 1871 Spain undertook to pay pecuniary damages to those citizens of the United States who had thus been injured in their property. The commission itself had so decided in several cases.

As to the existence of a state of war in Cuba, Mr. Durant said that Spain had never admitted it, nor was it ever recognized by the United States or by any European nation. (For. Rel. 1875, vol. 2, pp. 1155, 1158.) In the civil war in the United States, belligerent rights were recognized by European powers from the beginning as pertaining to the Confederate States, and the Government of the United States proclaimed and acknowledged the state of war by its blockade of the coasts of the Confederate States, by exchange of prisoners, by negotiations, and in other ways. "On the other hand, the authorities in Cuba," said Mr. Durant, "although there was no war, and consequently there was peace, proceeded at once in time of war to exercise war powers unknown to civilized nations."

Argument of Mr. Rodriguez.

With his brief Mr. Durant submitted an argument on the subject of embargoes by Mr. J. I. Rodriguez. Mr. Rodriguez declared that the outbreak of the insurrection in Cuba had found justification and even applause on the part of Spanish statesmen who had an interest in suppressing it; that the devastation of the island by the insurgents was purely a measure of war, like the devastation of the South by the march of Sherman's army; that the Cuban Junta in New York was an organization which of itself did not violate the laws, and that as soon as the President, by his proclamation of October 12, 1870 (16 Stats. at L. 1136), declared that it should cease to exist, it disbanded and promptly obeyed the orders of the head of the nation; that the natives of Cuba, far from being infected with a deadly hatred of Spain, were before the insurrection faithful subjects of that country, and after the insurrection were men who were fighting for their independence.

Apart from these general considerations, Mr. Rodriguez

maintained that the embargoes were illegal under the law of Spain of September 28, 1820, which was enacted in Madrid and communicated to Cuba, and of which article 4 (Zamora's *Biblioteca*, vol. 3, p. 218, word *Extrangero*) read as follows: "Not even by way of reprisals in time of war, nor for any other reason whatever, shall it be lawful to confiscate, sequestrate, or embargo the said property (the property of foreigners in Spain); but it shall be lawful to do so when the property belongs either to the governments with which the Spanish nation is at war or to their allies or auxiliaries." He also referred to a law of December 4, 1845, which provided (Sanguineti, *Diccionario de Legislacion*, vol. 3, p. 846) as follows: "The property of foreigners shall never be confiscated, even in case Spain is at war with the nation to which they belong."

Mr. Rodriguez contended that the laying of the embargoes was forced upon General Dulce, and that they were demanded by some from corrupt motives and by others from feelings of enmity. The decree of April 1, 1869, was not published in the *Gaceta* till the 16th of that month, when General Dulce was no longer able to resist the bands of volunteers who besieged his palace and who on the 2d of June compelled him to resign his office into the hands of General Espinar. The embargoes were executive, not judicial. General Espinar went away, and General Cabellero de Rodas, who came to occupy his place as Governor-General of Cuba, issued the order of September 2, 1869, by which Colonel Montaos was directed to act as judge-advocate and institute legal proceedings against the person supposed to be connected with the revolution. By these proceedings it was intended to turn the *executive embargoes*, first, into *judicial embargoes*, and then into *final confiscation*, but they reached a practical result only in cases of fifty-two persons, while the authorities went on laying executive embargoes. When General Valmaseda, the favorite of the volunteers, succeeded General Cabellero de Rodas as Governor-General, he abolished the council of administration of embargoed property; but when King Amadeo ascended the throne of Spain he established the *junta de la deuda* and ordered a general revision of all cases of embargo, directing the cases in which there were proofs against the parties to be sent to the courts, and the release of the property where there were no such proofs. This decree received little attention from the authorities in Cuba, and when the Republic was established

the embargoes were by the decree of July 12, 1873, ordered to be abolished. The minister of Ultramar went to Cuba to enforce this decree, but he was unable to do it, and the embargoes were not abolished till Marshal Martinez Campos arrived with 26,000 regular troops and put the volunteers under control. Mr. Rodriguez contended that under the decrees of April 1869 no opportunity of defense was given to the owners of the embargoed property, since by the embargo itself they were deprived of their civil rights, and could not appear before any tribunal in Cuba either in person or by attorney. The political secretary informed the consul-general of the United States at Havana that persons desiring to prove their innocence might appear before the Spanish consul of the place where they resided, and file with him testimony of trustworthy persons, which would be transmitted to the Captain-General, who would repeal the embargo if the testimony was satisfactory to him. This was an executive, not a judicial, proceeding. Mr. Rodriguez also contended that in order to make the measures adopted by the United States during the civil war a precedent for the measures adopted by the Spanish authorities in Cuba, it would be necessary to show that the United States seized and confiscated under its laws the property of foreign subjects in the United States. Moreover, the proceedings of the tribunals in Cuba during the insurrection were affected by the presence of armed bands of volunteers, who invaded and occupied the court rooms. In conclusion, Mr. Rodriguez made the following recapitulation:

"1. In Spain no other *embargoes* of property than the one decreed by the courts of justice, both in civil and criminal cases, are known. (See Escriche Diccionario, word *embargo*.)

"(2) No embargoes can be placed upon private property by executive decree.

"(3) Out of 135 claimants before this commission, there have been only four claimants against whose property a judicial embargo was placed, and this was on September 9, 1870. * * *

"(4) The embargoes under the decrees of April, 1869, were political measures, intended for political purposes, and the tribunals had nothing to do with them.

"(5) According to the laws of Spain the property of all foreigners, Swedes and Americans and Russians, can not be embargoed, sequestrated, or confiscated for any reason at all, even in times of war, by means of reprisals.

"(6) The Cuban embargoes were repealed as illegal in 1873, and the repeal was never disapproved by the government which succeeded the Republic.

"(7) The embargo and the confiscation of the property of American citizens in Cuba, even by reason of self-defense, were forbidden by the laws above recited and by the treaty of 1795 between the United States and Spain.

"(8) Spain has conceded the restoration of the property of the American citizens so seized, embargoed, and confiscated. * * *

"(9) Neither the arbitrators nor the umpire have ever held that the *embargoes* were rightful, and, on the contrary, the heavy awards made in favor of Angarica, Delgado, Poey, Youngs, Smith & Co., and others have shown their indisposition to accept the doctrine now set forth for the first time by the advocate for Spain."

Mr. McPherson's Reply.

To the brief of Mr. Durant dated February 18, 1881, and the accompanying brief of Mr. Rodriguez, Mr. McPherson replied in a brief dated August 30, 1881. He adverted to the fact that it is common in the jurisprudence of nations not only to punish acts committed by their citizens abroad, but also to render judgments against persons who are absent, such judgments, like those of the tribunals in Cuba, not being final, but subject to be reopened on the appearance of the parties against whom they were entered. In support of his position that a state of war existed in Cuba, he further referred to For. Rel. 1874, pp. 859, 861, 883, 904, 917; and in support of the position that foreign recognition is not necessary to constitute a state of war, he referred to the fact that, while the earliest recognition of the existence of the civil war in the United States was that of Great Britain on May 13, 1861, the Supreme Court of the United States held in the Prize Cases (2 Black, 670) that the first proclamation of blockade of Confederate ports on April 19, under which English vessels were captured before information of the British proclamation of neutrality had reached the United States, was conclusive evidence of the existence of a state of war, though in the same proclamation belligerent rights were denied to the Confederate Government by the declaration that any persons who, under its authority, molested vessels of the United States should be treated as pirates. Mr. McPherson denied that Mr. Martos had ever expressed acquiescence in the views of Mr. Sickles touching the illegality of the embargoes.

As to the laws of 1820 and 1845, which were quoted by Mr. Rodriguez, Mr. McPherson adverted to the fact that, in the first section of the act of 1820, it was declared that the protec-

tion given to foreigners and their property was conditional on their respecting the constitution and laws of the country, and to the fact that it was declared in the third section that they were to enjoy "exactly the same protection as the persons and property of Spaniards." The fourth section, he said, with significant caution expressly subjected to confiscation the property of those who, in the time of war, became the enemies of Spain or "the allies or *auxiliaries* of such enemies."[1] In regard to the dissolution of the Cuban Junta in New York, Mr. McPherson said that there was established in its place the "Agencia General de la Republica de Cuba," the president of which was Miguel de Aldama, and which contributed to the support of the insurgents by supplying them with money and arms, as well as by soliciting unarmed men to go to Cuba. From this source, it was contended, the insurgents derived their main support.

Case of Macias.

On May 20, 1881, the umpire, Count Lewenhaupt, made the following award:

"The Panchita estate was purchased by Mr. Macias, a naturalized American citizen, August 26, 1867, from Mr. Ruiz, for $197,000, of which amount $60,000 were actually paid at various times. The deferred payments were secured by mortgage, and as the claimant failed to pay an installment when it fell due, the mortgagee brought suit to foreclose the mortgage.

[1] *Law of September 28, 1820.*

ART. 1. The Spanish territory is an inviolable asylum for the persons and for the property of foreigners, both when these foreigners reside in Spain and when they live outside of her dominions; provided, however, that they respect the constitution and the laws of the country.

ART. 2. This asylum, as far as the persons are concerned, shall be without prejudice to the treaty stipulations already made with other powers; but as in these stipulations the offenses of a political character can not be spoken of, it is hereby enacted that no foreigners residing in Spain shall be delivered to their respective governments, and that their political offenses shall not be considered comprehended among the crimes mentioned in the above-named treaties.

ART. 3. The persons spoken of in the foregoing treaties, as well as their property, shall enjoy exactly the same protection as the persons and property of Spaniards.

ART. 4. Not even as reprisals in time of war, nor for any other reason whatever, shall it be lawful to confiscate, sequestrate, or embargo the said property; but it shall be lawful to do so when the property belongs either to the governments with which the Spanish nation is at war or to their allies or auxiliaries.

On the 4th of October 1869 a decree was entered for the sale of the property under foreclosure, but before the sale took place the attorney of Mr. Macias filed, June 30, 1870, a petition in bankruptcy, and obtained an order staying the sale directed by the decree of October 4, 1869; and as the bankrupt's property had to be placed in charge of someone designated by the court, Mr. Bock, brother-in-law and friend of Mr. Macias, and who already had charge of the Panchita estate, was appointed administrator.

"In the meantime Spanish officials had on two different occasions, in consequence of a confusion of name, by mistake interfered with Mr. Macias's property, but there is no satisfactory evidence that these incidents had any connection with Mr. Macias's failure to meet the payment.

"The first act complained of, for which Mr. Macias is entitled to indemnity, took place on the 20th of August 1870. On that day a general embargo was decreed against Mr. Macias to retroact to June 1869, and by this act he was deprived of all his civil rights, and his lands, chattels, and credits became, in fact, for the time and occasion, the property of the government. Mr. Ruiz, the mortgagee, was appointed administrator under the embargo, and placed in possession of the plantation. The proceedings in bankruptcy were stayed, and the plantation was finally sold on the 7th of November 1871 to Mr. Ruiz for $102,248.

"There is no doubt that the embargo was imposed without justification; that the property has not been returned, although an order of disembargo was issued November 23, 1873, and that the claimant has in vain made efforts to obtain restitution; but it is maintained on behalf of Spain that if the bankruptcy proceeding had succeeded it would not have arrested the execution of the decree already made for the sale of the Panchita, and that had the property been sold under proceedings in bankruptcy instead of foreclosure it would not have brought one dollar more than it did bring.

"On the other side, the advocate for the United States contends that if those proceedings had been continued and the embargo had been removed the products of the estate would have been under the control of the court and might have been applied to the payment of the debts of the estate, and that under the direction of the court there would have been an honest sale of the claimant's property.

"In the opinion of the umpire, the claimant in this case is entitled to an indemnity equal to the amount which might have been realized by a sale under bankruptcy proceedings, with interest on the amount from the date of embargo.

"The claim includes the following items:

"1. In respect of the estate Panchita, the value of the estate, less the purchase money due at the time of the sale, $263,000, with interest from November 23, 1873, the date of the order of disembargo.

"The Panchita estate was bought in August 1867 for $197,000. The claimant contends that it had increased in value by completion of a railroad and improvements; that he refused in 1869 an offer of $300,000; that the yearly product was 1,500 hogsheads of sugar, and that the value ought to be estimated at $400,000. That the value of the estate was materially increased is admitted by Spain, but it is contended that the building of the railroad must have been foreseen in August 1867; that it is not proved that the yearly product ever was more than 1,028 hogsheads, and that there is every reason to doubt that it was improved to the value of $400,000. In any case it is not probable that at a forced sale under bankruptcy at the time of the insurrection the plantation would have brought a price corresponding to the actual value, and the umpire is of opinion that an indemnity of $120,000 is a fair compensation for the claimant's loss in consequence of the embargo of this estate.

"2. The value of the three crops taken from the estate prior to the sale, $150,000, with interest from November 23, 1873.

"This claim is disallowed in consequence of the award made with regard to the first item.

"3. The value of the personal property on the estate Panchita, not included in the valuation of the estate, $2,000, with interest from June 1, 1869, the date when the embargo of August 1870 took effect.

"This item is disallowed because the property is not included in the official inventory, the correctness of which there is no reason to doubt.

"4. The value of the villa and lots at Matanzas, $15,000, with interest from June 1, 1869.

"On account of this claim an amount of $10,000 is allowed.

"5. The value of the household furniture in Havana, $3,000, with interest from June 1, 1869.

"This claim is admitted by Spain as far as the principal is concerned.

"6. The value of the debt secured by mortgage on the estate Ariadne, $5,000, with interest from June 1, 1869.

"Mr. Silveira, the owner of the estate, wrote on the 4th of March 1871 the following letter to the bureau of embargoed property at Matanzas:

"'I have just arrived from Spain, and for this reason I was not aware that the property of Mr. José Manuel Macias has been embargoed, and as I have to deliver to the said Mr. Macias in the month of May of the present year the amount of $5,000 for an installment I owe him for the estate of Ariadne, I will hold the said amount at the disposal of the government, complying with the circular about the matter, with the understanding that out of the said amount I have to deduct $433, which I paid for said Macias, and by account of said installment, to the city council of Matanzas for revenue taxes owed by the said estate at the time which it belonged to the said Macias, and which payment was made before the decree of embargo.'

"As it is reasonable to suppose that the above amount of $4,567 would have been paid at the time if the embargo had not existed, this amount is allowed, with interest from June 1, 1871.

"7. The value of the claimant's interest in the sugar embargoed on the estate Socorro, $1,023.33, with interest from May 30, 1870, the date of the embargo.

"The principal is allowed.

"8. Compensation for loss of business and credit, $100,000.

"This claim is disallowed.

"The umpire understands that it is not contended that the claimant has acquired under the decree of November 23, 1873, other rights than those conceded, which the umpire considers acquired under the agreement of 1871, and that in consequence there is no necessity for the umpire in this case to examine the question whether the commission has jurisdiction to hear and determine a case of violation of rights founded on the said decree.

"The umpire hereby decides that the claimant is a citizen of the United States within the meaning of the agreement of 1871, and that the following amounts be paid on account of this claim:

"One hundred thirty-four thousand twenty-three dollars thirty-three cents, with six per cent interest a year from the

20th of August 1870, the date of the embargo, and four thousand five hundred sixty-seven dollars, with six per cent interest a year from the 1st of June 1871 to this day."

José M. Macias, No. 52, Span. Com. (1871).

Thompson's Case.

The rest of the awards for embargo claims were as follows:

The claimant's estate in Cuba was twice embargoed by the Spanish authorities on the ground that, although she was a native of the United States, she was the wife of Juan D. Duggan, an insurgent convict. She and Duggan had for years held themselves out as man and wife, which fact, if true, would have given Duggan a legal interest in the property; but it was not true, Duggan having a lawful wife in another place. The first seizure of the property was made on April 26, 1869, and the embargo continued till the 5th of June. The second seizure was made on September 26, 1869, and under this embargo the authorities held the property till September 10, 1870, when it was restored to the claimant. When the first seizure was made, she asserted title to the property, but at the same time declared herself to be Duggan's wife. There was no evidence that she notified the authorities that she was not his wife till November 11, 1869, nearly a month after the second seizure; and it was contended on the part of Spain that the property was held by the authorities no longer than was necessary to satisfy themselves as to the actual status of the claimant, and the real ownership of the property.

The claimant asked indemnity on account of both seizures; on account of increased living expenses, and damages to the property, resulting from the embargo; and also on account of the failure of the authorities to restore a *potrero*, or cattle farm, which was part of her estate.

The umpire allowed damages for the net value of the crop of 1869–70 gathered during the second seizure, with interest at 6 per cent from June 30, 1870, the date when the last proceeds were received. He refused to allow damages for increased living expenses prior to the production by the claimant (after the second seizure) of proofs of her real nationality. He allowed the sum of $1,000 as compensation for the value of the place as a home after that time. He also allowed $2,000 as compensation for the detention of the *potrero* from Septem-

ber 10, 1870, to May 31, 1873, the date of the filing of the memorial.

The umpire refused to allow damages as a matter of course for injuries "which embargoed property always suffers." There was, said the umpire, no evidence whatever in the case that the injuries for which indemnity was asked "were caused by any specific act of the Spanish authorities." They were only such as were "the result of use, accident, and the like," and no indemnity could be allowed on that account. In making this ruling the umpire refused to be bound by the decision of one of his predecessors, M. Bartholdi, in the cases of J. G. Angarica, No. 13, and J. M. Delgado, No. 31, in which Spain was held to be liable "for unjust detention and use of property, *as well as for damages which embargoed property always suffers.*"

Count Lewenhaupt, umpire, case of *Alfred G. Compton, executor of Ana Thompson*, No. 39, Span. Com. (1871), May 3, 1882.

Rivas's Case.

The claimant asked damages for the seizure of his plantation by Spain under an executive decree issued about October 1, 1869. His property was restored in July 1870. The arbitrator for Spain contended that the treaty of 1795 did not cover embargoes of real property; that the prohibition of the seizures of "effects" could not apply to real estate, and that the prohibition of embargoes referred only to the exercise of the *jus angariæ;* that a prohibition of embargoes was found in similar language in various other treaties of the United States, and was understood to have that signification. It was also contended that Spain had a right to embargo property under the circumstances existing at the time in question; that at that time the Government of Spain had invested the Government of Cuba with extraordinary and discretional powers; that, owing to the condition of affairs in Cuba, the Governor-General had for many years possessed such powers as were vested in the commanders of besieged places; that such powers were conferred by the royal ordinance of May 1825, and were renewed and made common to all the governors in Cuba by the royal orders of March 21 and May 26, 1834; that similar powers were exercised by the authorities in Cuba in 1795, and that they constituted the regular course of proceedings in that island; that such being the rule for Spaniards as well as for foreigners, it could not be expected that a special

court with special proceedings should have been established for citizens of the United States in 1869.

The arbitrator for the United States answered:

"I understand it to be argued that under the law of Spain the will of the Governor-General of Cuba is the law of that island, and that in any case his authority is justification of the seizure of property. In my view this law is not such a law as was intended by the 7th section of the treaty of 1795. By that treaty Spain agreed in effect to proceed against the property of American citizens for offenses defined by law, for penalties imposed by law, and by a regular course of judicial proceedings. A law which vests in the Governor-General the powers to define offenses, affix penalties, and to proceed summarily or administratively does not seem to me to meet the requirements of the treaty.

"Even if a state of things existed which justified a summary procedure it could not justify the infliction of penalties not authorized by law. The suspension of courts is not a suspension of law."

For the losses caused by the embargo and detention of the claimant's estate the arbitrator for the United States allowed the sum of $31,000, with interest at 6 per cent from June 1, 1870, and $5,000 more for certain expenses connected with the embargo, with interest at 6 per cent from December 1, 1870.

The umpire, Count Lewenhaupt, concurred in the opinion of the arbitrator for the United States and adopted his award.

Case of *Ramon Rivas y Lamar*, No. 73, Span. Com. (1871), February 22, 1883.

Case of Madan.

"The injury complained of is the seizure of claimant's property in August 1869 under an executive decree.

"It is contended by Spain that the authorities in Cuba were justified by the right and duty of self-defense in temporarily sequestrating the revenues of native Cubans residing in the United States until assurance could be obtained that such revenues would not be devoted to the support of the insurrection; that it was the misfortune of the claimant to belong to that class of persons, and that it was his fault that by his participation in a previous insurrection he had rendered himself a proper object of suspicion in the occurrence of a new insurrection.

"The umpire is of opinion that under the agreement of 1871 it is immaterial whether or not the claimant took part in a previous insurrection; that there is no proof that he had

done anything to cause him to be suspected of participation in the insurrection of 1868, and that in consequence the seizure was not justified."

Count Lewenhaupt, umpire, case of *Cristobal Madan*, No. 45, Span. Com. (1871), February 22, 1883.

Case of Mora & Arango.

"The claimants, partners of the New York firm of Mora & Arango, are recognized by Spain as naturalized citizens of the United States.

"On the 18th of February 1870 the governor-general of Cuba issued a decree of embargo against the property of Fausto Mora on the ground that, according to information received from the Spanish consul in New York, Mora had contributed money in favor of the Cuban cause. On the 31st of July this embargo was annulled in consequence of a telegram from the Spanish minister in Washington, and on the 21st of August the minister wrote to the governor-general that the information given by the consul was erroneous. In the meantime the lieutenant-governor at Sagua la Grande had extended the embargo to the firm Mora & Arango by a decree of the 13th of April, and this decree was in fact a prohibition for the firm to do business in his district; but this second embargo was, according to the text of the decree, issued in consequence of the first, and it was understood by all parties that when the joint embargo was raised the said prohibition ceased. * * *

"The umpire is of opinion that there is no proof that the claimants were implicated in the insurrection and that the embargoes were not justified. With regard to the first embargo, the umpire is further of opinion that there is no proof that said embargo caused any loss, and that therefore no indemnity is due.

"The following claims are made on account of the second embargo:

"1. Indemnity for certain debts, which the claimants suppose that they would have collected if no embargo had been issued.

"The umpire is of opinion that there is no proof that the collection of those debts was delayed or prevented by the embargo; that a certain amount was recovered after the embargo, and that the greater part was lost because the debtors became insolvent. No allowance is made.

"2. Indemnity for stoppage of business with Cuba during

the embargo and for dissolution of the firm on the 1st of August 1870. * * *

"The umpire is of opinion that it is immaterial whether or not the embargo had the remote effect to cause the dissolution of the firm. * * *

"The firm was in fact, by the decree of the governor at Sagua la Grande, illegally warned off from trading with Cuba, and so far the case is of the same kind as those of vessels warned off from trading with a certain port without sufficient reason.

"It does not seem that any similar case has been decided by the commission; but it is usual in such cases to award indemnity for prospective earnings. The loss is, however, in the present case of a very speculative character, as depending upon most uncertain contingencies; and therefore the only allowance made is the sum of $3,225, in the nature of interest on the capital of the firm, which is stated in the record to have been $184,300. * * *

"For these reasons the umpire hereby decides that an amount of $3,225, with 6 per cent interest from August 1, 1870, to this day, be paid on account of this claim."

Count Lewenhaupt, umpire, case of *Mora & Arango*, No. 50: Spanish Commission (1871), February 22, 1883.

7. MISCELLANEOUS CASES.

Case of the "Franklin."

In 1828 the American ship *Franklin* was detained in Upper California by order of the Mexican general commanding at San Diego. There were no judicial proceedings, and, after a long detention, the master, finding that it was the intention of the general to get possession both of the ship and the cargo, ran away with his vessel to the Hawaiian Islands. The ship, when she left Boston for California, was laden with a valuable assorted cargo, which was largely sacrificed by the injurious conduct of the Mexican general. An award was made by the umpire of the sum of $119,966.39.

Charles Bradbury, William Oliver, and E. Copeland, jr. v. *Mexico:* Commission under the convention between the United States and Mexico of April 11, 1839.

Longstroth's Case.

The claimant, a citizen of the United States, engaged in business at Matamoras, was, upon a certain occasion when he was about to cross the Rio Grande, searched by the customs officer upon suspi-

cion of having money upon his person which he was attempting to export without paying the duty. The officer, finding that his suspicions were not well grounded, left him at liberty to proceed upon his journey. For this detention claimant asked $25,000. Some time afterward, during an insurrection, the civil and military government of the district in which claimant resided issued a decree declaring the country in a state of siege and prohibited all commercial traffic and intercourse with the insurrectional towns. Claimant asked compensation for losses suffered by him in consequence of this decree. The commissioners disallowed both claims. They held that the action of the customs officer was legal, and that the decree was lawfully enforced for military purposes and afforded no grounds for complaint.

James M. Longstroth v. *Mexico*, No. 68: Convention of July 4, 1868.

Wulfing's Case.

By Article IX. of the treaty between the United States and Mexico of 1831 it was provided: "The citizens of both countries respectively shall be exempt from compulsory service in the army or navy." Referring to the clause, Mr. Wadsworth, United States commissioner, delivering the opinion of the commission in *Robert Wulfing* v. *Mexico*, No. 345, MS. Op. I. 539, said:

"The treaty also condemned the forced military service exacted of the claimant by General Campos. An insurgent party engaged in revolt against the government may often be justly styled robbers, but an American citizen can not be forced to take up arms against them. These had just defeated Colonel Tierro, and had they succeeded in taking the town could not have regarded claimant as a neutral. We think it best to give full force and effect to the clause of the treaty in question."

Case of the Siempre Viva Company.

"In the case of the '*Siempre Viva Silver Mining Company* v. *Mexico*,' No. 98, the umpire observes that the chief foundation of the charge against the Mexican Government for the losses suffered by the company is that on various occasions Mexican officers by authority of law obliged the workmen at the company's mines to serve in the national guard in which they were enrolled. The war which then existed in the country rendered this step a necessity. It was one of those misfortunes to which natives as well as foreigners were exposed. The owners of the mine in question were subject, like all other inhabitants, to the law of the country whether enacted after

or before they acquired the mines; but in this instance the decree of April 12, 1862, which was enacted many months before the company was organized, declared that no Mexican between the ages of twenty and sixty years could excuse himself from taking up arms; so that it well knew the risk to which both by the written law and the natural necessities of the war which then existed it was exposed. In the opinion of the umpire, no claim can be made against the Mexican Government for losses arising to foreigners out of the legal obligation which bound Mexicans to military service."

Thornton, umpire, May 25, 1874, convention between the United States and Mexico of July 4, 1868, MS. Op. III. 63. Followed by the commissioners in *Germania Mina Prieta Company* v. *Mexico*, No. 612, MS. Op. V. 242.

Cole's Case.

"The umpire has on more than one occasion given his opinion that the Mexican Government, strictly speaking, had the undoubted right to impress into its military service native Mexicans employed, whether by American citizens or otherwise. In the present instance one of the great causes of the losses complained of by the claimant with regard to his cotton crops was the want of labor and the impossibility of obtaining it by reason of that impressment; but for this the Mexican Government can not be held responsible; it is one of the misfortunes inevitable in a state of war."

Thornton, umpire, July 15, 1876, *John Cole* v. *Mexico*, No. 948, Am. Docket, convention of July 4, 1868, 6 MS. Op. 497. *S. P.*, Thornton, umpire, April 29, 1876, *Cordillera Gold and Silver Mining Co.* v. *Mexico*, No. 734, MS. Op. VI. 419; *Fayette Anderson and William Thompson* v. *Mexico*, No. 333, MS. Op. III. 582; *Trinidad and San José Silver Mining Co.* v. *Mexico*, No. 720, MS. Op. VI. 417.

Case of Kerford & Jenkin.

"This claim is put in on behalf of Messrs. Kerford & Jenkin, who have been established in Zacatecas, as merchants, for eighteen years; and have been engaged in trade with Santa Fé, Chihuahua, and other places in the adjoining districts.

"The facts and circumstances alleged are as follows: In the year 1843 the Congress of the United States passed an act authorizing the export of merchandise overland to Canada, and to Mexico, via Santa Fé, with the benefit of a drawback of duties, and the claimants had, in 1846, prepared in England, a quantity of goods suited to the Santa Fé trade, and apparently not suited to any other market.

"The goods arrived in Philadelphia by the ship *Saranac*, in June 1846; the customs entry is dated 19th June 1846; at which time war existed between the United States and Mexico, and all commercial intercourse was stopped.

"The agents of the claimants, on the 18th of June 1846, petitioned the Government of the United States, stating that these goods had been prepared expressly for the Santa Fé trade, and, being suited to no other market, immense loss would be sustained if they were not permitted to carry out their views; and that they had five hundred mules, forty wagons, and forty-five men waiting at Fort Independence for the goods, at the charge of Mr. Kerford and partners; they therefore prayed permission to send their goods forward, with benefit of drawback.

"The United States Government granted the application 'under the peculiar circumstances involved, and without giving rise to any inference as regards the condition of Santa Fé, or to act as a precedent in other cases.'

"The export entry was dated June 29, 1846, for 986 packages [of] goods to Santa Fé and Chihuahua, by the route of the Missouri River; and the invoice value, exclusively of charges, was £14,210 16s. 11d.

"The goods arrived at Fort Independence, in transitu for Santa Fé, in New Mexico. The inspector's certificate is dated the 30th July 1846. The caravan, consisting, according to Mr. Kerford's statement, of 45 wagons, 600 mules, 250 oxen, and about forty horses, valued at about $80,000, but, according to Mr. Gentry's statement, of 46 wagons, 500 mules, 350 oxen, and 20 horses, valued at about $68,150, started from Fort Independence, under the care of 80 armed men, in the month of August. The precise day is not stated, but it was late in the season, the month of May being the best month to start in.

"After six weeks' march, without interruption, they were overtaken by a detachment of Missouri volunteers, under Colonel Price, to whom Mr. Kerford exhibited the permit and other papers received from the custom-house at Philadelphia, and represented that he was a British subject. Colonel Price examined every wagon, and detained the caravan ten days, and then suffered it to proceed, and they arrived at Santa Fé, according to Mr. Kerford, on or about the end of October, but the consular certificate for the return of the duties was dated Santa Fé, October 7, 1846.

"On their arrival at Santa Fé, Mr. Kerford waited on General Kearney, the United States commander of the district, and complained to him of the treatment he had received from Colonel Price. General Kearney assured him that the road was open to Chihuahua, and that he might proceed with his caravan without risk of further interruption, upon which they proceeded for several days, and had arrived in a wild country, where no supplies or provisions could be obtained, when they were stopped by another body of American volunteers, under the command of Captain Walton, who, on being informed that the goods were British property, allowed them to proceed, but, at the end of two days, sent a body of 200 men after them, who commanded them to halt, and mounted guard around the wagons, with orders to shoot the first man who should attempt to move. They thought it best to submit, although capable of forcing a passage, as the men were all accustomed to the use of firearms.

"About a month afterward, Colonel Doniphan took the command of the forces. It appeared to be the duty of the claimant to submit, and he, with the caravan, was detained for two months, according to Mr. Kerford, but according to Mr. Gentry for six weeks, during which the men were exposed to the inclemency of a severe winter and were reduced to extreme want, and many of the mules and oxen perished.

"The claimant applied to the commissary for relief, but none was afforded, as the troops were on half rations. During the whole of this detention the claimant made repeated applications to be released, which was refused on the ground that the introduction of so much valuable property, though it did not include any munitions of war, would be a great advantage to the enemy from the duties accruing upon it.

"At length Colonel Doniphan moved forward to attack Chihuahua, the caravan being ordered to travel in the rear, until a battle took place, in which the Americans were successful. Even then the caravan was not allowed to proceed, but was detained for several weeks (six weeks, according to Mr. Gentry), when, the vigilance of the guard having been relaxed, they prosecuted the journey and reached Chihuahua the latter end of February 1847, having been detained three and a half months beyond the time usually required for the journey.

"In consequence of this delay, the goods were sold at nearly thirty per cent below what they would have realized from them at an earlier period. * * *

"The value of the 896 packages of goods sent from England was, as per invoice, exclusive of charges, £14,210 16s. 11d., or about $70,000. The Santa Fé trade was stopped when the goods arrived, and as the owners would have been exposed to immense loss thereby they petitioned the United States Treasury to permit in this instance a deviation from the circular of 11th June 1846, prohibiting the export in the way desired.

"The Treasury accordingly permitted the export, with benefit of drawback, 'without giving rise to any inferences as regards the condition of Santa Fé, or to act as a precedent in other cases,' and on receipt of the consular certificate of the arrival of the goods at Santa Fé, the drawback, amounting to $53,108.94, was repaid to the claimants.

"After various delays the goods (or rather the greater part of them, a portion having been sold, as is alleged, to purchase supplies and food) arrived at Chihuahua in February, 1847, where they were sold for $260,000, a sum which, after the most liberal allowance for expenses, must have left a handsome profit on the enterprise. So that by this act of grace and courtesy on the part of the United States Government the claimants were saved immense loss and enabled to prosecute their adventure to a successful issue. They received back a sum of $53,108.94 for duties, and the mules, oxen, &c., provided were rendered available, which otherwise would have been [of] but little value. The claim, therefore, is not for actual loss sustained, but for alleged diminution of profits arising out of the detention of the caravan in the course of the journey.

"Much stress has been laid, on the part of the claimants, on the permission to export under drawback, which has been incorrectly and improperly termed a license. But there is no ground for the belief that anything more was intended than a permission to the claimants to undertake an adventure which was at the time legally prohibited. It can not be imagined that the United States Government had the slightest intention to confer a privilege which might interfere materially with their operations against the enemy. Indeed, the reservation expressly made in granting the petition was evidently intended to exonerate the United States Government from all responsibility and to intimate to the petitioners that they must take their chance in pursuing the adventure.

"They knew that war was being carried on, and must also have been prepared for difficulties and hindrances incident to

a disturbed state of affairs. The permission was not a privilege granted to them as British subjects, but was equally granted to other traders, citizens of the United States, who were placed in similar circumstances. It was a mere matter of favor on the part of the United States Government to allow the trade to be carried on at all by claimants and other traders, and they embarked in it with a knowledge of the disturbed state of the country to which the adventurers were bound.

"Much reliance has been placed on the case of *Harmony* v. *Mitchell* (I Black. Rep. 549) as affording a precedent in support of this claim, but the two cases differ essentially, and the opinion of the court, delivered by Mr. Chief Justice Taney, is clearly adverse to Messrs. Kerford & Jenkin.

"*Harmony and Mitchell's case.*

"1. The jury found for Harmony on the grounds that he was not trading with the enemy; that his goods and property were seized and part of them converted to the public use without the plea of urgent or immediate necessity, and that Harmony never resumed possession after the seizure.

"2. The property of Harmony was left in Chihuahua when the place was evacuated by the Americans (the goods having been unsalable during their occupation), and were confiscated by the Mexicans on their return and wholly lost to Harmony.

"3. The seizure in this case took place at San Eleasario, in the province of Chihuahua, at which place Harmony (having determined to proceed no further) was compelled by Colonel Mitchell to remain with and accompany the troops.

"*Kerford & Jenkin's case.*

"1. In the case of Messrs. Kerford & Jenkin there was no seizure, nor has any been alleged. Their avowed object was to go forward for the purpose of trading with the enemy, and they continued all along in the possession of their goods.

"2. The property of Messrs. Kerford & Jenkin was safely conducted to Chihuahua, and realized a very large sum, $260,000, by claimants' statement.

"3. The complaint of Messrs. Kerford & Jenkin is not that they were not allowed to leave the Army and proceed no further, but that they were not allowed to precede the Army of the United States to the place which they were going to attack.

"The question, therefore, in this case resolves itself into one

of detention. The commander of the United States forces had undertaken an expedition against the city to which Messrs. Kerford & Jenkin's caravan was bound. The arrival of the caravan would certainly have put the inhabitants of Chihuahua in a more favorable position for frustrating the expedition. Indeed, it is admitted in the plea put in on behalf of the claimants that the arrival of the caravan was anxiously expected, on account of the duties payable to the governor of the place. The enemy would have derived a further advantage in obtaining information respecting the strength and resources of the invading force, and part of the men employed to conduct the caravan were Mexicans.

"These circumstances are surely a sufficient justification of the control exercised by Colonel Doniphan over the movements of Messrs. Kerford's caravan. Similar control was exercised over other traders, citizens of the United States, without complaint on their part.

"It is contended that, as neutrals, Messrs. Kerford stood in a better position, and could not properly be impeded in carrying on their trade; but, admitting for argument sake that they were neutrals, this does not alter the case. It must be remembered that the trade in question had been stopped, and was only allowed under special circumstances and with a special reserve. It was not an open road on which a friendly power had a right to travel freely and without question.

"The case of *Harmony* v. *Mitchell* has been relied on as a precedent, but the following passage from the 'opinion of the court,' delivered by Mr. Chief Justice Taney, is conclusive in favor of the right of detention, for he says that, '*up to the period at which the trespass is alleged to have been committed at San Eleasario, in the province of Chihuahua, it is conceded that no control was exercised over the property of the plaintiff, that is not perfectly justifiable in a state of war.*'

"This seizure took place on 10th February 1847, at which time Harmony's property must have been detained for a longer period than that of Messrs. Kerford & Jenkin. On the whole review of the case, it appears:

"1. That no engagement was entered into by the United States Government which can be construed into a license to trade with the enemy or to pursue a course calculated to interfere with the military operations of the United States forces.

"2. That the detention by which the alleged losses were occasioned arose out of the state of war, and was a contingency incident to any trading adventure undertaken under such circumstances; and that there is, therefore, no fair claim for compensation against the Government of the United States."

Bates, umpire, case of *Kerford & Jenkin*, convention between the United States and Great Britain of February 8, 1853. (S. Ex. Doc. 103, 34 Cong. 1 sess. pp. 351–375.)

Case of the "Labuan."

"Bailey & Leetham, claimants, No. 386. The claimants were the owners of the British steamship *Labuan*, which, on the 5th of November 1862 was in the port of New York laden with a cargo of merchandise destined for Matamoras. On that day her master presented the manifest to the proper officer of the custom-house at New York for clearance, but such clearance was refused, and the refusal continued up to the 13th of December 1862, on which day it was granted. The memorial alleged that this detention was by reason of instructions received by the custom-house officers from the proper authorities of the United States to detain the *Labuan*, in common with other vessels of great speed destined for ports in the Gulf of Mexico, to prevent the transmission of information relative to the departure or proposed departure of a military expedition fitted out by the authority of the said United States. The memorial claimed damages for the detention, $38,000, being at the rate of $1,000 per day, the memorial alleging that on a former seizure and detention of the same vessel, from February to May 1862, when libelled as prize, this rate of compensation for the detention had been awarded to the owners by the district court of the United States.

"On the part of the United States it was contended that the detention of the *Labuan*, under the circumstances alleged in the memorial, was within the legitimate and recognized powers of the United States; that it was no infringement upon the rules of international law or upon any treaty stipulations between the United States and Great Britain, and that it gave no right of reclamation in favor of the claimants against the United States; that the right of self-protection, by temporarily refusing clearance to vessels through which information of great importance in regard to military movements is likely to reach the enemy, must be regarded as of necessity permissible to a government engaged in war; that at the time of this

detention important military movements then in progress in connection with the occupation of New Orleans by the Federal forces, including the dispatch of General Banks, with large reinforcements, to supersede General Butler in the command there, were in progress, and made it of the utmost importance that these movements should be carefully kept secret from the rebels; that the detention of the *Labuan* was not by any discrimination against her as a British vessel or against British vessels as such. All vessels capable of such a rate of speed as to make their departure dangerous in this regard were detained alike; that no claim had ever been made by the British Government, through the usual diplomatic channels, upon the United States for compensation; and that it could not be believed that such a claim would not have been made if Her Majesty's Government had considered such a claim valid. The counsel for the United States cited, in this connection, the letter of Mr. Stuart, Her Majesty's minister at Washington, to Mr. Seward, of 1st August 1862 (U. S. Dip. Cor. 1862, 1863, part 1, p. 273), upon a somewhat analogous question, in which Mr. Stuart says:

"'I have been instructed to state to you that Her Majesty's government, after considering these dispatches, in connection with the law officers of the crown, are of opinion that it is competent for the United States, as a belligerent power, to protect itself within its own ports and territory by refusing clearances to vessels laden with contraband of war or other specified articles, as well as to vessels which are believed to be bound to Confederate ports; and that so long as such precautions are adopted, equally and indifferently in all cases, without reference to the nationality or origin of any particular vessel or goods, they do not afford any just ground of complaint.'

"The case of the detention of the *Labuan*, it was contended on the part of the United States, was governed by the same principles and justified by the same rules as the cases referred to by Mr. Stuart. The counsel referred to the decision of the commission upon the American claims against Great Britain, growing out of the prohibition of the exportation of saltpetre at Calcutta (American claims, Nos. 11, 12, 16, 18), hereinbefore reported, and in which such prohibition was held by the commission not to involve a violation either of international law or of treaty stipulation, and urged that the principles which would sustain the validity of such prohibition must also include such a case as the detention of the *Labuan*.

"The counsel for the claimant maintained that the detention of the *Labuan* was in effect a deprivation of the owners of the use of their property for the time of the detention for the public benefit; that it was in effect a taking of private property for public use, always justified by the necessity of the state, but likewise always involving the obligation of compensation. He cited 3d Phillimore, 42, and Dana's Wheaton, 152, *n.*

"The commission unanimously made an award in favor of the claimant for $37,392."

Am. and British Claims Commission, treaty of May 8, 1871, Art. XII. Hale's Report, 171.

The *Tubal Cain*, a British steamship, was chartered at New York for a voyage to Matamoras via Havana and back to New York. April 8, 1863, being loaded and ready to sail, she was seized by the United State authorities at New York, on the ground (1) that she was undertaking an illicit voyage to the blockaded ports of Texas; (2) that she was carrying contraband of war destined for the Confederacy, and (3) that she had on board passengers (one of whom was an agent of the Confederate goverment) engaged in contraband trade with the enemy. May 26, 1863, Mr. Edwards Pierrepont, acting for the War Department, made a report inculpating two of the passengers, but exculpating the owner and charterer of the vessel. He held, also, that there was probable cause for the previous detention, but recommended that the vessel be discharged. She was not surrendered till July 16. The commission unanimously awarded $4,800 for her detention from the date of Mr. Pierrepont's report till her final discharge. (Hale's Report, 161.)

Case of Bank Shares.

A claim was made against the United States on account of the cessation of dividends upon and the depreciation in the value of certain shares in a New Orleans bank, "in consequence of the war in America between the Northern and Southern States, and of the occupation of New Orleans and of the bank by General Butler." On demurrer the claim was unanimously disallowed.

Am. and British Claims Commission, treaty of May 8, 1871, Art. XII. Hale's Report, 168.

8. Conclusion of Peace.

Case of the "John:" Treaty of Peace— Notice of.

By the treaty of peace between the United States and Great Britain, concluded at Ghent December 24, 1814, and ratified at Washington February 17, 1815, it was provided (Article II.):

"Immediately after the ratifications of this treaty by both parties, as hereinafter mentioned, orders shall be sent to the

armies, squadrons, officers, subjects and citizens of the two Powers to cease from all hostilities. And to prevent all causes of complaint which might arise on account of the prizes which may be taken at sea after the said ratifications of this treaty, it is reciprocally agreed that all vessels and effects which may be taken after the space of twelve days from the said ratifications, upon all parts of the coast of North America, from the latitude of twenty-three degrees north to the latitude of fifty degrees north, and as far eastward in the Atlantic Ocean as the thirty-sixth degree of west longitude from the meridian of Greenwich, shall be restored on each side; that the time shall be thirty days in all other parts of the Atlantic Ocean north of the equinoctial line or equator, and the same time for the British and Irish Channels, for the Gulf of Mexico, and all parts of the West Indies; forty days for the North Seas, for the Baltic, and for all parts of the Mediterranean; sixty days for the Atlantic Ocean south of the equator, as far as the latitude of the Cape of Good Hope; ninety days for every other part of the world south of the equator; and one hundred and twenty days for all other parts of the world, without exception."

On March 5, 1815, sixteen days after the exchange of the ratifications of the treaty, the American schooner *John*, bound from Matanzas, in Cuba, to Portsmouth, New Hampshire, was, when in latitude 31° 40′ north, and longitude 78° 10′ west from the meridian of Greenwich, and therefore within the zone in which captures were to be ineffectual after twelve days, seized as prize by the British ship of war *Talbot*, Maudesley, acting commander. The *Talbot* took the schooner in tow, and a few days later wrecked her by mistakenly steering her ashore on the Island of Cuba. The *Talbot* escaping the same fate by suddenly putting about, took the master and crew from the *John*, which was abandoned as a total loss, and carried them to Jamaica, where they were held as prisoners of war till the 29th of March, when news of the peace was received there and they were released. Subsequently the owners of the schooner brought suit in admiralty against Lieutenant Maudesley for the value of the vessel and cargo. On December 18, 1818, Sir William Scott decided against them, on the ground that the commander of a ship of war, when notice of peace had not reached him, was not personally liable for a capture.[1] He expressly declined to determine whether there was any liability on the part of the British Government. The owners, in the prosecution of the suit, in-

[1] The *John*, 2 Dodson, 336.

curred heavy expenses, and by this and other circumstances were delayed in invoking the interposition of the United States. At length, however, they applied to their government, by which their claim was diplomatically pressed; and it finally came before the mixed commission under the convention between the United States and Great Britain of February 8, 1853.

Thomas, agent and counsel for the United States, and Clark, Hayes, and Tuck, claimants' counsel, cited authorities to the following points:

"A treaty of peace or a truce binds the contracting parties from the time of the signature, or from its ratification, where a ratification is necessary. Hostilities are to cease from that time, or at the expiration of such other periods as may be provided in the treaty, in various districts and latitudes. (1 Kent's Com. 159; 2 Wheaton, 291; 1 Wildman's Institutes of International Law, 158.)

"The right of capture depends on the fact of war. When the war ceases, the right ceases.

"Ignorance of the peace can confer no right of capture in time of peace. The right, being wholly dependent on the fact of war, is necessarily independent of the knowledge of the captor. (1 Wildman's Institutes, 150.)

"In case of capture when peace exists, restitution and compensation is to be made. (Puffendorf, lib. 8, chap. 7, sec. 9; Grotius, lib. 3, chap. 21, sec. 5; 1 Rob. Rep. 181, the Mentor.)

"Kent and Wheaton cite Grotius as saying, in the section referred to, that 'where acts of hostility are committed after peace is made, but not notified, the contracting parties are not amenable in damage; but it is the duty of the government to restore what has been captured but not destroyed.' It will be found, however, on referring to the section, that Grotius states merely that the parties 'will not be liable to punishment, but must make good the damage;' and such seems to be the sound authority on this point. (1 Wildman's Institutes, 159; 1 Kent's Com. 169; 2 Wheaton, 291; Vattel, lib. 3, chap. 16.)

"It was further contended, that the rule as laid down by Chitty was applicable to this case, that 'where a party, by his own contract, absolutely engages to do an act, it is to be held as his own fault and folly that he did not expressly provide against contingencies, and exempt himself from responsibility in certain events;' and that, 'where a contract is general and absolute, the performance is not excused by an inevitable accident, or other contingency, although not foreseen by or within the control of the party.' (Chitty on Contracts, p. 735.)"

Hannen, agent and counsel for Great Britain, cited the *John*, 2 Dodson, 336, where Sir William Scott held, in a suit brought against the captor, that he was not liable except on notice, and

intimated an opinion that, in case of loss of the vessel, the government would not be liable. He cited, also, to the same point, 1 Kent's Com. 159, and 2 Wheaton, 291; and Vattel, lib. 3, chap. 16.

Upham, American commissioner, said that the *John*, 2 Dodson, 336, and the *Mentor*, 1 Rob. 183 (also decided by Sir William Scott), both sustained the point that, where there was want of due diligence in advertising the cessation of hostilities the injured party was clearly entitled to indemnification; and as it was at times difficult to determine what constituted due diligence under the circumstances, it was usual to assign fixed periods for the cessation of hostilities according to the situation and distance of places.[1] The question therefore arose, whether the assignment by the treaty of December 24, 1814, of different periods, according to the situation and distance of places, was not designed by the parties to establish the time to be held as reasonable notice within such limits. Quoting, then, the language of Article II., as given above, he proceeded:

"These several periods were undoubtedly agreed upon as equivalent to notice that peace existed within the prescribed limits. It cannot be supposed that the contending parties designed to append to these periods a further indefinite, uncertain time, as to what should constitute due diligence in giving notice, or to restrain or limit the fact in its consequences, that peace *should exist at the times named.*

"After the periods thus agreed upon, the obligation to cease from hostilities was imperative.

"Such being the case, we have the true starting point from which to consider the question of the respective rights of the parties. It is manifest that collisions might then occur without the imputation of any willful wrong in the violation of the compact entered into. The injury, would, however, exist, and the actual loss sustained should, on every principle of equity and justice, as well as of compact, be fully met.

"The stipulation was, therefore, entered into by the parties, that 'all vessels and effects' that should be taken after the several times specified 'should be restored.' The question then arises, What interpretation shall we place on this provision? Does it mean that vessels and effects captured shall be returned *in specie*, or that the identical property, merely, shall be returned, and where this has become impracticable that no restitution or satisfaction shall be had? I can not believe that such was the intent of the parties.

"They acknowledge themselves bound by a constructive notice of the peace, and it was their own fault that they did

[1] Vattel, Book III. c. 16.

not take time enough, or did not use diligence enough, to give *actual notice* of the peace 'to their armies, squadrons, officers, subjects, and citizens,' as was specially provided should be done by the treaty.

"Under such circumstances the doctrine of Vattel, adopted by Sir William Scott, applies, 'that those who through their own fault remain ignorant of the publication of the truce are bound to repair any damage they may have caused contrary to its tenor.'

"The party injured is in the same situation as a neutral whose vessel has been seized and destroyed as the property of a hostile power, where it is holden the neutral can only be justified by a full restitution in value. (1 Wildman, p. 175.)

"There is no measure of damage that justly meets the requirements of the case. The treaty provides not only that 'all vessels,' but also 'their effects,' which may be taken, after a certain specified number of days, within certain described limits, shall be *restored* on either side. But if the effects of a vessel, consisting of provisions or other articles, are taken and consumed, or are otherwise disposed of, so they can not be restored specifically, it will hardly be contended that no remuneration is to be made.

"If this be so, the rule would equally follow in relation to the vessel. Restoration and restitution are synonymous. One meaning of the word '*restore*,' as laid down by Webster, is 'to make restitution or satisfaction for a thing taken by returning something else, or something of different value,' and this is the meaning which should be rightfully attached to the word in the treaty.

"I do not understand that this is, in reality, denied; but the position is taken by Great Britain in this case that she is relieved from restoring the vessel, for the reason that it was subsequently cast away and lost by the act of God, and no one is accountable.

"If the case can be brought within this principle the excuse might avail, but there are circumstances connected with it that preclude such defence. No one can plead the destruction of property as the act of God, who is wrongfully in the use and control of such property. He is a wrongdoer from the outset; he has converted the property from the instant of possession, and the subsequent calamity which may happen, however inevitable it may be, is no excuse for its loss.

"The *John* was in the rightful pursuit of a lawful voyage at a time and place when peace existed by the express stipulations of the parties, after taking such period of notice as they held that the case required.

"She had pursued her course northwardly some four or five hundred miles out from harbor on her way to her destined port. She was there seized, placed under the charge of new men, and her course was directly reversed, until she was taken

back to the West Indies, and, through mismanagement or misadventure, was run on shore and lost.

"It may have been the ordinary accident of the seas or may not; but, in any event, she was taken there without right and subjected to risks to which she was not legally and justly liable. The plea that she was lost by the act of God is not, under such circumstances, admissible. The vessel itself can not be restored, but such compensation and restitution should be made as the nature of the case admits of.

"In the argument, considerable stress has been laid on a quotation in Kent and Wheaton, said to be founded on Grotius, that where collisions arise after peace exists, the governments 'are not amenable in damages, but it is their duty to restore what has been captured, *but not destroyed*.' The citation from Grotius is, however, erroneous. He merely says, in the section referred to, that if any acts be done in violation of the truce before notice can be given, 'the government will not be liable to punishment, but the contracting parties will be bound *to make good the damage*.' (Whewell's Grotius, liber 3, chap. 21, sec. 5.)

"What shall be the precise effect, as a matter of notice, where different periods of time are stipulated in which peace shall take place, does not seem to have been fully considered and settled. If it shall be held as an acknowledgment of notice, then every subsequent act of violation of it is the act of a wrongdoer, and full compensation follows of necessity.

"I can see no possible mode of avoiding the justness or soundness of the construction at which we have arrived, but think it should prevail on every ground of public policy and right interpretation of international compacts of this character.

"I am happy to say that my colleague, though he hesitates somewhat as to the views presented, waives his objection to the allowance of the claim, except on the score of interest, and this question is to be submitted to the umpire."

The umpire held that interest should be allowed, and it was accordingly awarded. The whole amount awarded, principal and interest, was $13,608.22.

Commission under the convention between the United States and Great Britain of February 8, 1853. (S. Ex. Doc. 103, 34 Cong. 1 sess., 427–435.)

Zacualtipan claims: conclusion of the Mexican war.

"Under the date of August the 3rd, 1871, the commissioners, not being able to agree, have directed this case to be laid before the umpire, for his opinion 'whether the Government of Mexico is entitled to an award against the Government of the United States; and, if yea, for how much?'

"The Government of Mexico in this case claims from the United States an award of about two hundred thousand dol-

lars (including the interest asked for) for the benefit of Ignacio Torres, a Mexican citizen and inhabitant of the town of Zacualtipan, in the State of Hidalgo. This town was attacked by American troops on the 25th day of February 1848, was sacked and burned, and Torres sustained the great loss he complains of as an injury done by the United States to a Mexican citizen, after the 2nd day of February 1848, the day when the treaty of Guadalupe Hidalgo was signed. His claim therefore falls precisely within the conditions laid down in the convention on which our international commission is founded according to the first paragraph of Article I. of said convention. It is moreover argued on the part of Mexico that the assault on Zacualtipan was an outrage on the law of nations, inasmuch as Zacualtipan is an open and unfortified place, and peace between the belligerents had been concluded, though it had not yet been ratified. The law of nations, it is urged, considers *peace* to begin *de jure* with the day of its first signing, and not with the ultimately perfected ratification. No retributive claim, however, is made; nothing is demanded but payment for the actual loss sustained by this breach of the law of nations, together with the interest having accrued on the sum of the original loss—$92,425.14—during twenty-two years. This is a plain statement of the Mexican presentation of the claim.

"I. As to the statement of the loss sustained by Torres, handed in by him, it is inconsistent and weak in point of law. Torres swears, and witnesses swear with him, that the conflagration which reduced Zacualtipan to ashes consumed all his books and mercantile papers, along with the merchandise belonging to Torres or stored in his house, and appurtenances, and yet he makes a statement of the losses which he sustained with suspicious detail. He gives seventy items of the most minute kind, constituting the claim of $92,485.40, all, it appears, from mere memory. Even if Ignatius Torres put down all the items as they now appear on the paper handed in by him, the moment after the conflagration had taken place, it must be confessed that the exhibit of these seventy minute details is one of the far greatest feats of memory recorded in the annals of our kind. There are several witnesses who swear to everything Torres has sworn to. Whether they have sworn to his memory or from their own memory, transcendent like that of Torres, does not appear; but what simply does appear is that each of them swore to leading questions; and the civil law

discountenances suggestive questions as much as the common law disapproves of leading questions. At least this is the case in those countries in which the civil law is the basis of the legal fabric, and with which I am acquainted; and I must suppose that it is so likewise in Mexico. The whole disapproval of leading or suggestive questions in the different law systems is dictated by morality and a simple sense of justice, which can no longer be disregarded, whatever used to be done in times happily past, in ecclesiastic and other courts.

"II. The conflagration of Zacualtipan was not an act of wanton lawlessness and pillage, but the effect of a military engagement—a regular action—in which there must have been protracted fighting, since there were a good many dead and wounded. The enemy had collected in the town and had erected some entrenchments. It was the very object of the general commanding the American troops to capture, kill, and disperse the Mexican troops or guerrilleros who had assembled in the town. There was, therefore, no unlawfulness in attacking the town, provided the time was lawful. The burning of the town was a simple consequence of the action. I follow in all this the official reports of the leading American officers engaged in that action to their commander. We have no other documents or information. They were drawn up more than twenty years ago, when no one had an inkling that some day they would come before an international tribunal, and they must be trusted as the regular and prescribed military reports of the inferior to the superior officers. We have no better source of information. But was the time when the American troops attacked the Mexicans in Zacualtipan a lawful time for hostilities? Had not the first signing of the treaty of peace at Guadalupe, twenty-three days before, suspended all hostility? And did not, after the second day of February, all further acts of arms cease to be lawful *public war* and become private crime and murder?

"These questions require careful answers and clear expositions. Hostilities frequently cease, but by no means always when commissioners of the belligerents meet to treat about a peace to be concluded. (See 'Instructions for the government of the armies of the United States in the field,' general orders No. 100, 1863, and the recent war between Germany and France.) How is it, however, when a treaty of peace has been signed, but has not yet been ratified? Many of the best authorities hold

that peace begins *de jure* when it is signed, and not from the day when it is ratified by the two supreme belligerent powers or the authorities which by the law of the land have alone the right to ratify. This, however, is far from being unconditional. If a peace were signed with a moral certainty of its ratification and one of the belligerents were, after this, making grants of land in a province which is to be ceded, before the final ratification, it would certainly be considered by every honest jurist a fraudulent and invalid transaction. But it is well understood that a peace is not a complete peace until ratified; that, as a matter of course, the ratifying authority has the power of refusing unless, for that time, it has given up this power beforehand, but there can be no doubt that so soon as peace has been preliminarily signed active hostilities ought to cease, according to the spirit of civilization and consistent with the very idea and object of the whole transaction, which is to stop the war and establish peace. It would be an unjustifiable act to continue vehement hostilities under such circumstances as if nothing had happened, wherever it is possible, and when the contrary is not plainly understood or actually expressed.

"But suspensions of hostilities, armistices, even the mere mitigation of energetic hostilities, are no spontaneous acts, like the efforts or suspension of activities of nature. Orders to such effects must be given. No officer or soldier can act on hearsay or rumor. No such order, however, it seems, was given on either side immediately on the signing of the Treaty of Guadalupe. On the contrary, that treaty contains the following passage:

"'Immediately upon the signature of this treaty a convention shall be entered into between a commissioner or commissioners appointed by the general in chief of the forces of the United States, and such as may be appointed by the Mexican Government, to the end that a provisional suspension of hostilities shall take place, and that in the places occupied by said forces constitutional order may be reestablished as regards the political, administrative, and judicial branches, so far as this shall be permitted by the circumstances of military occupation.'

"Commissioners *are to be* appointed, and on the 29th day of February 1848 we find a 'military convention for the provisional suspension of hostilities,' signed by American and Mexican commissioners in the city of Mexico.

"The Treaty of Guadalupe was signed on February 2nd.

"General Butler succeeded General Scott on February 19th.

"Zacualtipan was taken and destroyed on February 25th.

"The 'military convention for the suspension of hostilities' was signed on February 29th.

"And information obtained from the highest military authority in the War Department at Washington shows that no general order, having reference to the peculiar relation of the two armies or the general state of war, was issued from the American headquarters before March 6th. On that day was published the order marked 'Orders No. 18,' published by the general commanding 'for the guidance of the army.' This order is the result of the military convention, and the general commanding the troops of the United States occupying Mexico 'directs the same to be strictly observed.' We cannot under all these circumstances assume that complete peace was established on February 2nd; that in consequence a complete and plainly acknowledged armistice existed from that day forward, and that a continuation or a renewal of hostilities was necessarily out of the international limits of public war.

"IV. One of the ratifying authorities was far away. The American Senate ratified the treaty as late as in May 1848. It is certainly a noteworthy fact that while the Treaty of Guadalupe was signed on the second day of February, it contained a provision for the appointment of a military commission, and a 'military convention for the provisional suspension of hostilities,' or an armistice, was concluded between the two contending armies on the 29th day of February 'for the purpose of complying with the second article of the treaty of peace, which was signed in the town of Guadalupe Hidalgo on the second instant, as follows:' Then follows the quotation from the treaty of Guadalupe which I have given above. It has appeared necessary to me to repeat certain facts. The armistice, as it is seen, had not yet been carried out on the day when a portion of Zacualtipan was destroyed four days before the military convention was signed.

"V. It is admitted by the Mexican commissioner that absolute necessity would give a right to resume hostilities even after the signing of a treaty, and before its ratification (he seems to be of opinion that the signature of a treaty makes it *de jure* perfect in every respect). Even this point seems to be in favor of the United States. I follow again the official

reports of the American general. He says that guerrillas assembled in or about Zacualtipan, endangering the American trains of provisions, as they had been attacked by guerrillas before. This gathering of troops was a hostile movement and appeared dangerous to the Americans; they were obliged to take care of their present and future provision trains. The first necessity of armies is to have that which fills the stomach, as it is also their permanent great difficulty. There is a passage in the memoirs of the Marshal de Saxe, one of the great soldiers of the last century, to this effect: *Armies like snakes move on their bellies.* General Lane thought his provision trains would be exposed to danger, and he attacked the enemy in the town where they had assembled at a time when no distinct armstice had been concluded and in order to ward off great danger. If there had existed an armistice at this particular time it would have been the Mexicans who broke it by endangering the American trains.

"I can not see in the burning of the whole or a portion of Zacualtipan, and along with it of the property of Torres, a particular injury done by the United States of America to a Mexican citizen, Ignacio Torres; but only a common calamity of war—common, however bitter it may be; but what martial inflictions are not bitter? Under all these circumstances and in consideration of all these facts the umpire is constrained to decide that he can award no damages to the Republic of Mexico for the benefit of Ignacio Torres. The umpire wishes to add, however, that since Torres had a full legal standing before the commission, and since there are points in this case which no doubt have presented difficulties to the commissioners, as they have done to the umpire, the latter would be well pleased if the commissioners would allow to Ignacio Torres a sum as high as $1,000 for the expenses he has incurred in pursuing his claims. My decision is that the claims of the Mexican Government against the United States for the benefit of Ignacio Torres be dismissed."

Lieber, umpire, *Ignacio Torres* v. *The United States,* No. 565, convention of July 4, 1868, MS. Op. II. 83. The commissioners did not allow the claimant a gratuity for expenses, doubtless deeming themselves without authority to do so. On the strength of the decision in Torres' Case the following Zacualtipan claims were dismissed: *Marcial Perez,* No. 563; *Francisco Abrego,* No. 847; *Felipe Olivares,* No. 837; *Mariano Guzman,* No. 897; *Celso Ruiz,* No. 862; *Francisco Cordoba,* No. 564; *Jesus Ruiz,* No. 848; *Jesus Espindola,* No. 875; *The Corporation of the City of Zacualtipan,* No. 876.

Case of Anaya.

In the case of *José Maria Anaya* v. *The United States*, No. 52, MS. Op. VI. 122, a claim was made for the robbery of property by a body of forty United States soldiers at the hacienda de Guadalupe, in Tlaxcala, Mexico, April 2, 1848. The commissioners differing, the case was referred to the umpire. The umpire, Sir Edward Thornton, observed that it was not shown "that an officer was present, or that the plunderers were under the control or command of an officer." Continuing, he said:

"If they were robbers on their own account the United States Government can not certainly be held responsible for the losses suffered by the claimant, who, however, might have made a representation of the facts to the officer in command of the detachment at Fort Frio, with a view to the punishment of the offenders, and perhaps the recovery of his property. * * * But, without admitting the fact, the umpire will suppose that an officer was in command of the forty soldiers, and witnessed and even ordered the spoliation of the claimant's property. * * * The umpire thinks that he only is representing the dictum of the best international writers upon the subject in declaring that he considers that a treaty of peace is not complete until all the necessary forms shall have been fulfilled, of which the exchange of ratifications is the principal and final form. It is then that the respective treaties, signed by the sovereigns of the two nations, whether President, Emperor, King, or whatever the title, are exchanged, and it is those signatures, then exchanged, which give effect to the treaty. Upon the negotiation of a treaty of peace it is customary to agree upon a suspension of hostilities, and even without it the good feeling of the belligerents would impress them with the expediency of suspending hostilities; but the treaty itself, unless it should expressly so declare it, does not necessarily and of right involve a suspension of hostilities. The second article of the treaty itself looks to a possible resumption of hostilities, when it says, 'to the end that a provisional suspension of hostilities shall take place.' In the instance in question a convention of armistice was agreed upon, and it is upon a violation of this only that any complaint could be founded by the claimant. By this it was stipulated that there should be a suspension of hostilities, and it is laid down in the first article that the infractors of this stipulation should be prosecuted and judged by the laws of war. The Mexican commander in chief might therefore have demanded the trial by a court of the officer who authorized the robbery of the claimant's property, and the Mexican Government might have gone so far as to denounce the convention of armistice by reason of its violation by an United States officer, might have renewed hostilities, and might have refused to ratify the treaty of Guadalupe. But they did nothing of the sort; on the contrary, it is not shown that the

trial and punishment of the unknown offending officer was demanded, and the President of the Mexican Republic ratified the treaty on the 30th of May, 1848. The ratifications were exchanged on the same day, and the umpire considers that by these final formalities all previous acts of the United States military forces in Mexico were condoned and consigned to oblivion."

José Maria Anaya v. *The United States*, No. 52, convention between the United States and Mexico of July 4, 1868, MS. Op. VI. 122. This decision was reaffirmed in *Agapito Angoria* v. *The United States*, No. 515, and *Pragedes Oribe* v. *The United States*, No. 525. In *Dolores Carillo de Serrano, widow*, v. *The United States*, No. 119, MS. Op. VI. 64, the commissioners allowed a claim for depredations committed by troops of the United States in evacuating Vera Cruz in July 1848, after the ratification of the treaty of peace. They awarded the value of the property with 6 per cent interest.

Revilla's Case.

"In the case of *Bernardo Revilla* v. *The United States*, No. 135, there seems to be no doubt that the claimant is a citizen of the Mexican Republic, and the umpire believes that he was so at the time of the origin of the claim. He claims for the use of his property by the forces of the United States under General Sterling Price from the 20th of March till about the middle of June 1848. The umpire is of opinion that the claim is well founded. The convention of July 4, 1868, which established the mixed commission, distinctly says that the claims which it has to take into consideration are those 'which may have been presented to either government for its interposition with the other since the signature of the Treaty of Guadalupe Hidalgo, between the United States and the Mexican Republic, of the 2nd of February 1848.' The date of the signature of the treaty is distinctly laid down, and that of the exchange of the ratifications of the same treaty is not mentioned. The claim was certainly submitted by the Mexican Government to the minister of the United States at Mexico to be transmitted to his Government. In the opinion of the umpire the claim comes under the 13th article of the convention for the suspension of hostilities, signed on the 29th of February 1848. This convention was an emanation of the second article of the Treaty of Guadalupe Hidalgo, which provided for its negotiation. If the treaty had not been ratified and the war had continued the convention might also have fallen to the ground, and the United States might not have been bound to its stipulations, but the ratification of the treaty confirmed instead of annulling the provisions of the convention as far as the interval between

the signature and the ratification of the treaty was concerned. That the claim should not have been presented before the exchange of the ratifications of the treaty was perfectly natural; for until that event the date of the departure of the occupying force could not have been decided, nor could it have been known by the claimant whether the commander of the United States forces would pay for the use of the claimant's property or not.

"By the thirteenth article of the convention for the suspension of hostilities, it was stipulated that all supplies taken for the American Army should be paid for at fair prices. The umpire can not conceive that the use which a portion of the United States Army made of the property of the claimant is not comprised in the above-mentioned stipulation and ought not to be paid for by the United States Government. But the amount claimed seems to the umpire to be exaggerated. The whole claim for losses suffered by about three months' occupation is $21,110, whilst the annual rent of the estate was $3,000. The pasturage of a number of animals during those three months is charged at about $7,400, whilst the loss of crops on account of the presence of these animals is estimated at $4,500. It is clear that if one of these is paid for the other ought not to be. Taking into consideration all the circumstances of the case, the use of the estate and of the house, of horses and mules belonging to the claimant, the value of those which were not restored, the damage done to the property, etc., the umpire * * * awards that there be paid by the Government of the United States, on account of the above-mentioned claim, the sum of $8,000, Mexican gold, with an annual interest of 6 per cent from the 15th of June 1848 to the date of the final award."

Thornton, umpire, June 29, 1875, *Bernardo Revilla* v. *The United States*, No. 135, convention of July 4, 1868, MS. Op. VI. 266.

Case of Turner and Renshaw.

"In the case of *Turner and Renshaw* v. *Mexico*, No. 143, the umpire considers that the claimants were citizens of the United States. The ground of the claim is that the claimants, who owned a quantity of tobacco at Tampico and at Matamoras, imported during the occupation of those posts by the United States forces, were refused by the Mexican custom-house officers permits or 'guias' to take that tobacco into the interior of Mexico,

and in consequence of that refusal were compelled to sell their tobacco at those posts and thereby suffered great loss.

"Before entering upon the merits of this claim the umpire deems it necessary to express his views with regard to certain parts of the Treaty of Guadalupe Hidalgo, and particularly the 19th article of that treaty. The umpire considers that tobacco is certainly included in the 'merchandise, effects, and property' mentioned in the 1st rule of the 19th article, which, it is stated, 'shall be exempt from confiscation, although the importation of the same be prohibited by the Mexican tariff.' Nothing could more clearly indicate that tobacco was one of the articles contemplated. The 2d rule of the 19th article and the 20th article appear to be null and void, for they depend upon an eventuality which never arose. They supposed that the custom-houses might be restored to the Mexican authorities before the expiration of 60 days from the date of the signature of the treaty; but the sixty days had expired long before the restoration of the custom-house. Therefore the two stipulations mentioned above had no effect. The 5th rule of the 19th article agrees that if merchandise described in the first and second rules should be removed to a place 'not occupied at the time by the forces of the United States,' it should pay the usual duties at that place, as if it had been imported under the Mexican tariff. The tobacco of the claimants, if permits had been granted, would have been removed to some such place and would have had to pay duties.

"The 7th article of the armistice of March 9, 1848, has been cited in opposition to the claim. The umpire considers that the negotiators of that armistice were in no way authorized to stipulate anything which was contrary to the terms of the treaty, as the last sentence of the 7th article of the armistice certainly was, and after the treaty was ratified and the ratifications exchanged it could not possibly be overruled by the conditions of the armistice.

"The umpire believes that the claimants, through their own agents and through the United States consul at Tampico, asked for permits to remove the tobacco to the interior and that they were refused. He therefore considers that the claimants are entitled to compensation for the loss they suffered, but it is extremely difficult to estimate the amount of this loss. For the claimants have not stated to what particular place in the interior they would have removed the tobacco if the permits had

been granted them; there are, therefore, no data upon which to estimate the cost of freight nor the amount of duties to be paid at the place of destination. It does not appear that the number of bales upon which loss was sustained was nearly so great as that alleged by the claimants. It was sold at about $13 the quintal. The witness, F. R. Gracesgui, testifies that at the time of the evacuation of the Republic of Mexico the tobacco was worth and might have been sold in Monterey or Saltillo for $23 per quintal. The umpire believes that the greater part of the difference would have been swallowed up by freight charges and duties at the place of destination, and that these were the principal causes of the difference between the prices at the ports and in the interior. After having made, therefore, such a calculation as is possible under the circumstances, and which must to a certain extent be conjectural, the umpire is of opinion that the claimants will be fairly compensated for their losses on the sales of their tobacco at Tampico and Matamoras and the expenses incurred by its detention at those ports by the sum of $7,000, and taking the 1st of September 1848 as an equitable date from which to count the interest, the umpire awards that there be paid by the Mexican Government on account of the above-mentioned claim the sum of $7,000, Mexican gold, with interest at 6 per cent per annum from the 1st of September 1848 to the date of the final award."

Thornton, umpire, May 6, 1875, *Turner & Renshaw* v. *Mexico*, No. 143, convention of July 4, 1868. A similar case was dismissed by the umpire for want of evidence of ownership of the tobacco and of the refusal of permits. (*John Parrott* v. *Mexico*, Nos. 103 and 104, MS. Op. IV. 588.) In the case of the *Heirs of Felix Maxan* v. *Mexico*, No. 182, Sir Edward Thornton made an award in favor of the claimant on account of his being refused, in violation of the treaty of Guadalupe Hidalgo, permission by the Mexican authorities to sell certain tobacco which he had imported into Mexico.

Belden's Case.

"When the troops of the United States entered Mexico in June, 1846, Samuel A. Belden, one of the original claimants in this case, accompanied them as a sutler. It subsequently became important for the sustenance of the army that business agencies should be established in the territory occupied by it, and it was thought advisable, for several reasons, that these agencies should be conducted by private enterprise. The military authorities having control of the occupied territory, in order to facilitate the starting of such agencies, issued orders permit-

ting the introduction of goods into Mexico, paying a duty to the United States of 30 per cent ad valorem. Mr. Belden, under these orders, opened, in connection with Mr. W. Alling, under the name of S. A. Belden & Co., a business house at Matamoras, being a part of the occupied territory, and imported large masses of goods into Matamoras, in accordance with the terms of the orders above stated.

"During the negotiations for peace which followed, the claims of S. A. Belden & Co., and persons in a similar situation, were taken into consideration by the representatives of the United States, and by Article XIX. of the treaty of peace it was provided that all merchandise imported into Mexico during the military occupancy of the United States should be exempt from confiscation and charge on sale. This treaty, it is to be observed, was signed February 2, 1848, and was ratified and exchanged May 30, 1848, but was not finally proclaimed until July 4, 1848, and was, therefore, not officially published till that date.

"In June 1848, during the occupancy by our troops of Matamoras, a large quantity of tobacco was received in Matamoras by a Mr. Kingsbury, the date of reception being therefore before the proclamation of the treaty of peace and the date of the order of the tobacco being long before the peace was negotiated. Of this tobacco, three hundred bales were sold to Belden & Co. and were by that firm (duties to the United States having been paid by Kingsbury) forwarded to the interior for sale. Peace having been proclaimed when these bales were still in transit, they were not only confiscated by the Mexican Government, but they were declared, in a process so summary that time was not given to Mr. Belden to attend the hearings, to have been smuggled. By the Mexican law a fine of double the value of the goods is imposed on smuggling. This fine, to the amount of $26,309.12, was imposed on Belden & Co., and to enforce its payment writs were issued to seize the goods of the members of the firm and to arrest their persons. Mr. Belden, who represented the firm at Matamoras, was compelled to leave the country; the goods of Belden & Co. at Matamoras were seized, and not only were the goods on which duty had been paid to the United States taken away from Mr. Belden, but he was precluded from recovering the price of other goods on which he also had paid duty, but which were sold by him on credit.

"Mr. Belden having subsequently sought to obtain indemnity from Mexico through the agency of his own government, on August 30, 1850, Mr. Webster, then Secretary of State, instructed Mr. Letcher, then United States minister to Mexico, in reference to this claim, that—

"'The allegations of the claimants seem to be well sustained by the proof. * * * If therefore you shall be satisfied that they have ineffectually employed all the means for obtaining redress which the Mexican laws offer, you will present the subject to the minister for foreign affairs with an application for their relief.'

"On November 6, 1850, Mr. Letcher replied, stating that having previously investigated the case, and having been convinced that it was not only just, but well established by proof, he had brought it to the notice of the Mexican minister of foreign affairs on the 29th of June of that year; but that nothing had been done in the case by the minister.

"On May 29, 1852, Mr. Fillmore, then President, sent a message to the Senate, inclosing, in answer to a resolution of that body, certain papers and proofs bearing on the Belden claim.

The Senate committee, on July 20, 1852, reported as follows:

"'It would seem from the proofs adduced by the petitioners that they were fully warranted in importing said tobacco into Mexico under the authority and by permission of the military authorities of the United States in possession at the time, as is above stated; that after the peace the right so to have done was recognized by the Mexican authorities, and proper permits and protection under the provisions of the nineteenth article of the treaty of Guadalupe Hidalgo; notwithstanding all which, the tobacco was seized in the absence of its owners and confiscated by a judicial decree; and, in addition, a heavy fine was imposed on them by the same tribunal, to pay which a large stock of merchandise and other property belonging to the petitioners was seized, and the whole terminated by an order for their arrest and imprisonment.'

"The committee closed their report with an expression of the opinion that 'a most flagrant violation of the treaty stipulations referred to' had been committed, and added:

"'But the committee regret that they can do no more than express this opinion. The claim is against the Mexican Government, not against this; and its prosecution is to be conducted by the executive department until a failure to procure proper justice to be done (should such unfortunately be the result)

should devolve on Congress the duty of interposing against any infraction of the treaty by one of the parties to it, and to protect its citizens whose rights are secured thereby.'

"To the same purport was another report of the same committee on August 3, 1854.

"Afterward, Mexico having failed to act, Congress was again appealed to, and on February 10, 1855 (10 Stats. 847), passed the following act:

"'*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That the Secretary of the Treasury be, and he is hereby, authorized to audit and settle an account of the duties paid by Samuel A. Belden and Company to the officers of the United States charged with their collection in the city of Matamoras, in the Republic of Mexico, whilst that city was in the military possession of the United States, upon merchandise, except tobacco, imported by them into Matamoras during that period, which, after the restoration of peace between the two countries, they were deprived of, either in the form in which imported, or in the proceeds of sales, by illegal seizure, confiscation, sequestration, or their enforced abandonment of the same by the judicial authorities of the Mexican Government, and pay the amount thus ascertained to the said Samuel A. Belden and Company out of any money in the Treasury not otherwise appropriated, upon the execution by them of a proper and legal assignment to the United States of all their right to the amount so refunded when recovered from the Government of Mexico.'

"Mr. Guthrie, then Secretary of the Treasury, having examined the proofs in the case, assessed the amount of duties ad valorem to be refunded to Belden & Company, on account of duties paid by them on merchandise, except tobacco, at $18,347.28. Thereupon Belden & Company executed and delivered to the Secretary of the Treasury the following document:

"'Whereas it is provided by an act of Congress, approved on the 10th of February A. D. 1855, entitled 'An act for the relief of Samuel A. Belden & Co.' [here follows the act above quoted], and whereas the said Secretary of the Treasury, through the proper accounting officers of the Treasury, has audited and settled the said account of Samuel A. Belden & Co., in part, to wit: For all that portion of said account in which it is satisfactorily proved that the duties were paid by said Belden & Co. to the officers of the United States charged with their collection, * * * and has paid to the said

Samuel A. Belden & Co. the amount so found due them, viz, the sum of eighteen thousand three hundred and forty-seven dollars and twenty-eight cents:

"'Now, therefore, be it known that in the consideration of the payment to us of said sum of eighteen thousand three hundred and forty-seven dollars and twenty-eight cents, the receipt whereof is hereby acknowledged, we hereby assign, transfer, and set over to the United States all our right, title, claim, and interests in and to said amount so refunded to us, so that neither we, the said Samuel A. Belden & Co., nor our heirs, assigns, or administrators shall claim or demand any part thereof.

"'In witness whereof we have hereto set our hands this 27th day of July A. D. 1855.

"'SAMUEL A. BELDEN & Co.'

"The claim of Belden & Co. was submitted to the claims commission, organized under the convention of the 4th of July 1868 between the United States and Mexico, and the commissioners having disagreed was decided by Dr. Lieber, the umpire, in favor of the claimants. Upon this decision the following award was made by the commissioners:

"'[Samuel A. Belden & Co. *vs.* Mexico. No. 131 A. D.]

"WEDNESDAY, *July 19, 1871.*

"'The umpire, Dr. Francis Lieber, having decided that claimants in this case are entitled to an award, Mr. Commissioner Wadsworth delivered the following order and award of the commission:

"'This case having been decided by the umpire and his opinion returned to the commissioners, and it appearing that the claim had been promptly presented to the Mexican Government by the minister of the United States resident at Mexico (Mr. Letcher) and subsequently by Mr. Conkling:

"'It is now ordered and awarded that the Government of the Republic of Mexico pay to the United States for and on behalf of claimants, Samuel A. Belden & Co., for 299 bales of tobacco, the sum of $13,154.56, with interest from the 20th day of October 1849 at 6 per cent per annum, and the further sum for goods seized and sold under execution and loss attending the same of $10,000, with interest from March 6 1850 in the currency of the United States, making a total to July 1 1871 of $53,099.25.

"'But as the United States paid to said Belden & Co., on the 27th of July 1855, on account of their supposed losses the sum of $18,347.28, and took from them an assignment in writing of their said claim (now before us), which advance, with interest after the rate allowed claimants, amounts now to the

total sum of $35,920.81, nothing in this award is to be construed as preventing the United States from retaining out of the gross sum awarded herein as due that government on said assignment the aforesaid sum of $35,920.81, paying to Belden & Co. the balance, viz, $17,178.44.'"

Report of Mr. Bayard, Secretary of State, to the President June 28 1886, S. Ex. Doc. 191, 49 Cong. 1 sess.; S. Rep. 1452, 49 Cong. 1 sess. In the proceedings before the mixed commission, no record of the proceedings in Mexico in which the tobacco was condemned was produced either by the claimant or by Mexico. Claimant swore that he had a search made for them in Saltillo, but that they could not be found. He produced depositions to the effect that they were irregular, and that Belden & Co. were not cited to hear judgment rendered against them prior to the issuing of execution. The award of the umpire was very brief, and did not discuss any matter of principle.

[redacted]

CHAPTER LXVI.

PRIZE CASES.

1. Probable Cause.

Case of the "Nancy": Opinion of Mr. Gore.

"Mr. Bayard, memorialist, in behalf of James King and Messrs. Bethell & Crofter, of Philadelphia, states that the schooner with her cargo, bound from Port au Prince to Philadelphia, were captured on the 30th July A. D. 1793 and sent into New Providence, and restored by the decree of the vice-admiralty court 25th March 1794 without allowance of costs and damage, demurrage, or expenses; that the decree of the lords commissioners of appeal, bearing date on the 27th February 1796, affirmed the sentence of the vice admiralty; that the property belongs to the claimants, who are citizens of the United States of America; that the voyage was conformable to the law of nations, and no act has been done whereby their right to costs was forfeited.

"Mr. Gostling in answer states: 'That, amongst other circumstances appearing in evidence is the fact of papers being thrown overboard, a fact incapable of any satisfactory explanation, and inconsistent in its own nature with a claim of costs and damages.'

"The ship's papers and those relating to the cargo were full, complete, and general. They not only respected the voyage to, but also that from, Philadelphia. The latter papers, with the letters of the French merchants who loaded the schooner, abundantly confirmed the evidence derived from the documents, which declared the property of vessel and cargo at the time of capture. The depositions of the witnesses, viz, the captain, supercargo, two of the sailors, and a French passenger, corroborated the evidence of the papers. The fact of the vessel and cargo being as claimed is still further confirmed by the extraordinary means taken by the captors to prove it

French, and these means failing, for it is in proof that Captain Moulden, the commander of the privateer who made the capture, offered one of the sailors of the *Nancy* $250 if he would swear there was French property on board.

"The captain of the *Nancy* threw some papers overboard which he received in Port au Prince to be put in the post-office in Philadelphia. He swears that the address on the letters was in French, but, as he can not read that language, he knows not to whom they were directed, and it does not appear that he or anyone on board knew the contents. The supercargo gives the same account of throwing the letters overboard, and says the reason for doing so was 'that, as they were in French, and he supposed the privateer had no linguist on board, they might be the cause of his detention.' One of the witnesses, a Scotch boy, swears that papers were floating in the sea; probably these were the same that the captain had thrown overboard. Captain Moulden desired one of his officers to go in a boat and pick them up, but he did not.

"The only circumstance that can raise a doubt in the present case as to the claim of the memorialist is that of throwing several letters overboard. In pursuance of that good faith required by the law of nations, the vessel is to be provided with complete and genuine papers, to discover whether the property belongs to friend or enemy. The belligerent having a right to the property of an enemy, though on board the vessel of a neutral, the neutral is not justified in concealing or destroying the evidence that shall so designate it. If he does either, he interferes with the acknowledged right of the belligerent. But if the neutral has on board his vessel complete and genuine papers which speak clearly as to the property, he conducts himself conformably to the law of nations, and as he interferes with no right of the belligerent in destroying papers that do not relate to vessel and cargo, I see no just reason why he should be put to trouble and expense for such an act. It impairs no rights of nor is inconsistent with any duties due from him to the belligerent; yet there are cases where the destruction of papers, though totally irrelevant to the vessel and cargo, may justly lead to suspicions that the papers so destroyed contained evidence of the property being enemy's, or were of such a nature as to detract from the apparent weight and authenticity of the remaining papers. In such a case, the neutral is bound to remove that suspicion, and whatever loss or

expense is necessarily incurred in rendering the evidence free from the cloud thrown thus upon it ought to be at the proper charge of him whose conduct has raised the doubt. Whenever suspicions, thus excited, are satisfactorily removed, any further detention becomes unjust and an injury to the detained.

"It is doubtful, under all the circumstances of this transaction and the means the captor had of possessing himself of the papers thrown into the sea, whether the fact was not satisfactorily explained at the time of the capture. However this may have been, there could remain no doubt after the preparatory examination of the captain, supercargo, and crew under oath. Their testimony was positive as to the property being as declared in the papers, and refuted every suspicion that those destroyed had any relation to this vessel and cargo.

"I am therefore of opinion that the claimants are entitled to compensation for the loss they have sustained by being obliged to pay any costs either of their own or the captors after the decree of the vice-admiralty court of the 13th September A. D. 1793, and also for all loss and damage which they have sustained by reason of the detention of vessel and cargo after that day."

Gore, commissioner, case of the *Nancy*, Florence, master, Article VII. of the treaty between the United States and Great Britain of November 19, 1794.

Case of the "Sally," Choate: Opinion of Mr. Gore.

"Bayard, memorialist, in behalf of Wm. Pierce Johnson, Phillip Johnson, Zebidia and Elias Hunt, and E. Choate, the master, states that vessel and cargo were captured on the 24th November 1793 by the private ship of war *Brilliant* while on a voyage from Boston to Amsterdam; that vessel and cargo were restored by decree of the high court of admiralty, but without allowance for costs, damages, demurrage, and expenses; that on the 7th May 1796 the lords commissioners affirmed the sentence of the admiralty, and further condemned the claimants to pay the costs of appeal; that the voyage was conformable to the laws of nations, and vessel and cargo belonged solely to the claimants, who are citizens of the United States; that neither master nor owners had done any act whereby their right to demurrage, costs, and expenses was forfeited, and suggests as a reason for the decision of the lords certain orders of His Brittanic Majesty authorizing the capture.

"Gostling states in answer: That there were no bills of lading on board, a defect the more remarkable, as the letter of instructions from the owners of the ship and part of the cargo expressly referred to bills of lading; that the accounts of the destination of the ship are contradictory; that, on a consideration of those and other circumstances, the judge was of opinion that a simple restitution was the whole of what was due, and that the lords commissioners were of opinion that the appeal of the claimant was vexatious and oppressive.

"It appears from the concurrent testimony of all the papers found on board at the time of capture, the declaration of the master and seamen, that the vessel and cargo were at that time the property of the claimants, and that they were citizens of the United States. All this was manifest from the evidence shown to the captors on their coming aboard, and it is not pretended that the voyage was not legal, whether to Bordeaux or Amsterdam, or that anything excited suspicions that the property was other than as declared, or that the transaction was not honest and fair.

"The evidence of the articles of cargo and [of the persons] to whom it belonged consisted of papers denominated instructions and invoices, wherein the articles were not only particularly specified, which is not ordinarily the case in a bill of lading, but every material fact contained in a bill of lading was also stated, viz, by whom and on whose account and risque the goods were shipped, the freight to be paid for those which did not belong to the owners of the ship, the place from and to which they were bound, the person to whom consigned, and the compensation to be made to the captain.

"It is true that in the instructions from the owners of the ship to the captain they say: 'You having sundry goods and merchandise as per invoice on our account and risque, as also some freight, the whole consigned to you, you are to dispose of the whole, taking your freight agreeable to bill of lading.' The paper to which they refer had all the essential qualities of a bill of lading, as the captain was the consignee, and especially contained the rate of freight, the object in which alone they were interested and to which they referred. It afforded all the evidences of property that are in a bill of lading in common form; it contained every obligation on either of the parties relative to this property, and, from a copy of the receipt signed by the captain on the back, it is evident that the

shippers retained one as their security against him. From the relation of the parties it necessarily included more than a bill of lading generally does, inasmuch as the captain was the consignee, and it referred to a future voyage to be made with the proceeds of these articles.

"Surely there is nothing in these papers, or calling the last, by the shipowners, a bill of lading, especially in the sense to which they alluded, that could raise a suspicion to warrant the capture or detention of this vessel and cargo.

"I know of no law of nations that renders it necessary to the safety of neutral property that there be a bill of lading in the vessel, either according as the terms are generally understood, or according to the particular character of such a document in any one nation. It is sufficient, in my opinion, if there be evidence accompanying the cargo, which shows explicitly to whom it belongs and so as to leave no just suspicion on the mind of a belligerent whether it be the property of a friend or enemy.

"In the celebrated reply of Lords Mansfield and others to the Prussian memorial in 1756, 'it is said the law of nations requires good faith; therefore every ship must be provided with complete and genuine papers, and the master at least should be privy to the truth of the transaction. To enforce these rules, if there be false or colorable papers, if any be thrown overboard, if the master and officers grossly prevaricate, if proper ship's papers are not on board, or if the master and crew can not say whether the ship or cargo be the property of a friend or enemy, the law of nations allows, according to different circumstances, etc., costs to be paid or not to be received in case of acquittal.'

"Here is no particular specification of what papers are indispensably necessary, but, in pursuance of that good faith required by the law of nations, the papers shall be genuine and complete, and the master shall be able to satisfy the belligerent whether the ship and cargo be the property of a friend or enemy.

"The Government of France has always been uncommonly rigid in requiring plenary and minute proof of property on board ships in times of war. The edicts of Louis XIV. on this subject have been extremely severe, and in many instances unsupported by the law or practice of nations; but even these do not extend so far as to require bills of lading and invoices.

The French ordonnance renders it necessary that there be on board a charter party, bills of lading, or invoices. According to Valin's Commentary on this ordonnance, the words are to be construed disjunctively and not collectively, and, if either be on board indicating the property, it is sufficient. What is not declared in such papers shall be good prize, while all the rest shall be released.

"I am of opinion that in the present case the papers on board were genuine and complete, both as to vessel and cargo; that the capture was illegal and irregular, and that the claimants are entitled to full compensation from the British Government for the loss and damage they have sustained by reason of such capture."

Gore, commissioner, March 13, 1797, case of the *Sally*, Choate, master. Article VII., treaty between the United States and Great Britain of November 19, 1794.

Case of the "Sally," Choate: Opinion of Mr. Pinkney.

"I am of opinion, 1st, that the claimants are entitled to the costs below, to damages, and demurrage; 2nd, that they are entitled to the costs of appeal and to be reimbursed such costs as were adjudged against them to the captors.

"There was no probable cause of seizure or detention.

"The orders of the 6th November 1793, relied upon in the respondent's printed case, might have excused the captor in a controversy between him and the claimants, but can have no weight in a question between the claimants and the British Government under the treaty. The complaint is now to be considered independent of those orders.

"According to Vattel credit should have been given to the ship's papers produced by the neutral master at the time of the capture *unless any fraud appeared in them or there were very good reasons for suspecting their validity.*

"1st. The ship's papers upon the face of them bore no marks of fraud and afforded no reason at all to justify a doubt of their validity and fairness. The want of formal bills of lading could not affect their credit, as there were papers on board in substance equivalent to them.

"Invoices to which the master's acknowledgments were subjoined, stating explicitly for whose account the goods were shipped and engaging to follow the shipper's instructions by which they were accompanied, and to which they refer, answered every object for which bills of lading are calculated.

"The invoices, acknowledgments, and instructions taken

together formed a body of clear and unequivocal evidence of the ownership of the cargo, its place of destination, the person to whom it was consigned, and the manner in which the proceeds were to be disposed of. Bills of lading could not have done more nor indeed so much, and, if in point of *information* they could at most have been barely equal to those documents, in point of *law* they could not in any respect lay claim to superior efficacy.

Indeed, as the whole cargo was consigned to the master on board, the manner in which it was documented was better suited to the nature of the transaction than bills of lading in the customary form. An engagement on the part of the master to deliver the cargo to *himself* upon his arrival in port could hardly be so proper as an engagement to follow the instructions of the consignors either indorsed upon or accompanying the invoices.

"It is alleged in the printed case of the respondents that there is in this respect an *irreconcilable inconsistency* between the letter of instructions from the shipowners to the master and the other papers relative to the cargo. It is true that this letter does direct the master to take his freight for goods not shipped on their account *according to bills of lading*, but it is so obvious that this was mere inaccuracy that it ought not to be mentioned as a rational ground of suspicion. The instructions of those who shipped the goods on freight prove unanswerably that there was no bill of lading signed for them, for they refer to an *invoice* and to that only, which invoice, having the master's acknowledgment and engagement as above stated subjoined, together with the freighters' instructions therein referred to *indorsed*, was to every purpose of law or explicitness equal to a bill of lading, and might well have been called so by the shipowners (putting inadvertence out of the question) without hazarding the credit of the ship's papers with those who should be disposed to place upon them a just and liberal construction.

"But surely if a bill of lading was purposely omitted with dishonest views, the same views would have induced the shipowners to say nothing about bills of lading in their instructions to the master which, doubtless, were not intended for concealment. If bills of lading were actually signed, but meant to be concealed from British or other cruisers for fraudulent purposes, it was the perfection of stupidity to refer to them in that very paper which was sure to come under the

inspection of those against whom the fraud was meditated. If it was designed to carry on a fraud by means of showing false papers and concealing true ones, what reason can be imagined why the master should not have signed and taken with him *false bills of lading* as well as receive on board as instruments of deception *false and colorable invoices*, to which he made himself a party as effectually as he could be to bills of lading? There can be no reason unless we suppose that fraud consults form in what it intends to keep out of sight, but neglects it altogether in what it fabricates as the only means of imposition; that it is scrupulously technical when it is of no use to be so, but is slovenly and negligent when its own object prescribes to it a nice attention to regularity and accuracy. He who adopts such a supposition must reject all experience. In short, this objection appears to be manifestly captious.

"It is further objected by Mr. Gostling that the master's pretence of the vessel's destination from Rochelle to Amsterdam is contradicted by the letter of instructions from the shipowners, etc. If we are to take the letter of instructions without the postscript under the same date this allegation is true. But why it is that we are to reject the postscript (which expressly authorizes the destination to Amsterdam) it would have been well for the objector to have explained.

"2d. If (as I hold to be most clear) the papers on board were free from any imputation upon the face of them, it is to be considered whether the preparatory examinations furnished anything upon which to impeach them.

"The law of nations requires that a belligerent making prize of a neutral in the teeth of proper written documents shall have *very good reasons* for his conduct. The reason in this case (even admitting it to have been known to the captor at the time of the seizure, which is not at all likely) was simply that Anduze, a Frenchman, who happened to be, among others of his countrymen, a passenger on board the *Sally* from America to France, did not as the others did leave the ship at Rochelle, but was proceeding in her to Amsterdam. That he had no interest in or control over the cargo appeared from the ship's papers, and if the captor made any inquiries on the subject (without which he could have known nothing of this alleged probable cause) it must also have appeared from the declarations of the master, mate, and Anduze.

"It was, however, *possible* that, notwithstanding these

papers and declarations, Anduze *might be* interested in the ship or cargo or both, and if the *possibility* of such an interest be a *very good reason* for distrusting the papers, etc., then and then only had the captor probable cause of seizure on this occasion. But possibility is not probable cause. There must be an apparently well founded presumption. The presumption here relied upon was that Anduze would have landed at Rochelle, if interest had not attached him to the ship; but this was an arbitrary and fanciful presumption—a mere *surmise* rested upon the selection of one motive out of many, all of them equally, and some infinitely, more probable.

"Anduze had for many years been an inhabitant of America and the West Indies, and, of course, had been in no situation to calculate with certainty how far a residence in France would suit his views in life, his political opinions, or the part he might have acted previous to his arrival. It was not practicable for him even to ascertain whether he could be in safety there during that turbulent era of the Revolution. At Rochelle he might be enabled to make this estimate more conclusively, and the result may be supposed to have been a conviction that it would be more prudent to go on to Holland. Rochelle, too, was at that time in a state of much disturbance, as appears by the proof, and this might have influenced him to prefer proceeding with the vessel. In short, without enumerating them, it must be evident that various causes, in no shape connected with the *Sally* or her cargo, might have induced him to reimbark, and as the fact was thus fairly attributable to so many strong and probable reasons, consistent with the ship's papers and the declarations of the captured, if the captor would persist in carrying the vessel into port upon mere possibility and surmise to the contrary, *he did it at the peril of indemnifying the neutral if his surmise should turn out to be groundless.*

"In taking Anduze to Amsterdam the neutral master was doing a perfectly innocent act, and it would be strange if the consequence of this innocent act should be to subject him to the heavy loss he has incurred, although he had taken every precaution to manifest the neutrality of ship and cargo which could be supposed to be necessary. If such doctrine be according to the law of nations, it will be impossible for a neutral to provide for his security. Let his vessel and goods be documented how they may, let his conduct be ever so unexceptionable,

some solitary conjecture may always be conjured up against him which shall be sufficient to ruin all his prospects and compel him besides to sacrifice his time and money in an admiralty contest by which everything is to be lost and nothing to be gained. I, for one, think better of the law of nations, and I am therefore of opinion that when Sir James Marriott pronounced for restitution he should have granted to the claimants costs, damages, and demurrage, unless he was restrained by the orders of the 6th November 1793, which, however they might have bound him, are no rule for us; and, further, that as the claimants were obviously aggrieved by his refusal to grant these costs, &c., and were compelled to carry their case before the lords for redress, the expenses attending or consequent upon the appeal are due to them from the British Government."

Pinkney, commissioner, July 13, 1797, case of the *Sally*, Choate, master; Article VII., treaty between the United States and Great Britain of November 19, 1797.

It having been decided that there was not probable cause for the seizure discussed in the foregoing opinion, the case was referred to the merchants "to ascertain the compensation to be paid to the owners of the said vessel by way of damages which the board has adjudged to be due to them from the day of her capture to the time of her discharge, and also for the damages alleged to have been sustained by the said vessel while in the custody of her captors, and also for such expenses as were necessarily incurred by the said owners by reason of the detention of the said vessel and her cargo (not including costs), and also to ascertain the compensation to be paid to the respective owners of the cargo, laden on board the said vessel, for the detention thereof from the day of the capture to the time of the discharge, and also to ascertain the compensation to be paid to the claimants for the costs by them incurred in the prosecution of their claim before the admiralty and the lords of appeal, and they are to make report of their proceedings herein."

The records of the commission disclose further proceedings in the case as follows:

"London, the thirteenth day of April one thousand seven hundred and ninety-seven.

"At a board of commissioners appointed and qualified and constituted pursuant to the provisions of the seventh article of the treaty of amity, commerce, and navigation, between His Britannic Majesty and the United States of America.

"Present, John Trumbull, esq'r, fifth commissioner.

"John Nicholl, L. L. D., John Anstey, esq'r, commissioners named on the part of His Britannic Majesty.

"Christopher Gore, esq'r, William Pinkney, esq'r, commissioners on the part of the said United States.

"*Sally*, Ebenezer Choate, master.

[redacted]

"In the case of the claim preferred by Samuel Bayard, esquire, agent for the United States of America, on behalf of William Pierce Johnson, Phillip Johnson, Zebidia and Elias Hunt, and the said Ebenezer Choate, described in the memorial of the said Samuel Bayard as citizens of the United States of America, stating—

"'That on the twenty-fourth day of November, in the year of our Lord one thousand seven hundred and ninety-three, and during the course of the war in which His Britannic Majesty was engaged at the time of exchanging the ratifications of the said treaty the said ship and cargo were illegally and irregularly captured by Louis Rousel, commander of the private ship of war the *Brilliant*, while in the prosecution of a voyage from Boston to Amsterdam, and that the said ship and cargo were proceeded against in the high court of admiralty, and by sentence of the said court ordered to be returned to the claimants and owners, but without any allowance for costs, damages, demurrage, and expenses, from which sentence an appeal was prosecuted before the lords commissioners of appeal, who, on the seventh day of May, in the year of our Lord one thousand seven hundred and ninety-six, affirmed the said sentence and further condemned the said claimants to pay the costs of appeal, from all which the said claimants have sustained loss and damage to the amount of two thousand pounds sterling.

"'That the owner of the said vessel and cargo were at the time of the capture and still continue to be citizens of the United States, and that the said vessel at the time of the said capture was engaged in a fair and legal trade, and that neither the owners nor master of the said vessel had done any act that could operate as a forfeiture of their rights to costs, damages, demurrage, and expenses arising from the capture aforesaid.

"'And therefore praying that, inasmuch as from the circumstances so as aforesaid belonging to the said case of the said claimants they could not at the time of exchanging the ratifications of the said treaty, nor at any time since and can not now actually obtain adequate compensation for the loss and damage so sustained as aforesaid in the ordinary course of justice, and inasmuch as the said loss and damage have not been occasioned by the manifest delay and negligence or willful omission of the said claimants, the board would examine the justice and merits of the said case, and, pursuant to the provisions in that behalf made in the seventh article of the said treaty, award full and complete compensation to the said claimants, to be paid to them by the British Government under such releases and assignments as by the said board should be directed.'

"LONDON, *18th day of April 1797*.

"The board having duly considered the said memorial, as also the written objections of Nathaniel Gostling, esquire, the agent appointed by the British Government on behalf of the Crown, together with all the depositions, proofs, and vouchers laid before the board in the course of the investigation by them made of all the circumstances in evidence upon the merits of this claim, do decide and award as follows, viz:

"That the complainants in the said memorial named, viz: William Pierce Johnson, Phillip Johnson, Zebidia and Elias Hunt, and Ebenezer Choate, are entitled under the provisions of the seventh article of the said treaty to have and receive of the British Government full and complete

compensation for the losses and damages so by them alleged to have been sustained as aforesaid, and the same having been duly ascertained to amount to the sum of one thousand one hundred and eighty-nine pounds and eight pence three farthings sterling money of Great Britain.

"The board do adjudge and award, and it is hereby awarded accordingly, that the said sum of one thousand one hundred and eighty-nine pounds and eight pence three farthings be paid by the British Government, according to the provisions of the said article, at His Majesty's treasury on Saturday, the first day of July next, unto Samuel Bayard, the memorialist and claimant, on behalf of the said complainants, William Pierce Johnson, Phillip Johnson, Zebidia and Elias Hunt, and Ebenezer Choate, or his assigns, to the sole use of the said William Pierce Johnson, Phillip Johnson, Zebidia and Elias Hunt, and Ebenezer Choate, their executors, administrators, or assigns.

"And the board do further award that the said Samuel Bayard or his assigns shall at the time of receiving the said sum of one thousand one hundred and eighty-nine pounds and eight pence three farthings at his said Majesty's said office of treasury, actually sign and deliver to the person making the said payment on behalf of the British Government an acquittal and release in the form following, viz^{t}:

"I, —— ——, agent of the United States ——, do hereby acknowledge to have received of and from the British Government, for the use of William Pierce Johnson, Phillip Johnson, Zebidia and Elias Hunt, and Ebenezer Choate, of the State of Massachusetts, in the United States of America, their executors and administrators, the sum of one thousand one hundred and eighty-nine pounds eight pence three farthings sterling money of Great Britain, in full satisfaction of the like sum mentioned in an award made at London on the thirteenth day of April, in the year of our Lord one thousand seven hundred and ninety-seven, in the case of the ship *Sally*, Ebenezer Choate, master, by the board of commissioners appointed in pursuance of the treaty of amity, commerce, and navigation between His Britannic Majesty and the United States of America, according to the tenor of the said award and in full satisfaction of the capture or condemnation in the said award mentioned.

"LONDON, *13th day of April 1797.*

"We do hereby certify that the foregoing was the final decision and award made at London this thirteenth day of April, in the year of our Lord one thousand seven hundred and ninety-seven, by a majority of us, the commissioners aforesaid in the said case of the *Sally*, Ebenezer Choate master.

"In testimony whereof we have hereunto set our hands and seals at London this thirteenth day of April, in the year of our Lord one thousand seven hundred and ninety-seven.

"JNO. TRUMBULL. [L. S.]
"JNO. NICHOLL. [L. S.]
"JOHN ANSTEY. [L. S.]
"C. GORE. [L. S.]
"WM. PINKNEY. [L. S.]

"At the same time the board prepared and executed a certificate of the foregoing award for the purpose of being used by the memorialist in demanding at His Majesty's treasury the payment of the sum awarded.

"*Ordered*,

"That whenever a certificate of an award shall be given to any person entitled to receive the same, the secretary shall require from such person to sign in the minutes of the proceedings of the day an acknowledgment that he has received the same.

"*Ordered*,

"That the secretary do apprize Mr. Long, or the Secretary of the Treasury for the time being, for the information of the lords commissioners of His Majesty's treasury, of all sums awarded by the board to be paid by the British Government, and also of the time when such sums are to be paid."

Journal of the commission under Article VII. of the treaty between the United States and Great Britain of November 19, 1794, MSS. Dept. of State.

Case of the "Diana": Opinion of Mr. Gore.

Memorial by Samuel Bayard, in behalf of Isaac Clason and Gideon Gardner, owners of said ship and cargo, states:

"That the brigantine and cargo were captured by the private ships of war the *Beaulieu* and the *Agnes*, on a voyage from Guadaloupe to New York on the 2nd December 1793. Vessel, etc., were carried into St. Christophers, and detained until 2nd April 1794, when the same were acquitted and ordered to be restored as neutral property, damages and costs refused, and the claimants ordered to pay costs to the captors. Both parties appealed from this sentence. The claimants from that part which disallowed them costs, etc., and ordered them to pay costs to captors. The captors, from so much as ordered the vessel and cargo to be restored. The captors took out no inhibition, nor proceeded in any wise to prosecute their appeal. The claimants duly prosecuted the appeal made by them until the captors were obliged to appear thereto, and the same was ready to be set down for hearing; when their lordships decided that from the 6th November 1793 until notice of an instruction of His Britannic Majesty to commanders of war, etc., dated Jany 8, 1794, captors were justified in seizing, prosecuting, and bringing to judgment the vessels of neutrals, with their cargoes consisting of the produce of the French colonies, although at the time of the capture such captors were not apprised of His Majesty's order of the 6th November 1793, and that even in cases where, pending the prosecution of such vessels and cargo, such captors had notice of said instruction of January 8, and that persons who brought forward appeals under such circumstances should pay costs to the respondents; whereupon the claimants found it necessary to

abandon their appeal. Mr. Gostling, in answer, does not deny the decision of the lords as asserted by Mr. Bayard, and on which he grounds his claim before the board and his abandonment of the appeal, but says the judgment of the court below was founded on the throwing overboard some papers, and suppressing others, and says some never were delivered up, of which the captain does not attempt to exculpate himself; that the excuse offered by the captain for throwing overboard papers was contradicted by the only witness regularly examined; that the claimants cannot be relieved for the not submitting all their papers without distinction to the inspection of commissioned captors; that the withdrawing them on any pretense whatever from such inspection will render the claimants liable to costs; and that, if any relief was due, it ought to have been pursued in the ordinary course of judicial proceedings.

"The judge of the vice-admiralty court does not mention the grounds on which he founded his decree.

"There is no reason to believe, from any papers found on board or any evidence respecting vessel and cargo, that they were not *bona fide* the property of the claimants.

"The captain, Gardner, swears expressly that there are no papers relative to vessel and cargo in any country or on board any vessel except such letters as he had written to his owner, Clason. That no papers had been delivered out of his vessel and carried away, except such as were received by the captors, and three papers delivered to a Mr. Bethly, which since that delivery were handed in to court, and some others which he at that time delivered in to the judge of the said court. It appears likewise by his testimony, by the testimony of James Holt, who stood at the helm all the time the brigantine was chased by the privateer, and by the testimony of Hezekiah Barker, the chief mate, that only three letters were thrown overboard. That two of them were letters from French aristocrats, who had desired Gardner to throw them overboard if he was in danger of being captured, especially by a French privateer; that the other was a letter from the master of a vessel at Guadaloupe to some person in New London and in the custody of the mate. The letters were all sealed and the contents unknown to the captain, or any person on board, and were thrown overboard while they were confident the privateer that chased them was French, and known to them as be-

longing to a person in Guadaloupe; that the letter directed to New London was thrown overboard because the contents were unknown. The mate swears that in his belief the letters would not have been thrown into the sea if the captain had known the privateer to have been English; that their destruction was merely to save the writers of them from trouble. These depositions appear to have been taken in precisely the same way, under the same solemnities and by the same person as that of James Cannery, with this only difference, that the depositions of the captain, mate, and helmsman were taken in the presence of the proctor in behalf of the captors, and that of Cannery without the attendance of any proctor or other person in behalf of the claimants; neither does it appear that the claimants were notified of the taking his deposition. Cannery swears that there were three or four packages and other letters brought up and placed on the binnacle when the brigantine was chased; that they were suffered to remain there until the privateer had pulled down her French and hoisted her English colors. After this he was ordered forward and on his return to the deck did not see them. Afterward he heard the captain say to the mate that he did not know where to hide the letters, and the mate advised him to put them in some dirty old thing, such as a piece of canvas or an old pair of trousers. This deposition was dated the 27th December, Gardner's on the 6th December, Barker's on the 21st, and Holt's on the 30th of the same month. Gardner appeared to have been examined again by the captors on the 13th of February 1794. The mate, Barker, swears that Cannery had deserted from the brigantine, and entered on board a vessel of war belonging to His British Majesty; that he had stolen certain articles from the captain, which were found in his chest when he came to take it away, and was compelled to give them to the owner.

"The knowledge that any letters were thrown overboard appears to have come from the master's own account on his first examination, and altho' all the evidence relating to the destruction or concealment of papers was known before the filing of the libel, which was on the 2nd January, that is made no ground of charge against vessel and cargo; but the case is rested chiefly upon the following grounds, viz: That the property belonged to French subjects, or persons inhabiting the territories of France; that the voyage was not allowable by the law of nations and upon the order of his British

Majesty of the 6th November 1793. There is no objection that the evidence relative to vessel and cargo was not clear and plenary, or that such was withholden from the captors on their boarding the brigantine, or that any circumstance in the papers, appearance of the vessel, or conduct of the persons on board, afforded any suspicion of the property or destination being other than declared by the captain. It does not appear that any papers relative to vessel and cargo were concealed or suppressed, but on the contrary it is expressly in proof that every paper, except the three letters before mentioned, were delivered into the hands of the captors or into court on or before the 6th December. There is the strongest ground for believing that the letters thrown overboard had not the smallest relation to vessel and cargo, or voyage; and the reason given at the same moment that the fact of destroying the letters was known, and by the same person that communicated this information, is natural and satisfactory. It is not then probable that this circumstance could have influenced the capture, bringing in or detention of the vessel, or the judge's decision. The evidence relative to vessel and cargo was conclusive, and arose from the ship's papers, the concurrent testimony of the people on board, and confirmed by the depositions of others who were in Guadaloupe when the cargo was purchased, and in St. Kitts shortly after the arrival there of the *Diana*.

"The destruction of papers, material in discovering the property of vessel and cargo to be enemy's, and with a view to protect the effects of one belligerent from another, is an offence against the law of nations and subjects the neutral so conducting to certain inconveniences. But, when the papers destroyed are irrelevant to vessel and cargo, it does not offend the rights of the belligerent to suppress or destroy them; and if the rights of the belligerent are not impaired and he put to no inconvenience from such suppression or destruction there is no reason in subjecting the neutral to loss and damage or expense on this account.

"When writers on the law of nations speak of the forfeiture of certain rights by the destruction or suppression of papers they must certainly be understood as speaking of papers which relate to vessel and cargo and contain evidence interesting from such their relation to the belligerent who makes the capture. Taking the words in an universal sense would subject to such forfeiture for the destruction of a piece of blank paper,

and by persons who had no interest or knowledge of vessel and cargo. Papers that have no reference to either, or that do not speak truths important to be known to the belligerent in respect to these, must be considered in the same light as blank papers. The destruction of such is innocent in the neutral as respects the belligerent and by no means impairs that good faith which he owes to the powers at war. He ought not to suffer for doing an act innocent in itself and which in no degree interferes with the rights of others. That the construction I have given of the rule which forbids the destruction of papers is just, appears in an eminent degree from two ordinances of France, one in 1708, the other in 1744, and exactly similar, and the comment and instructions on the 1st by Louis XIV. and the adoption of that construction as part of the other. In the ordinance of 1708, it is declared that every vessel captured, whose papers shall have been thrown into the sea, shall be a good prize with her cargo, upon the sole proof that some papers were thrown into the sea, without any regard to what the papers were, by whom they were thrown into the sea, nor if there remained sufficient aboard to prove that the vessel and cargo belonged to friends or allies. No terms could have been more explicit or made the rule against the throwing papers into the sea more absolute than these, whether reference is had to the quality of the papers, the persons by whom destroyed, their relation to the property, or the use to which they could have been applied. Notwithstanding the language adopted, which seemed not to leave the smallest discretion in the judge, the literal expression operated so unjustly and was so contrary to reason that the courts of admiralty had scruples whether a literal construction could have been intended. On hearing which Louis XIV., in 1710, wrote a letter to the president of the council of prizes explanatory of the article, in which he says, 'it was never my intention that this ordinance should receive a literal construction, having always thought, on the contrary, that confiscation ought only to be decreed on account of papers which would have given some proof that the property or destination was hostile. To remove these difficulties and to leave you and the commissaries of the council of prizes in their judgment all the liberty that I have always intended to give you, I write you this letter to say to you that I remit entirely to you and the commissaries to apply the rigor of this ordinance or to interpret it according to the exigency of the

case and the circumstances which shall have caused the throwing the papers into the sea.' This letter has been coupled with and considered part of both ordinances, notwithstanding that of 1744 was so many years after the letter and conceived in the same absolute terms. (2 Valin Commrs. 268.)

"After the decision of the lords communicated to the appellant, there was no good reason for his prosecuting his appeal in that court, and from this communication it was as evident to him, and can not fail of being equally so to this board, that he could not obtain compensation for the loss and damage sustained by the capture in the ordinary course of justice, as if he was possessed of their decree against his claim.

"I am therefore of opinion that the cause is properly before the board and that the claimants are entitled to full and complete compensation for the loss and damage which they have sustained by the capture of their property which in my opinion was irregular and illegal."

Gore, commissioner, February 23, 1797, case of the *Diana*, Gardner, master; Article VII., treaty between the United States and Great Britain of November 19, 1794.

Case of the "Diana": Opinion of Mr. Pinkney.

"I am of opinion that the vessel and cargo were seized and carried into port without probable ground of suspicion that either vessel or cargo were lawful prize, and that the facts afterwards disclosed in regard to throwing papers overboard, which were at the time of such disclosure proved to be wholly immaterial, and to have been destroyed under apparently well-found impressions that the privateer in chase was French, did not furnish any such ground. I think of course that the claimants are entitled to full and complete compensation for the loss and damage occasioned by this capture, including expenses and demurrage."

Pinkney, commissioner, February 23, 1797, case of the *Diana*, Gardner, master; Article VII., treaty between the United States and Great Britain of November 19, 1797.

Case of the "Diana": Opinion of Mr. Trumbull, Fifth Commissioner.

"This is a claim for costs and damages merely, the neutrality of the vessel and property on board having been decided by the sentence of the vice-admiralty court.

"The point on which the agent of the crown rests his opposition to the memorial before us is, 'that some papers had been

thrown overboard, and others secreted and never delivered up.' I do not find from examination of the papers that the latter fact is established; and the question in my mind rests entirely on the innocence or criminality of throwing overboard certain papers under all the circumstances of the case.

"We are further told, however, that the irregularity of the papers found on board, and particularly the want of invoices and bills of lading, gave reason to suspect that the papers thrown overboard were in fact such as (had they been suffered to appear) would have proved the property to have belonged to the enemy.

"It is true that no invoice or bill of lading of the cargo on board at the time of seizure does appear in a copy certified to be a true copy of all the papers and proceedings had in the case. Yet the copy before us contains full and complete internal evidence of its own imperfection, and that invoices and bills of lading were found on board, and produced before the vice-admiralty court in the case. For first we find in Fol. 22, copy of the appraisement made at St. Kitt's on the 3rd March 1794, under order of the court, which runs thus:

"'Brig *Diana* valued at £800
"'40 hhds. of sugar, cost by French invoice £60 pr cwt. a 66
"'Do do do. do.

"And secondly, the decree of the judge, fol. 19, recites that certain papers had been read in court, and among others 'bill of lading marked F, agreement with Fourneau and Toulanson, together with the invoice of the cargo on board.' Now, altho those papers do not appear among those submitted to us, yet this recital in an office copy of the sentence, certified both by the registrar and judge, under the seal of the court, must be admitted as good evidence that such papers did exist, and were produced in court:—by whatever error of the registrar it may have happened that the insertion of copies of the papers themselves has been omitted. The clearance from Guadaloupe, certificate of the payment of duties outward, and final settlement with the treasurer of the island, respecting a protest of Mr. Genist, all bearing date the 30th November, the day before the vessel sailed, appear to be perfectly fair and genuine, as were also all the ship's papers, and those relating to the outward cargo. The claimant is therefore clearly to my mind exonerated from the charge of probable cause of seizure said to arise from the absence or irregularity of necessary papers,

and as it does not appear from anything before the board that the captors, at the time they took possession of the brig, had any knowledge that papers had been thrown overboard (no mention being made of this circumstance in the libel, altho it goes much into detail of the reasons for the capture), I am induced to believe that at the time of seizure there did not exist in the knowledge of the captor any probable cause of suspicion, which could justify the detention of the brig any longer than was necessary for the examination of the papers on board; and I am, therefore, of the opinion that the capture, was irregular and illegal in the first instance. The knowledge that papers had been thrown overboard appears to have been acquired on the 6th of December, four days after the capture (and subsequent to the arrival of the vessel in the captor's port), from the answer of Captain Gardner, to the 16th interrogatory: He declares on oath, 'That three or four letters which he received at Guadaloupe, with French addresses on them, one or two of which he was desired to throw overboard, in case he was like to be taken, but more particularly if by a French privateer, were thrown overboard, while the privateer was in chase, and while she chased under French colors.'

"The deposition of Henry Barker, the mate, confirms that of the captain, and states that 'the papers thrown overboard were three letters, two of which the captain informed him (*in the cabin, on the morning after they sailed and before they were chased*), were from French gentlemen aristocrats, who had requested that they might be destroyed if he should be in danger of being stopped by a French privateer; that the three letters, viz, the two with French addresses above described and one from the captain of an American vessel to some person in New London, which had been committed to his care, were brought upon deck by him, the mate, wrapped up by him in a bit of sheet lead, laid by him upon the binnacle, and finally thrown overboard by the captain, during the time that the privateer was in chase, while she chased under French national colors, while he (after carefully viewing her with the glass) believed her to be a French cruiser, and at least an hour before she hoisted English colors and hailed in English.

"The deposition of James Holt, who was at the helm during the whole chase, and who from his consequent proximity to the binnacle was better enabled to have seen and known correctly the facts of tying up and throwing overboard the papers,

as well as their bulk and number, than any other seaman on board, confirms the testimony of the captain and mate, both as to the number and size of the papers and the time of throwing them overboard, particularly 'that it was done while the privateer was in chase under French colors, and, to his best recollection, an hour and a half before the privateer came up and hailed in English under English colors.'

"James Cannery, one of the seamen on board the *Diana*, differs from the three foregoing witnesses in several points, and declares 'that there were three or four packages and other letters tied up by the mate in sheet lead and lying on the binnacle while the privateer was in chase; that they were lying there at the time when the privateer hailed the brig in French under French colors; that she afterwards hoisted English colors and hailed in English; that he was then ordered forward on duty by the captain, and when he returned aft (which was not long) does not know what became of them.'

"It may be objected that Captain Gardner being interested as owner of part of this cargo, his testimony ought to be received with caution; but Barker, the mate, and Holt do not appear to have had any interest in vessel or cargo, and their testimony, corroborating each other and that of the captain, must unquestionably be allowed to outweigh the solitary declaration of one man. I therefore regard the fact sufficiently proved '*that three letters were thrown overboard by Captain Gardner, during the time that the privateer was in chase, while she was under French national colors, and while she was believed by the captain and others on board the Diana to be a French cruiser.*'

"The question remains whether the law of nations be so severe on this subject as that this act under these circumstances is sufficient according to justice and equity to deprive the claimant of his right to costs and damages.

"It is said that the law of nations is absolute on this point, and that the act of throwing overboard, or otherwise destroying, *during the chase* any paper on board (no matter by whom the act was done or what was the nature of the paper) is in itself sufficient to destroy the right of the neutral to any cost or damage which may result from his being seized and carried into port for legal examination.

"That this general rule is just I am ready to admit, but I conceive that like all general rules it must have its exceptions.

This board is expressly bound by its constitution and by oath to give in all cases such awards as shall be consistent with equity and justice, as well as with the law of nations; and if in any case the latter shall appear to lead to such decisions as are inconsistent with the former, it must so far yield of its severity as to recover its consistency with them.

"I confess it does not clearly appear to my mind to be consistent with these principles to admit the operation of the rule in all its extent in the case before us. It is easy to imagine a case where collateral circumstances should throw so clear a light on the cause of the act, as well as the nature of the papers destroyed, that the captain of a privateer, a prize master or officer of common understanding, would cease to regard the mere act as affording probable cause of suspicion, and where, therefore, it could not be justifiable in equity to detain the vessel for any further inquiry than what could be immediately made on board by the captor; and the present appears to me to have been very much of that description. In other cases attendant circumstances may so increase the general suspicion created by the act as to justify and render necessary the most severe judicial investigation. But in all cases equity and justice demand that equal attention and respect be paid to the rights of the neutral as to those of the belligerent bringing him in.

"In the case before us the preparatory examination of the captain was had on the 6th December. It then became known that papers had been thrown overboard, and the declaration of the fact was accompanied with an explanation of the reason as well as of the nature of the papers, which, if not perfectly satisfactory while resting on the single testimony of the captain, was at least such as made it the duty of the captor (feeling, as he ought, a due respect and attention for the rights of the neutral) to proceed without delay to a full investigation by the examination of other persons on board. I also understand it to be a rule of admiralty proceedings that 'the captain *and other principal officers* of the captured vessel shall be examined *in preparatorio*.' What was done here? The captor, neglecting equally the respect due to the laws of his own country as to the rights of the neutral, examined no other person *in preparatorio* except James Cannery, a private seaman; and that not until the 29th of December, near a month after the captain. The 'other principal officers on board' were never examined *in*

preparatorio. At the request of the claimant the depositions of the mate and the helmsman (the two persons whose testimony was of most importance from the nature of their character and situation on board) were admitted by the vice-admiralty court, and are before us and form the most material part of the evidence.

"It is to this criminal negligence on the part of the captors that the losses sustained by the claimant and now about to be borne by the British Government may be traced. For it appears from the proceedings and final sentence of the vice-admiralty court that the ship's papers of every kind were complete and genuine, and the property of vessel and cargo clearly neutral. It appears that the papers thrown overboard had no relation to the cargo. That they were thrown over while the privateer chased under French colours, and was believed by the captain and people on board the *Diana* to be a French cruiser; that they were thrown over from motives of humanity, at the request of those who wrote them, and for the purpose of guarding against the violence of party zeal; in fine it appears manifestly that they were thrown overboard for the purpose of concealing knowledge from a French cruiser, and not from an English one. All this appeared in explanation of the fact at the time of its disclosure by the captain. No light was ever thrown upon the subject, nor any examination made, other than was manifestly in the power of the captor, on the day the fact was disclosed; and no reason exists why this explanation, which ultimately was satisfactory, must not have been equally so on the 6th of December as at any subsequent day, if the captor had then done his duty, by proceeding in the examinations *in preparatorio*, according to the rules of admiralty proceedings and without delay.

"I am therefore of opinion that the detention of this vessel and cargo, as well as the capture, was irregular and illegal; and that the complainant is in equity and justice as well as by the laws of nations entitled, under the provisions of the 7th article of the treaty under which we act, to receive from the British Government full and adequate compensation for the loss and damage which has been sustained in consequence of such capture and detention."

Trumbull, fifth commissioner, April 12, 1797, case of the *Diana*, Gardner, **Article VII.** treaty between the United States and Great Britain of November 19, 1794.

Case of the "Peterhoff."

The British steamer *Peterhoff* was captured February 25, 1863, in the Atlantic Ocean, off the island of St. Thomas, by the United States steamer *Vanderbilt*, and taken into the port of New York, where both the *Peterhoff* and her cargo were condemned as prize. (Blatchford's Prize Cases, 381, 463–550.) The Supreme Court on appeal reversed the decree of the district court, except as to a small part of the cargo found to be contraband and another part found to belong to the owners of the contraband. (5 Wallace, 28.) Subsequently claims against the United States on the part of the owners of the vessel and cargo were presented to the commission under Article XII. of the convention between the United States and Great Britain of May 8, 1871.[1]

Position of the Claimants.

The case for the claimants, as summarized by the agent of the British Government (Howard's Report, 133), was as follows:

"On the 20th of February 1863 while proceeding on her voyage and when about to enter the harbour of St. Thomas to procure coals, the vessel was stopped by an armed vessel of the United States, and her papers carefully examined and passed upon as correct. On the same day the vessel anchored in the harbour of St. Thomas and there remained engaged in taking in coal until the 25th of February. During the time of her detention at St. Thomas there arrived there the United States steamer *Massachusetts*, having on board Admiral Charles Wilkes. At noon on said 25th day of February the *Peterhoff* proceeded to sea, and while steaming slowly out of the harbour of St. Thomas, met the United States steamer *Vanderbilt* going in. When the *Vanderbilt* arrived off the harbour mouth she was observed to exchange signals with the admiral's ship. The *Vanderbilt* then turned and followed the *Peterhoff* to sea, and when both vessels were some four or five miles from shore, but within sight of the port, the capture was made. * * *

"After the capture, and while the proceedings in prize were pending, the vessel was taken for the use of the United States,

[1] The steamer *Peterhoff*: Spence & Fleming, No. 405, claimants for the vessel: James Wetherell, No. 406; William Almond, No. 407; Alfred Wilson and others, No. 408; the same, No. 409; Joseph Spence, No. 410; Alfred Lafone, No. 411; Charles S. Osborne and others, No. 412; Anna Louch, No. 413; Frederick D. Frost and others, No. 414; Thomas P. Austin, No. 415; James Holgate, No. 416; Jarman & Smith, No. 417; Welch, Margetson & Co., No. 422; Wilson & Armstrong, No. 423; Grant, Brodie & Co., No. 424; Hine, Mundella & Co., No. 425; Ernest Ellsworth, No. 426; John Ellsworth, No. 438; Walter Easton, trustee, No. 439; Robert Sinclair, No. 440; Thomas Edgley & Co., No. 441—claimants for cargo.

and the sum of 80,000 dollars paid into the registry of the court as her appraised value. It was claimed that the proofs showed that the vessel at the time of the capture and at the time she was taken for the use of the United States was worth 128,000 dollars. That in April 1863 the Secretary of the Navy of the United States had consented to take the vessel for the use of the Navy at her value, then estimated to be 110,000 dollars; and that subsequently, in August 1863, the United States took the vessel. By order of the district court an appraisement was made by three persons, one representing the owners, one the captors, and one the United States. The estimate of the representative of the owners was 120,000 dollars, the estimate of the representative of the captors was 100,000 dollars, and the estimate of the representative of the United States was 80,000 dollars. The United States took the vessel at the valuation fixed by their own officer. The cargo was sold under process issued by the district court before the case was decided by the Supreme Court. After the decision of the Supreme Court was rendered, the district court, in the execution of the mandate, and, as it was claimed, in violation of the directions therein contained, deducted from the proceeds of the restored cargo the sum of 32,968 dol. 64 c. as costs and expenses, and 50,000 dollars as fees of counsel for the claimants.

"On behalf of all the claimants it was argued:

"I. That the capture of the *Peterhoff* was illegal, because of the fact disclosed by the evidence and distinctly stated in the diplomatic correspondence, that the vessel was followed from a neutral port and captured within sight of a neutral port which she had just left by a belligerent captor, who had made use of the neutral port as a position from which to watch, follow, and search neutral vessels. The evidence made it undeniable, it was said, that Admiral Wilkes, who had previously received what was known as 'the black list' (a list of suspected vessels, in which the *Peterhoff* was named), was awaiting the arrival of the vessel, and that the capture was effected through communications made by a public vessel of the United States lying in the harbour at St. Thomas; and that under the settled doctrines of international law it is a violation of neutrality for the armed vessel of a belligerent to use neutral waters for the purpose of intercepting the merchant vessels of the same or another neutral state under suspicion of having contraband on board, or for any other purpose which might make them liable to the belligerent right of search.

"II. That the *Peterhoff* was a neutral vessel consigned to a neutral port, there to enter into and become a part of the general stock of merchandize, and that there was no ground for just suspicion that she was intended to penetrate the blockade, or that her cargo was destined for belligerent use.

"III. That the conduct of the captain and the alleged destruction of papers did not of themselves constitute grounds for capture or condemnation, and were satisfactorily explained.

"IV. That the articles pronounced contraband by the Supreme Court were really common and innocent articles of lawful commerce; and that, even if they were contraband, there was not the least proof that they were intended for an enemy's port or territory.

"V. That the capture being therefore unjustifiable, all the claimants were entitled to costs and damages.

"VI. That even if it were admitted that the decision of the Supreme Court was justified by the proofs and by the law applicable thereto, yet the owners of the vessel would be justly entitled to an award for the difference between the actual value of the vessel at the time of the capture and the sum paid by the United States on the appraisement of its own officer, and in the exercise of arbitrary power as to the amount to be paid.

"VII. That if it were admitted that the decision of the Supreme Court was justified by the proofs and by the law applicable thereto, the owners of the restored cargo had a right to complain that said decision was not carried into effect; that in plain violation of its provisions they were improperly and illegally compelled to pay a large sum of money as costs, expenses, and counsel fees, and that in any aspect of the case they were entitled to an award for the amount so paid out, with interest thereon from the date of payment.

"VIII. That as to the alleged failure of these owners to appeal from the decree of the district court illegally imposing said costs and expenses, they did not hear of said decree until the time within which an appeal could legally be taken had expired."

Position of the United States.

The case on the part of the United States, as summarized by its agent (Hale's Report, 136), was as follows:

"Pending the proceedings in the prize courts the vessel was taken by the authorities of the United States for the use of the Government, under the statute for that purpose. * * * The cargo was also sold by order of the district court, pending the proceedings. On the remanding of the cause to the district court, proofs were there taken as to the portions of the cargo condemned as contraband and its value, and as to other portions of the cargo and their value belonging to the owners of the contraband cargo, as to the costs of the captors chargeable against the vessel, and as to the claimant's costs chargeable against the ship, and the condemned and uncondemned cargo, and these costs were duly apportioned accordingly. The amount of the appraised value at which the ship had been taken, less the costs charged against her, was paid over to her owners. The proceeds of the uncondemned cargo were also paid over to their respective owners, less the proportion of claimant's costs against same, which costs were paid to the

proctors of the respective claimants to whom they were by the final decree allowed. No complaint appeared to have been made in the district court as to the allowance or apportionment of the costs and charges, or in respect of the appraised value at which the United States had taken the vessel; and no question in respect of either of these matters was taken to the Supreme Court on appeal. By stipulation of the counsel for the respective parties, all the papers relating to the appraisal and taking of the vessel by the United States were omitted from the apostles sent up to the Supreme Court on appeal. * * *

"The proofs showed that the *Peterhoff* sailed from London for the mouth of the Rio Grande in January 1863, the bills of lading of her cargo specifying the same as destined for Matamoras, and to be taken from alongside the ship at the mouth of the Rio Grande. Included in the cargo were some thirty-two cases of artillery harness, a large quantity of boots, described in the invoice as 'artillery boots,' 'men's army bluchers,' etc.; and eighty bales of blankets described in the invoice as 'government regulation gray blankets.' Besides these portions, which were held by the Supreme Court as belonging to the class of articles 'manufactured and primarily and ordinarily used for military purposes in time of war,' and so contraband when destined to the use of a belligerent, the cargo included large quantities of iron, steel, nails, leather, and drugs, including 1,000 pounds of calomel, large amounts of morphine, 265 pounds of chloroform, and 2,640 ounces of quinine, all goods in special demand for the use of the Confederacy. Much of the cargo was deliverable to order. A package deposited with the captain by Mohl, one of the Texan passengers, and which the captain testified he was told by Mohl contained 'white powder,' but which the mate testified appeared to be a package of 'dispatches,' was thrown overboard by order of the captain on the boarding of the vessel by the captors. Other papers were at the same time burned by the fireman by order of the captain. The firm of James I. Bennett & Wake, London, were the agents of the *Peterhoff*, and the cargo was mainly secured through them. A circular of this firm was proved, dated 24th November 1862, in which they notified their 'friends desirous of shipping to America' that they would dispatch a vessel to the Rio Grande about 1st December; that the services of Mr. Redgate, Lloyd's agent, an expert in cotton, who had been a resident nearly forty years in Texas and Mexico, had been secured, whose services would 'be of great value to shippers in respect to his local knowledge and influence, as also as regards agency of the inland transit and landing and shipping of goods and cotton.' And further, that 'a Mr. Besbie, of the Confederate States of America, holds a contract with that government, whereby he is to receive 100 per cent on invoice cost, payable in cotton * * * for any goods he may deliver into the Confederate States,' the benefits of which contract he would share to the extent of 50 per cent with any houses that might feel

inclined to ship. The Mr. Redgate named in this circular was a passenger on the *Peterhoff* at the time of her capture, and was a claimant for part of the cargo and for damages by occasion of his capture and detention before the commission. The Mr. Besbie, or Begbie, also named in the circular, joined the ship at Plymouth, but suddenly left it at Falmouth. His name was not mentioned by the master in his deposition *in preparatorio*, who alluded to him merely as 'another passenger' who 'left at Falmouth.' Neither of the firm of Bennett & Wake was examined as a witness by the claimants before the commission, though notice was given of the examination of Bennett, and proof was made that he was within reach in London at the time of the taking of the testimony for the claimants there, and the counsel appearing for the United States on the examination demanded his production as a witness for the claimants pursuant to the notice. Bennett & Wake had contracted on the 27th October 1862, with Pile, Spence & Co., the owners of the *Peterhoff*, for the laying on of a first-class screw steamer to proceed to the Rio Grande on freight; under which contract the *Peterhoff* was dispatched, as named in the circular of Bennett & Wake of 24th November 1862, above referred to.

"The counsel for the United States referred to and adopted the opinion of the Supreme Court (5 Wall. 28) as part of his argument. He maintained that the proofs before the prize court, especially strengthened as they were by the proofs taken before the commission, fully sustained the condemnation of the portion of the cargo condemned by the Supreme Court as contraband, and in fact sufficiently showed the pretended destination of the vessel and cargo to Matamoras to be colorable. That if all the proofs now appearing before the commission had been before the prize court they would have fully justified the condemnation of the vessel and the entire cargo. That in any event the capture of the vessel and taking her into port was justified by the presence of the contraband on board, which was in fact liable to condemnation as well as by the circumstances of the case, fully establishing probable cause. That the evasions and falsehood of the master, Jarmin, on his examination *in preparatorio* and the spoliation of papers shown of themselves debarred the claimants from any award for costs or damages. That as to the taking of the vessel by the United States at an appraisement below her alleged actual value, and as to the alleged errors of the district court in the apportionment of claimants' costs upon that part of the cargo not condemned in captor's costs, those were matters as to which no question was raised in the prize courts, and for which those courts afforded an ample remedy if any injustice was done in respect of them to the claimants, or any of them, and that the claimants could not be heard here for the first time to question the legality of the proceedings in those respects. That as to the

apportionment of the claimants' costs, this appeared to have been done not only without objection of the claimants in the prize court, but on the application of their own proctors and counsel. And as to the appraisement and taking by the United States, everything in relation to these matters had been by stipulation withdrawn from the consideration of the Supreme Court, thus clearly implying the consent of the owners to the taking at the valuation named."

The commission unanimously disallowed all the claims having their origin in the capture of the *Peterhoff*.

2. CONTRABAND.

Orders in Council of April, 1795.

Certain vessels were seized under an order in council issued by the British Government in April 1795. The order was not published, but, from the evidence in certain cases, it appeared to be substantially the same, with perhaps some extension of the list of articles subject to seizure, as the additional instructions of June 8, 1793, by which the commanders of His Majesty's ships of war and privateers were directed "to stop and detain all vessels loaded wholly or in part with corn, flour, or meal, bound to any port in France, or any port occupied by the armies of France, and to send them to such ports as shall be most convenient, in order that such corn, meal, or flour may be purchased on behalf of His Majesty's government, and the ships be released after such purchase, and after a due allowance for freight, or that the masters of such ships, on giving due security, to be approved by the court of admiralty, be permitted to proceed to dispose of their cargoes of corn, meal, or flour in the ports of any country in amity with His Majesty."

Case of the "Neptune."

Among the vessels captured under the order of April 1795 was the *Neptune*, which was seized on a voyage from Charleston to Bordeaux, whither she was bound partly laden with rice. The vessel was brought by the captor to London, where proceedings were begun against her in the high court of admiralty. By this tribunal the cargo was ordered to be sold to the British Government and the proceeds paid into court; and, on a claim duly preferred, restitution was decreed of the cargo or its value, and of the ship, with freight, demurrage, and expenses. The question of the value of the cargo was then duly referred to the registrar and merchants, before whom

the claimant demanded what the cargo would have brought at Bordeaux at the time it probably would have arrived there if it had not been seized. The registrar and merchants, however, acting on the rule prescribed to them by the British Government, allowed only the invoice price, together with a mercantile profit of 10 per cent. For compensation for the loss occasioned by this allowance the claimant applied to the board of commissioners under Article VII. of the Jay Treaty, estimating his loss as the difference between what he was allowed and what would have been the net value of the cargo at Bordeaux. This claim was resisted on the part of the British Government on the ground that the capture was lawful, provisions being, under the circumstances of the case, liable to be treated as contraband of war, at least to the extent to which they were so treated in the order under which the seizure was made; and that the British Government at any rate had the right to seize provisions and pre empt them under the circumstances of the case. The board, by a majority vote, held otherwise, and allowed the compensation demanded. The opinions of the majority of the commissioners are given below. Formal opinions by the minority were not filed. The opinions discuss both questions, viz, (1) Under what circumstances provisions may be treated as contraband; (2) Under what circumstances may a nation claim a right of preemption in respect of provisions.

Opinion of Mr. Gore.

"Mr. Gostling says provisions are not generally contraband, but under possible circumstances they may become so. Both these positions are undoubtedly true. What these circumstances are which render provisions contraband deserve inquiry.

"A neutral has an unquestionable right to carry on commerce with either of the parties at war, except in those things which are contraband.

"'Jure Gentium licere unicuique merces portare ac vendere ad quos voluerit.' (Grotius de I. B. & P. 3 L. 16. 5n.)

"Whoever will derive to himself advantage by the exception to a general rule, or by an interference with the generally acknowledged rights of another, is bound to prove that his case is completely within the exception.

"Certain articles particularly necessary to war, and bound to any port of the enemy's territory after the war is known to exist, are contraband. All articles become so when bound to a place besieged or blockaded, if the importation is attempted

after it is known that the same is in a state of siege. He then who claims goods as contraband in their own nature, or from the peculiar situation of the place to which they are bound, ought to show them to be of the quality or the place of their destination to be in such a state as by the law of nations entitled him to seize and appropriate them to his own use.

"If cases exist other than these, and which, being within the reason of the law, are also within its penalty, it is the duty of those who found a right on a parity of reason to describe the circumstances in which they are similar, and whereby the reason applies equally to such as to those in a state of siege or blockade.

"In the present case it is said that such circumstances of distress did exist in France as rendered provisions, bound to any port of that extensive country, contraband of war.

"The circumstances, then, ought at least to have been stated, that those whose duty it is might examine and decide whether there be any rule of the law of nations to justify the assertion.

"No circumstances or facts are mentioned on which we can judge; and it is not on the vague assertions of either party that any court can be expected to found its decisions.

"It is not pretended that all the coast of France was blockaded, and there is strong evidence that no distress was experienced in that country very superior to what was felt in Great Britain, inasmuch as the agent for the claimant offered security that he would sell the property in England and indemnify the government against them, provided he might be permitted to dispose of the cargo himself. The price, therefore, can not be supposed to have been very different, and it is this which distinctly marks the degree of want and distress in both countries. It is also in evidence that the great, if not sole, reason of the government in issuing the orders which authorized this capture was to provide against an expected scarcity in England. This is confirmed by many public documents, and also by captures under the orders, extending to vessels bound to ports in alliance with His Majesty.

"The acknowledged right in a neutral generally to carry provisions to the country of an enemy; the not proving, or even stating, any peculiar circumstances which rendered this case an exception to that right; the judgment of the admiralty court, with the consent of His Majesty's officers, that the vessel and cargo did belong as claimed and should be restored,

with costs and damages, etc., the deposition of Mr. Mullet, containing the information he received from the various officers of the crown, incontestably conclude in favor of the assertion of the memorialist 'that the stoppage of this cargo was an infringement of the rights of a neutral state,' and against that of the agents of the British crown, 'that this capture was made under such circumstances of distress as rendered the act lawful against the neutral.'

"In those books on the law of nations, which I have had an opportunity of examining I find no cases mentioned wherein provisions are contraband unless bound to a place besieged or blockaded. If there are others, they must be such as where, under similar circumstances, like relief is attempted to be afforded to one party and equal injury to the other.

"In the present war a right has been assumed, as in the case before the board, to stop provisions under circumstances where no siege or blockade exists.

"The only authority that I have seen quoted in support of such right is in 2d Vattel, sec. 112, viz: 'Commodities particularly used in war, and the importation of which to an enemy is prohibited, are called contraband goods—such are arms, military and naval stores, timber, and even provisions in certain junctures, where there are hopes of reducing the enemy by famine.'

"What these certain junctures are the writer does not say, but characterizes them by this description, 'where there are hopes of reducing the enemy by famine.' What is the natural import of these words? What are those junctures wherein hopes may be justly entertained of reducing an enemy by famine?

"The hope of reducing an enemy by famine can not exist without supposing the immediate operation of a force capable of attaining that end and of preventing relief.

"The reducing an enemy by famine is placing him in such a state that he must either submit to the terms proposed or die of hunger.

"These hopes may be entertained in certain cases where you can besiege or blockade a place. To constitute a siege or blockade the place must be surrounded. It must also be incapable of providing within itself the means of subsistence to support the hopes of reducing it by famine. When, therefore, we reflect on the force necessary to form a perfect siege or

blockade, and that there must also exist a disparity between its capacity to produce subsistence and the numbers to be supported to justify such hopes, it is evident that these can be entertained only in respect to some small tract of territory or island.

"There can hardly be imagined such a juncture, in the affairs of a great nation consisting of more than twenty millions of people, and extended over a large tract of territory, that would raise hopes of reducing it to such an unconditional surrender as is supposed in the case of famine, viz, a reduction to such terms as the conqueror may choose to impose.

"The supplies of provisions, furnished to such a nation from foreign countries, must, in the nature of things, be so trifling, compared to their actual consumption, as to be of no important consequence to the nation who receives or to that which intercepts them.

"It is hardly within possibility that the admission or prevention of all provisions from other countries could of itself prevent or effect a famine.

"If the idea could ever be seriously entertained of surrounding such a country as France, and the inhabitants be supposed in such a state as in absolute danger of perishing by famine, is it not infinitely more probable that, impelled by hunger, such a body of people would break through all the feeble restraints that could be imposed upon them and find their way into a country of plenty, rather than submit unconditionally to the terms of the besiegers?

"To avoid perishing by famine, an enemy surrenders, and is relieved from that evil.

"If a nation, populous as the one mentioned, be in such a state, it may well be doubted if any effectual relief could be obtained by a surrender, for a little reflection on the immense quantity of food necessary for the support of so many people will convince any man that it could not be easily spared from the rest of the world, or, if it could, that there would be no means of transporting it to them in season to prevent their destruction.

"If all supplies could be prevented from without to such an extended country, fertile in its soil and varied in its climate, and capable in ordinary times of raising a sufficiency of provisions for the support of all its inhabitants and a surplus for exportation, hopes could not be derived from thence of reducing that nation by famine. There may be a scarcity of certain

articles of provisions in such a country that may be inconvenient, but it is hardly possible there should be a famine in the common acceptance of the term—that is, such a scarcity of all food as to produce death generally among the people.

"Such a nation has within itself all the means of subsistence. Suppose that by misfortune or neglect to cultivate the land not more than three-quarters of their usual quantity of provisions is obtained. An economy in the expenditure of this quantity will suffice for the support of life without hazard of starving. Yet no one will believe that it is possible for any part of the world to supply this deficiency.

"When, therefore, we consider the impracticability of guarding and surrounding a territory extensive like that of France, so as to prevent the importation of provisions; that the quantity of foreign supply can in no case be material to prevent famine; that such a nation does not depend on others for sustenance, but has within itself all the means of subsistence, and can supply any deficiency in their ordinary quantity of food, by economy in their expenditure, more effectually than from any foreign aid, we may safely conclude that the junctures, in which hopes are entertained of reducing an enemy by famine, can not be predicated of such a nation, and that therefore the seizure of provisions, bound generally to their ports, not in a state of siege or blockade, can not be justified on the before-cited passage of Vattel.

"This appears to me the natural construction of the words of this author, taken distinctly and by themselves. By referring to other parts of his treatise, and to other eminent writers on the law of nations, this interpretation will be confirmed, and it will be evident that provisions are not contraband, except in case of being bound to a place besieged or blockaded.

"Vattel, in the one hundred and seventeenth section, speaks of the punishment that King Demetrius inflicted upon the master and pilot of a vessel carrying provisions to Athens when he had almost reduced that city by famine. Athens was at that time closely besieged.

"This case then marks the juncture when provisions become contraband, and defines those grounds of hope of reducing the enemy by famine, the existence of which is necessary to justify their seizure. As this author mentions no other case where the hopes of reduction by famine render provisions contraband, we must construe this indefinite declaration by the example which he afterwards gives, and especially when he makes use

of nearly the same expressions in both sections to describe that situation of an enemy which renders it just to prohibit the importation of provisions.

"Zouch quotes the instance of Demetrius to support a doctrine expressed in terms of like extent with those of Vattel:

"'Huc spectat quod Demetrius cum Atticam teneret exercitu, Athenis famem facturus gubernatorem cum nave frumentum inferre parantem cepit; et Carthaginienses Romanos qui hostibus commeatum attulerunt, ceperunt eosdem vero repetentibus reddiderunt. Distinguendum censet Grotius de rebus quae deferuntur quarum aliae in bello multum usum habent, ut quae voluptati inserviunt, quod genus querelam non habet; alia in bello tantum usum habent, ut arma quae qui hostibus subministrant in hostium partibus habentur; alia sunt quae in bello vel extra bellum usum habent, ut pecunia, commeatus, naves, quas etiam, si earum subvectio deditionem, quae expectatur impedire poterit intercipere licebit.' (De Judicio inter Gentes, Pars. 2, sect. 8.)

"By all rules of sound construction it is prohibited to extend a principle beyond what the circumstances of the case from which it is deduced will fairly warrant. It will be seen also hereafter that Grotius, whose language he adopts, instead of extending the case wherein provisions are contraband beyond those of siege and blockade limits them within a narrower compass.

"Bynkershoek makes use of expressions of greater latitude in treating generally on this subject, viz: 'Excepta sape et cibaria, quando ab amicis nostris obsidione premuntur hostes, aut *alias fame laborant.* Optimo Jure interdictum est, ne quid eorum hostibus subministremus, quia his rebus nos ipsi quodammodo videremur amicis nostris bellum facere.' (Quest. I. P. 1 B. page 70.)

"Yet in the eleventh chapter he gives his opinion in the most explicit manner that provisions may be carried to all places, even to camps, if not besieged.

"In this last cited chapter he adduces many arguments to prove that camps as well as cities may be surrounded and besieged and ports blockaded by fleets, from whence he concludes that provisions bound to ports and armies thus situated become contraband. The words, then, *alias fame laborant*, which are more latitudinary than those of Vattel, can be construed to extend only to cases where provisions are bound to places blockaded by fleets and to camps besieged.

"A construction that should embrace cases other than these would be totally irreconcilable with what the author afterwards declares in the most positive language, for, on much consideration of the subject, and of several ordinances of Spain and Holland, prohibiting the importation of provisions into each other's territory, he proves them to have been unjustly made in the heat of war, or in retaliation for such as were so made, and that the ordinances, so far as they prohibit provisions, can only be considered just when the place to which they are bound is besieged, for on that state alone, says he, does their justice depend. (1 Lib. 11 chap. p. 87.)

"This intelligent writer examines very particularly the doctrine that attempts to include among contraband of war provisions and other things which are of use both in peace and war, under circumstances other than those of siege or blockade, and, after considering the arguments in favor of it, explodes the principle as dangerous and unjust, and contrary to the law and custom of nations. His concluding remarks are in the following words, viz: 'In tertio genere distinguit Grotius, et permittit res promiscui usus intercipere sed in casu necessitatis, si aliter me, meaque tueri non possim, et quidem sub onere restitutionis, verum ut alia praeteream, quis arbiter erit ejus necessitatis, nam facilimum est eam praetexere. An ipse ego qui intercipi? Sic puto, ei sedet, sed in causa mea me sedere judicem omnes leges, omniaque Jura prohibent, nisi quod usus tyrannorum omnium princeps admittat, ubi foedera inter principes explicanda sunt. Nec etiam potui animadvertere mores Gentium hanc Grotii distinctionem probasse, magis probarunt, quod deinde ait, neque obsessis licere res promiscui usus advertere, sic enim alteri prodessim in necem alterius.' (Q. I. P. 10 chap., page 76.)

"He afterwards, in chap. 11, says: 'Ex ratione communi, et Gentium usu Urbibus obsessis nihil quicquam licet advertere ut alia occasione supra dicebam, id ipsum quoque dixit Grotius de Jure B. et P. improbat enim subvertionem, si Juris mei exsecutionem rerum subvertio impedierit, idque scire potueret qui advexit, ut si oppidum obsessum tenebam si portos clausos, et jam deditio, aut Pax exspectabatur: Sola obsidio in causa est cui nihil obsessis subvertere liceat, sive contrabandum sit sive non sit nam obsessi non tantum vi coguntur ad deditionem, sed et fame, et alia aliarum rerum penuria.'

"We see here, according to Grotius, provisions were not contraband going to a place besieged, unless peace or a surrender was expected from the siege, and that quickly; and his commentator, Barbeyrac, agrees with Coccejus in opinion, that a neuter may carry provisions to one of two enemies who is besieged and pressed by the other, provided he does not do it with a design to deliver him from this grievous extremity, and that he is also ready to sell the same provisions to the other enemy; the state of neutrality and the freedom of commerce, he remarks, take from the besieging all cause of complaint. Although this opinion of Grotius is very justly combatted by Bynkershoek as inconsistent with the law of nations, yet it serves to show that, in the judgment of the writer himself, the terms made use of, in giving a general description of the cases in which provisions may be seized, instead of being extended beyond the case of siege or blockade, are confined within narrower limits than even those of mere siege or blockade—for he requires not only that the place should be besieged, but that, in addition thereto, peace or surrender be soon expected to take place.

"And although the opinions of Barbeyrac and Coccejus are not allowed to be conformable to the law and usage of nations, yet they are of importance to show that the general and indefinite expressions of Grotius on this subject can not be construed to embrace cases other than those of siege or blockade.

"The description of cases by Vattel, wherein provisions belonging to a neuter may be seized, is 'in certain junctures, where there are hopes of reducing the enemy by famine.'

"That by Grotius (leaving out the terms that relate to siege, and thus render it definite), where peace or surrender is soon expected.

"It is therefore highly probable that the words of the former are adapted from the latter in his general description, and if so they are selected for the purpose of confining the right of the belligerent within a narrow circle rather than extending it beyond the cases of siege or blockade. They are, however, certainly of no greater latitude than those of Grotius, and by no means so indefinite as those of Bynkershoek, viz: 'Quando ab amicis nobis obsidione premuntur hostes, *aut alias fame laborant.*' Yet, as we have the construction of these celebrated men of their own language, wherein they expressly confine

their meaning to cases of siege or blockade, and as Vattel does not suggest any alteration in the law of nations on this subject and quotes no other case than that of a close and perfect siege to show what is the usage of nations as to the seizure of neutral property, it follows conclusively that the construction I have given of this passage is confirmed by himself as well as by those other eminent writers on public law.

"Valin in his Commentaries on the Ordinances of Louis XIV. examines in what cases provisions are contraband. The following quotation will show his opinion on this subject. Speaking of the prohibition to carry articles contraband of war to the country of an enemy, he says: 'Et tel a été de tout temps les droit des gens relatif à la guerre. Loccenius *de jure maritimo*, étend même la prohibition aux vivres et munitions de bouche, de même que l'article 5 du réglement du Roi de Dannemark, en date du 5 avril 1710: mais par nos loix et le droit commun, elle n'a lieu en cette partie que par rapport aux places assiégées ou bloquées;' and afterwards he says: 'Ces objets exceptés' (referring to contrabands in their own nature) 'les sujets des puissances amies ou neutres peuvent donc commercer librement avec nos ennemis, leur porter leurs denrées et marchandises, et prendre en échange ou paiement des effets du pays ennemi.' (3 L. 9 tit. 11 art. p. 264, 5.)

"Mr. Gostling says the law of nations warrants the seizure of goods as contraband in certain cases, for the purpose of compulsory preemption.

"Goods are contraband from some fault in the person sending them; a knowledge of war, in the case of articles necessary to war, or of the siege or blockade, in that of other articles, is requisite to render them liable to capture.

"It is, however, probable that he grounds himself on the words of Grotius before quoted, in the distinction which he makes of the different sorts of goods, and the rights which he attributes to a belligerent from his own necessities. In my opinion the answer given to this by Bynkershoek is conclusive against such doctrine; although, if Grotius himself is examined as to the necessity which should exist to support a right of seizure, it will be very clear that this case is not within the necessity there prescribed:

"'Nam si tueri me non possum nisi quae mittuntur intercipiam, necessitas, ut alibi exposuimus, jus dabit, sed sub onere restitutionis, nisi causa alia accedat.' (3 L. 1 C. 5 S.)

"The necessity here spoken of is a necessity on the part of the captor. Articles can never be deemed contraband merely because the belligerent who seizes is in want of them.

"This comes not within any description of contraband that I have ever seen. Grotius explains himself as to the necessity here intended by referring to the 6th sec. of the 2d chap. 2d book. It is a necessity which may take place in peace as well as war. It must be, says he, a necessity so absolute as to absolve a man from all human laws that regard the rights of property, as in case of one man at sea having reserved in store a quantity of provisions when there was great scarcity; here necessity admits of a distribution in common among the rest; or, in case of fire, to pull down my neighbour's house, if I have no other means of preserving mine. In the 7th sec. he says precautions are to be used lest this liberty derived from necessity should go too far; 'first, that all possible means should be used by which such a necessity may be avoided, by entreating the owner to supply us with what we stand in need of,' &c.

"In case of war necessity may justify a belligerent, as he states in the tenth section of the same chapter, in possessing himself of any fort in a neutral country, provided there be not an imaginary but a certain danger of the enemy getting it into his hands, and of his being thereby *capable of doing irreparable injuries*. The necessity must be absolute, continues he, because whatever does but deviate the least from necessity is injustice.

"There is no pretense that there existed any such state of things in Great Britain at the time of this capture, or of issuing the orders which authorized it, as would justify the seizure of provisions belonging to neutrals on the ground of a necessity thus defined by Grotius.

"By the authorities which I have quoted, and these are confirmed by Rutherforth and Lee, it is manifest that provisions are not contraband, except in cases where they are bound to places besieged or blockaded; and that the seizure of them is not justifiable by the law or usage of nations in any other cases. I have seen no writers on public law that give the least color to the opposite doctrine except Heineccius, on the Law of Nature and Nations, by Turnbull (2 book, 9 chap. 201 sec.), who cites Grotius, L. 3 C. 17, sec. 3, and Bynkershoek, Quaest. Jur. P. cap. 9, and sec. 9, in support of his assertions; and whoever

will take the trouble to turn to the passages quoted will find that they have not the smallest relation to the subject, or are directly repugnant to the purpose for which they are adduced.

"The limitation of Grotius, in rendering it necessary to the seizure of provisions, in case of siege or blockade, that peace or surrender should be speedily expected, has been very justly exploded, not so much on account of its unreasonableness, as on account of its uncertainty, and the endless disputes which placing a right on such vague grounds would certainly engender between the nations at war and those at peace. The extending a right to seize the property of neutrals in cases other than those of siege or blockade is liable to the same objections in much greater degree.

"In one case there is a public and obvious fact, by which the neutral and belligerent may know and determine their respective rights. In the other there is nothing to which the neutral can refer to ascertain whether the trade is lawful or otherwise, or, in case of dispute, to which both parties can appeal for settling the question. Happily for mankind, in this eventful age, in which surely there is no reason for multiplying the occasions of dispute and the pretenses or causes of war, this point does not remain unsettled. If it did, the foregoing reflection would be sufficient to refute a doctrine which would provide the certain means of extending the war of two peoples to all the mercantile nations on earth.

"Mr. Gostling has chosen to remark that the eighteenth article of the subsisting treaty expressly recognizes a right in the belligerent to stop provisions under the circumstances of the present case.

"It is hardly possible to believe that this article of the treaty has ever been read by those who adduce it in support of such a doctrine. The words are:

"'Whenever any such articles (referring to provisions and other articles not generally contraband), so becoming contraband *according to the existing law of nations*, shall for *that reason* be seized, the same shall not be confiscated, but the owners thereof shall be speedily and completely indemnified.'

"The article grants to the belligerent no new rights. It does not extend the list of contraband in the smallest degree, nor does it make any new cases wherein articles not generally contraband shall become so. By the just and unavoidable construction of these words it impairs the rights of the belligerents

and grants to the neutral a benefit not before enjoyed. It restrains the former from confiscating articles in certain cases where by law they are contraband, and assures to the latter complete indemnification for their seizure in cases where by law a forfeiture is incurred.

"If goods are contraband by the existing law of nations the belligerent has a right to seize them, but no right derives from the treaty. If they are not so contraband, there exists no right to seize them. It appears incontestably that under the circumstances of this case the cargo was not contraband according to the existing law of nations. It follows, then, conclusively that the belligerent had no right to make this seizure by virtue of any doctrine recognized in this treaty. Whence a different conclusion could have been drawn it is not possible for me to conceive.

"The United States have constantly resisted, by all the means in their power, a doctrine that attempted to embrace within the list of contraband provisions in cases other than those of siege or blockade. And in my judgment this clause was introduced in the article merely to avoid disputes which often arise as to the fact of blockade—that is, whether or not the place was so invested as in construction of law amounts to a blockade.

"And although Great Britain has issued orders at different periods during the war to seize provisions belonging to neutrals if bound to ports of France, though not in a state of blockade, yet she has always engaged to pay for the same. If the circumstances under which they were seized rendered them contraband, she was under no obligation to make any compensation for the seizure.

"If by the law of nations they were justly seizable as contraband, the condemnation of them would have been equally just and would have followed of course. Her engaging then to make payment affords strong proof that the right was not perfectly clear even to those who adopted the practice.

"On the supposition that a necessity existed on the part of Great Britain which justified the capture and detention of this cargo, a question arises 'What obligations the laws of justice and of nations imposed on the belligerent?' The answer will be found in the same author who speaks of the necessity, and is in the following words, viz: 'It may seem needless for us to treat of those that are not engaged in the war, when it is

manifest the right of war can not affect them; but because, upon occasion of war, many things are put upon them on pretense, it may be proper here, first, briefly to repeat, what we have mentioned before, that the necessity must be really extreme to give any right to another's goods; second, that it should be requisite that there should not be the like necessity in the owner; third, when absolute necessity urges us to take, we should then take no more than it requires. That is, if the bare securing of it be enough, we ought not to make use of it, and, if we can not help abusing it, we ought to return the full value of it.'" (3 Grotius, 17 chap. 1 sec.)

Gore, commissioner, June 30, 1797, case of the *Neptune;* Article VII., treaty between the United States and Great Britain of November 19, 1794.

Opinion of Mr. Pinkney.

"The majority of the board were for applying the rule adopted in the case of the *Betsey*, Furlong, i. e., 'the net value of the cargo at its port of destination at such time as the vessel would probably have arrived there.'

"One of the British commissioners objected to the application of that rule, not only upon the general grounds mentioned in his written opinion in the case of the *Betsey*, Furlong, which I have elsewhere fully considered, but upon grounds peculiar to cases arising under the provision order of 1795.

"The objections peculiar to this class of cases were chiefly founded upon the following positions:

"1st. That the order of council was made when there was a prospect of reducing or bringing the enemy to terms by famine, and that in such a state of things provisions bound to the ports of the enemy became so far *contraband* as to justify Great Britain in seizing them upon the terms of paying therefor the invoice price *with a reasonable mercantile profit thereon*, together with the freight, demurrage, etc.

"2d. That the order of council was justified by *necessity*, the British nation being at that time threatened with a scarcity of those articles directed to be seized.

"The first of these positions has been rested, not only upon the general laws of nations, but upon the eighteenth article of the treaty between Great Britain and America.

"The evidence of this supposed law of nations is principally the following loose passage of Vattel: 'Commodities particularly used in war, and the importation of which to an enemy is prohibited, and called contraband goods. Such are military

and naval stores, timber, horses, and even *provisions in certain junctures when there are hopes of reducing the enemy by famine.*' (Vattel, B. 3, ch. 7, sec^{n}. 112.)

"It might be sufficient to say, in answer to this authority, that it is at best equivocal and indefinite, as it does not designate what the junctures are in which it shall be allowable to hold 'that there are hopes of reducing the enemy by famine;' that it is entirely consistent with it to affirm that these hopes must be built upon an obvious and palpable chance of effecting the enemy's reduction by this obnoxious mode of warfare, and that no such chance is by the law of nations admitted to exist except in certain defined cases, such as the actual siege, blockade, or investiture of particular places. This answer, satisfactory enough in itself, would be rendered still more so by comparing what is contained in the foregoing quotations with the more precise opinions of other respectable writers on the law of nations, by which we might be enabled to discover that which Vattel does not in this quotation profess to explain—the combination of circumstances to which his principle is applicable or intended by him to be applied.

"But there is no necessity for relying wholly on this answer, since Vattel will himself furnish us with a pretty accurate commentary on the vague text he has given us.

"The only instance put by this writer which comes within the range of his general principle is that which he, as well as Grotius, has taken from Plutarch. Demetrius (as Grotius expresses it) held Attica by the sword. He had taken the adjoining towns of Eleusine and Rhamnus, *designing a famine in Athens*, and had almost accomplished his design, when a vessel loaded with provisions attempted to relieve the city. Vattel speaks of this as a case in which the provisions were *contraband* (sec. 117); and although he does not make use of this example for the declared purpose of rendering more specific the passage above cited, yet as he mentions none other to which it can relate, it is strong evidence to show that he did not mean to carry the doctrine of special contraband further than the example will warrant.

"It is also to be observed that in section 113 he states expressly that all contraband goods (including, of course, those becoming so by reason of the junctures of which he has been speaking at the end of section 112) are to be confiscated. But nobody pretends, and it would be monstrous to pretend, that

Great Britain could rightfully have confiscated the cargoes taken under the order of 1795. And yet if the seizures made under the virtue of that order fell within Vattel's opinion, the confiscation of the cargoes seized would have been justifiable according to the same opinion.

"It has long been settled that all contraband goods are subject to forfeiture by the law of nations, whether they are so in their own nature or become so by existing circumstances; and even in early times, when this rule was not so well established, we find that those nations which sought an exemption from forfeiture never claimed it upon grounds peculiar to any description of contraband, but upon general reasons embracing all cases of contraband whatsoever.

"As it is admitted, then, not only by the order itself but by the agent of the crown and every member of this board, that the cargoes in question were not subject to forfeiture as contraband, it is manifest that the juncture which gave birth to that order is admitted not to have been such a one as Vattel had in view, or, in other words, that the cargoes did not become contraband at all, within the true meaning of his principle or within any principle known to the general law of nations.

"In confirmation of the above observations upon Vattel, it may not be unimportant to add that Zouch,[1] who speaks upon this subject almost in the very words used by Vattel in the foregoing quotations, illustrates and fixes the extent of his general doctrine by the case of the investment of Athens by Demetrius.

"I have understood it to be supposed that Grotius also countenances the position I am now arguing against.

"He divides goods into three classes, the first of which he declares to be plainly contraband, the second plainly not so, and as to the third he says, 'In tertio illo genere usus ancipitis, distinguendus erit belli status. Nam *si tueri me non possum nisi quae mittuntur intercipiam, necessitas, ut alibi exposiumus, jus dabit*, sed sub onere restitutionis, nisi causa alia accedat.' (Lib. 3, ch. 1, sec. 5, etc.) This 'causa alia' is afterward explained by 'ut si oppidum obsessum tenebam, si portus clausos, et jam deditio aut pax expectabatur.'

[1] "Bynkershoek, too, who lays down his general principle even in larger terms than Vattel, evidently confines its application to cases of siege and blockade."

"This opinion of Grotius as to the third class of goods does not appear to me to proceed at all upon the notion of contraband, but simply upon that of a pure necessity on the part of the capturing belligerent. He does not consider the right of seizure *as a means of effecting the reduction of the enemy*, but *as the indispensable means of our defense.*

"He does not authorize the seizure upon any supposed illegal conduct in the neutral in attempting to carry articles of the third class to the ports of the enemy or upon any supposed character of contraband attached to those articles. He authorizes it upon the footing of that sort of absolute necessity on the part of the belligerent making the seizure which by the law of nature suspends in his favor sub modo the rights of others. This necessity he explains at large in lib. 2, ch. 2, sec. 6, etc. And in the above-recited passage he refers expressly to that explanation.

"Lib. 2, ch. 2, sec. 6. '1. Videamus porro, ecquod jus communiter hominibus competat in eas res, quae jam propriæ aliquorum factæ sunt: quod quæri mirum forte aliquis putet, cum proprietas videatur absorpsisse jus illud omne, quod ex rerum communi statu nascebatur. Sed non ita est. Spectandum enim est, quae mens eorum fuerit, qui primi dominia singularia introduxerunt: quæ credenda est talis fuisse, ut quam minimum ab æquitate naturali recesserit. Nam si scriptae etiam leges in eum censum trahendae sunt quatenus fieri potest, multo magis mores, qui scriptorum vinculis non tenentur.

"'2. Hinc primo sequitur, in gravissima necessitate reviviscere jus illud pristinum rebus utendi, tanquam si communes mansissent: quia in omnibus legibus humanis, ac proinde et in lege dominii, summa illa necessitas videtur excepta.

"'3. Hinc illud, ut in navigatione, si quando defecerint cibaria, quod quisque habet, in commune conferri debeat. Sic et defendendi mei causa vicini aedificium orto incendio dissipare possum: et funes aut retia discindere, in quae navis mea impulsa est, si aliter explicari nequit. Quæ omnia lege civili non introducta, sed exposita sunt.'

"In sections 7, 8, and 9 Grotius lays down the conditions annexed to the exercise of this right of necessity. As, first, it shall not be exercised until all other possible means have been used; second, nor if the right owner is under a like necessity; and thirdly, restitution shall be made as soon as practicable. (Vide also Lib. 3, ch. 17, sec. 1.)

"Grotius exemplifies what he has said in the foregoing passages thus: Sec. X. 'Hinc colligere est, quomodo ei, qui bellum pium gerit, liceat locum occupare, qui situs sit in solo pacato: nimirum si non imaginarium, sed certum sit periculum, ne hostis eum locum invadat, et inde irreparabilia damna det: deinde, si nihil sumatur, quod non ad cautionem sit necessarium, puta, nuda loci custodia, relicta domino vero jurisdictione et fructibus: postremo, si id fiat animo reddendæ custodiæ simulatque necessitas illa cessaverit. "Enna aut malo, aut necessario facinore retenta," ait Livius: *quia malum hic, quicquid vel minimum abit a necessitate, etc.*'

"From these quotations it must be evident that Grotius in the first-mentioned passage does not rely upon any principle similar to that which is attributed to Vattel; and that he does not hold the seizure of articles of the third class (among which provisions are included) *not bound to a port beseiged or blockaded* to be lawful, when made with the mere *view of annoying or reducing the enemy;* but solely when made with a view *to our own preservation or defense* under the pressure of that imperious and unequivocal necessity which breaks down the distinctions of property, and, upon certain conditions, revives the original right of using things as if they were in common.

"In book 3, ch. 17, sec. 1 (of neuters in war), this author, recapitulating what he had said before on this subject, further explains this doctrine of necessity, and most explicitly confirms the construction I have placed upon ch. 1, sec. 5.

"Rutherforth, in commenting on lib. 2, ch. 1, sec. 5, also explains what Grotius there says of the right of seizing provisions upon the footing of necessity, and supposes his meaning to be that the seizure will not be justifiable in that view, 'unless the exigency of affairs is such *that we can not possibly do without them.*' (2 Ruth. p. 585.) And in commenting on lib. 3, ch. 17, sec. 1, he says the necessity must be *absolute and unavoidable.* (Vid. 2 Ruth. p. 586.)

"So far as Grotius considers the capture of articles of the third class as a means *of reducing the enemy*, he confines the right within very narrow limits; for he supposes the trade of neutrals in these articles to be lawful even to a beseiged or blockaded port, 'unless a surrender or a peace is quickly expected.'

"Instead of stating provisions to be contraband in any case other than those of siege or blockade, he declares it to be the

duty of neutrals to supply both parties to the war with provisions (lib. 3, ch. 17, sec. 3), and places no other restriction upon this duty than that they are not to relieve the besieged.

"I think that it may be confidently concluded that this writer, in place of countenancing the Orders of 1795 upon any idea of contraband, may be relied upon in that view as a strong authority against them.[1]

"Every other writer on the law of nations, so far as has come within my observation, in treating upon the subject of contraband limits the right of seizing goods not generally contraband of war (and provisions among the rest) to such cases as I have stated above.

"Rutherforth, in a work of great merit, speaking particularly of the article of provisions, so confines this right. (2 vol. Inst. Nat. Law, p. 583.)

"Bynkershoek (whom I forbear to quote at large, since Mr. Gore has already done so) also so confines it.

"Lee on Captures, Ch. XI. and XII., following Bynkershoek, upon a full consideration of the practice of nations, also so confines it, and he concludes his XII. chapter in these words: 'From what has been said, it appears that the whole matter *turns upon the place being besieged or not*, as the goods which are not contraband (among which he reckons provisions) or prohibited by treaty, those which are so being at all times during the war lawful prize, etc.' Postell, specim. Jur. Marit. sec. 11 has the same limitation.

[1] "Even if it were proved that the opinion of Grotius, lib. 3, ch. 1, sec. 5, applied to the Orders of 1795, the rule of compensation established by the majority of the board would still be proper. For this writer tells us, in the sections before quoted, as well as in the section which contains the opinion relied upon, in favor of these orders, that when under the pressure and plea of necessity we appropriate that which belongs to others, we must make restitution or compensation to the owner; and of course we come again to the question in the case of the *Betsey*, Furlong, 'Ought not the compensation to be equal to the damage sustained?' Vattel, speaking of this same right of necessity and putting the same case with Grotius, has this passage (Vattel, B. 3, ch. 7, sec. 112): 'Extreme necessity may even authorize the temporary seizure of a place and the putting a garrison therein for defending itself against the enemy or preventing him in his designs of seizing this place when the sovereign is not able to defend it. But when the danger is over, it must be immediately restored, paying all the charges, inconveniences, and damages caused by seizing the place.' (Burlamaqui, Principles of Nat. and Politic. Law, vol. —, p. —, 1 Ruth. p. 85, and Lee on Captures to the same effect; see also 2 Ruth. 587 and Grotius, lib. 3, ch. 17, sec. 1.)"

"See also Zouch, and Valin's commrs. on the ordonnances of Louis XIV., the same limitation.

"It appears, then, that so far as the authority of writers on the law of nations can influence this question, the Orders of 1795 can not be rested upon any just notion of *contraband*. Nor can they in that view be justified by the reasons of the thing or the approved usage of nations.[1]

"If the mere hope (however apparently well founded) of annoying or reducing an enemy by interrupting the commerce of neutrals in articles of provision (which are no more contraband in themselves than common merchandise) to ports not besieged or blockaded will authorize that interruption, I think it will follow that a belligerent may at any time prevent (without a siege or blockade) all trade whatsoever with its enemy, since there is at all times reason to believe that a nation having little or no shipping of its own may be so materially distressed, by preventing all other nations from trading with it, that such prevention may be a powerful instrument in bringing it to terms. The principle is so wide in its nature that it is, in this respect, incapable of any boundary. One may reason upon it to the total annihilation of neutral commerce, or rather it inevitably leads to that inadmissible result. There is no solid distinction in the view of this principle between provisions and a thousand other articles. Men must be clothed as well as fed, and even the privation of the conveniences of life is severely felt by those to whom habit has rendered them necessary. Besides a nation at war, in proportion as it can be debarred of its accustomed commercial intercourse with other states, must be enfeebled and impoverished. And if it is allowable to a belligerent to violate the freedom of neutral commerce in respect to any one article of trade notoriously not contraband *in se* upon the expectation or imagined practicability of annoying the enemy or bringing him to terms by a seizure of that article and preventing it from reaching his ports, why not upon the

[1] "Mr. Hammond's justification of the provision Orders of 1793 to the American Government seems to carry this principle to a still greater extent, for he says in his letter to Mr. Jefferson of the 12th September 1793 (covering a copy of those Orders), 'that by the law of nations, as laid down by the most modern writers, it is expressly stated that all provisions are to be considered as contraband, and as such liable to confiscation in the case where the depriving the enemy of those supplies is one of the means intended to be employed for reducing him to reasonable terms of peace.'"

same expectation of annoyance (equally rational, and indeed more so) cut off as far as possible by capture all communication with the enemy, and thus strike at once at his power and resources in a way which would not often fail of being effectual.

"We know that in the case of siege or blockade there is no distinction between provisions and other articles of merchandise. The besieger may stop all commodities bound to the place besieged. And if this barbarous mode of hostility is admitted to extend itself beyond its ancient limits, I know not where it is to find others which, while they leave provisions liable to seizure, shall exempt other commodities not contraband in themselves from a similar fate.

"The principle in question, into whatever form it may be moulded, will not allow of such a restriction. It stands simply upon the *possibility of injuring or bringing an enemy to terms* by intercepting provisions on their way to his ports, or, as we find it in a letter which I have just mentioned in a note, '*Upon the intention of employing the seizure of provisions on their way to the ports of an enemy as the means of reducing him to reasonable terms of peace.*' Surely if such a foundation be sufficient for this principle, it will always be lawful for a belligerent to do any act whatsoever or commit depredations upon any trade whatsoever, provided it shall appear to be possible by doing so to *annoy or bring the enemy to terms*—or provided he shall only *intend* by doing so *to reduce the enemy to reasonable terms of peace.*

"Hence this new rule of the law of nations would furnish a complete apology for the Dutch Placart of 1630, by which they prohibited all commerce with Flanders (doubtless with a prospect and certainly with an *intention* of *injuring and bringing the enemy to terms by enforcing* such a prohibition), and for the convention between England and Holland in the treaty of Whitehall, by which they agreed to prohibit all commerce with France (unquestionably with the same prospect and intention). Yet these attempts have been reprobated as lawless and oppressive by all the world, and in the last instance, upon a counter treaty being entered into between Sweden and Denmark in 1693, for maintaining their rights and procuring just satisfaction, the parties to the convention (says Vattel), perceiving that the complaints of the two crowns were well grounded, did them justice.

"It is true indeed that these attempts were not made with

any reference to the new-found principle, for it was not then supposed to exist.

"Those who struck so deeply at the commerce of Europe in 1630 and 1689 seemed to have believed that they could only lend a color to their enterprise by pretending that they *had* blockaded or *intended* to blockade the ports of their enemies. The pretense was manifestly frivolous, but it would appear to be at least as well founded as the vague allegation of a *hope or prospect or intention of reducing such a country as France by famine.*

"In a word, if a belligerent is empowered by the law of nations to seize the property of neutrals upon its own terms whensoever that belligerent shall believe or affect to believe that by such means its enemy may be annoyed or reduced, few nations would choose to remain neuter. A state of war would be infinitely preferable to such a state of neutrality. I say 'affect to believe,' because the principle now contended for is liable to be thus abused. Who is to be the judge when there exists a *prospect of reducing the enemy* by violating the acknowledged liberty of commerce? If the belligerent is not to be himself the judge, at least in the first instance, the principle is an idle one and means nothing; and if he is to be the judge, it follows that the principle is more than an idle one, and will be applied in practice upon false as well as mistaken grounds.

"What standard have neutral nations to refer to for the purpose of ascertaining the abuse of this limitless discretion? The standard of siege or blockaded is deserted, and what can we substitute in its place but speculative calculations upon probabilities which will be as various as the interests, the hopes, and the inclinations of those who make them, and never can present a certain result until after they have been acted upon? It is upon this ground, among others, that modern writers on the law of nations reject the idea of Grotius that all trade to places besieged or blockaded is lawful unless a surrender or a peace is quickly expected.

"Without professing to enter into much detail upon this occasion, the foregoing considerations appear to me to prove satisfactorily that the Orders of 1795 can not, in the light in which I am now considering them, be justified or excused.[1]

[1] "Even if the general position stated by Vattel be admitted in the utmost possible latitude, still it would not follow that provisions belonging to [redacted]trals and bound to France could rightfully be seized as the Orders of

"It is now to be seen whether the eighteenth article of the treaty gives any sanction to those orders.

"Upon this part of the case I shall content myself with transcribing the observations of a writer of the first eminence

1795 directed. Before articles not contraband *in se* can be seized, even when bound to a besieged or blockaded port, the person attempting to carry them must be apprised of such siege or blockade. And it is only upon his persisting in his efforts to supply the place after such knowledge that his cargo becomes liable to seizure. In what way a neutral is to be informed of the *hope* or *prospects* of one belligerent of reducing the other by famine or of its *intentions* of resorting to the stoppage and seizure of all provisions bound to the enemy as a means of reducing him to terms, I know not, unless it be from the declarations of that belligerent; but we may, I think, safely assume that it is indispensable that he should have this information before his cargo of provisions on its way to the ports of the enemy not besieged or blockaded can be taken upon any terms of contraband. In cases of seizure under the Orders of 1795 the American traders had no information of this sort. Great Britain had made no declaration amounting to a notice of its hopes, prospects, or intentions in this particular, and how otherwise a neutral could obtain a knowledge of them it is not easy to conjecture. The Orders themselves were not made public. They were mere *secret* instructions to commanders of armed vessels, and were not even sent to the court of admiralty, as is usual. Even now it is found to be impracticable to procure a copy of them, although of every other order issued during the war copies have been easily procured. The provision order of 1793 (which was made public) contained an alternative that the vessel stopped might, upon giving security, proceed upon her voyage to the ports of any country in amity with His Majesty. This, to be sure, was little more than a nominal alternative; but it does not appear that the Orders of 1795 contained any alternative at all. How can it be imagined that the absolute and unconditional seizure of those provision cargoes could be lawful upon the footing of contraband, when those who were conveying those cargoes to France had not and could not have the least information of the hopes, etc., of Great Britain of reducing that country by famine? They could not collect such hopes, etc., from any facts known to them, for in truth there was not any state of things to produce a rational prospect of that sort, and, indeed, it may well be doubted whether there can be such a state of things in a country like France. To starve a single town or fortress into terms is practicable, because it can not raise provisions to supply itself and because it may be sufficiently prevented from receiving supplies from without. But the fertile soil, the extensive territories, and seacoasts of France would seem to fix upon an attempt to treat it like a town or garrison the character of wild and chimerical.

"At any rate there must be a concurrence of circumstances which have not happened in that country during the present war to authorize the prospect in question.

"If the Orders of 1795 are to be considered as an experiment on this subject (and we are told that they are), that experiment has proved the rashness of the hope. But in fact these orders made no experiment which

in America, published while the treaty was under discussion there. It will not be necessary to subjoin more than a few reflections of my own, because it happens that the topics now urged at the board in reference to this article are in substance the same with those which occurred to the enemies to the treaty in the United States, and are consequently considered (and in my judgment satisfactorily refuted) in the number of that publication which I am about to quote.

"Indeed, it may safely be asserted that if those objections had not been believed in America to be totally groundless, we should not now be sitting here in the character of commissioners.

"'No. XXXII of Camillus:

"'The eighteenth article of the treaty which regulates the subject of contraband has been grievously misrepresented; the objections used against it with most acrimony are disingenuous and unfounded, etc.

"'The most labored, and at the same time false, of the charges against the eighteenth article is, *that it allows provisions to be contraband in cases not heretofore warranted by the laws of nations, and refers to the belligerent party the decision of what those cases are.* This is the general form of the charge. The draft of a petition to the legislature of Virginia reduces it to this shape: "The treaty expressly admits that provisions are to be held contraband in cases other than when bound to an invested place, and impliedly admits that such cases exist at present."

"'The first is a palpable untruth which may be detected by a bare perusal of the article. The last is an untrue inference impregnated with the malignant insinuation that there was a design to sanction the unwarrantable pretension of a right *to inflict famine on a whole nation.*

"'Before we proceed to an analysis of the article, let us review the prior situation of the parties.

"'Great Britain, it is known, had taken and acted upon the ground that she had a right to stop and detain, on payment for them, provisions belonging to neutrals going to the dominions

had not been already made by those of 1793 under circumstances equally if not more favorable to such an enterprise. I believe the truth to be that Great Britain intended by the Orders of 1795 to supply its own wants and had no expectation of making them instrumental in the reduction of the enemy."

of France. For this violent and unpolitic measure, which the final opinion of mankind will certainly condemn, she found color in the sayings of some writers of reputation on public laws.

"'A passage of this kind, from Vattel, has been more than once quoted in these terms: "Commodities, etc." Heineccius[1] countenances the same opinion, and even Grotius seems to lean toward it.

"'The United States with reason disputed this construction of the law of nations, restraining the general propositions which appear to favor it to those cases in which the chance of reducing the enemy by famine was manifested and probable, such as the cases of particular places bona fide besieged, blockaded, or invested. The government accordingly remonstrated against the proceeding of Great Britain and made every effort against it which prudence, in the then posture of affairs, would permit. The order for seizing provisions was, after a time, revoked.

"'In this state our envoy found the business. Pending the very war in which Great Britain had exercised the pretension, with the same administration which had done it, was it to be expected that she would in a treaty with us even virtually or impliedly have acknowledged the injustice or impropriety of her conduct, etc.?

"'On our side to admit the pretension of Great Britain was still more impossible. We have had every inducement of character, right, and interest against it. What was the natural and only issue out of this embarrassment? Plainly to leave the point unsettled; to get rid of it; to let it remain substantially where it was before the treaty—this *I have good ground to believe* was the real understanding of the two negotiators, and the article has fulfilled that view.

"'After enumerating specifically what articles shall be deemed contraband, it proceeds thus: "And whereas the difficulty of agreeing on the *precise cases* in which *alone provisions and other articles*, not generally contraband, may be

[1] "I have examined Heineccius and find that he ranks provisions among the articles generally contraband of war for which he cites Bynkershoek, ch. 9, and Grotius, lib. 3, ch. 17, sec. 3. It need not be stated that those writers prove the reverse of this and that the reverse of it is universally admitted. Indeed, the eighteenth article expressly admits the reverse of it."

regarded as such, renders it expedient to provide against the inconveniences and misunderstandings which might thence arise: It is further agreed that whenever any such articles, so becoming contraband *according to the laws of nations*, shall for that reason be seized, the same shall not be confiscated, but the owners thereof shall be speedily and completely indemnified, and the captors, or, in their default, the government under whose authority they act shall pay to the masters or owners of such vessels the full value of all articles, with a reasonable mercantile profit thereon, together with the freight and also the demurrage incident to such detention."

"'The difficulty of agreeing on the precise cases in which articles not generally contraband become so from particular circumstances, is expressly assigned as the motive to the stipulation which follows.

"'This excludes the supposition that any cases whatever were intended to be admitted or agreed. But this difficulty rendered it expedient to provide against the inconveniences and misunderstandings which might thence arise. A provision with this view is therefore made, which is that of a liberal compensation for the articles taken. The evident intent of this provision is, that in *doubtful* cases, the inconveniences of the neutral party being obviated or lessened by compensation, there may be the less cause or temptation to controversy and rupture and the affair may be the more susceptible of negotiation and accommodation. More than this can not be pretended, because the agreement is "that whenever any such articles so become contraband *according to the existing laws of nations* shall for that reason be seized, the same shall not be confiscated, but the owners, etc."

"'Thus the *criterion* of the cases in which articles not generally contraband may, from particular circumstances, become so, is expressly the *existing law of nations;* in other words, the law of nations at the time the transaction happens. When these laws pronounce them contraband, they may for that reason be seized; when otherwise, they may not be seized. Each party is as free as the other to decide whether the laws of nations do, in the given case, pronounce them contraband or not, and neither is obliged to be governed by the opinion of the other. If one party, on a false pretext of being authorized by the laws of nations, makes a seizure, the other is at full liberty to contest it, to appeal to those laws, and, if it thinks fit, to

oppose, even to reprisals and war. This is the express tenor of the provision. There is nothing to the contrary; nothing that narrows the ground; nothing that warrants either party in making a seizure, which the laws of nations, independent of the treaty, do not permit, nothing which obliges either party to submit to one, when it is of opinion the law of nations has been violated by it.

"'But as liberal compensation is to be made, in every case of seizure, whereof difference of opinions happens, it will become a question of prudence and expediency whether to be satisfied with the compensation or to seek further redress. The provision will, in doubtful cases, render an accommodation of opinion the more easy and, as a circumstance conducing to the preservation of peace, is a valuable ingredient in the treaty. A very different phraseology was to have been expected, if the intention had been to leave each party at liberty to seize *agreeably to its own opinion of the law of nations*, upon the condition of making compensation. The stipulation would not then have been, "It is agreed that whenever either of the contracting parties shall seize any such articles so *becoming* contraband." This makes, not the *opinion of either party*, but the fact of the articles having *become* contraband by the laws of nations, the condition of the seizure.

"'A cavil has arisen on the term "*existing*," as if it had the effect of enabling one of the parties to make a law of nations for the occasion.[1] But this is mere cavil. No one nation can make a law of nations; no positive regulations of one state, or of a partial combination of states can pretend to this character. A law of nations is a law which nature, agreement, or usage has established between nations; as this may vary from one period to another by agreement or usage, the article very properly uses the term "existing," to denote that law which, at the time the transaction may happen, shall be then the law of nations. This is a plain and obvious use of the term, which nothing but a spirit of misrepresentation could have perverted to a different meaning.

"The argument against the foregoing construction is in substance this (viz): It is now a settled doctrine of the law of nations that provisions and other articles not generally con-

[1] "This has not been urged at the board on this occasion; but in the case of the *Betsey*, Furlong, Mr. Gostling's objection to the jurisdiction amounts to it."

traband can only become so when going to a place besieged, blockaded, or invested; cases of this kind are fully provided for in a subsequent part of the article; the implication, therefore, is that something more was intended to be embraced in the antecedent part.[1]

"'Let us first examine the fact whether all cases of that kind are comprehended in the subsequent part of the article. I say they are not. The remaining clause of the article divides itself into two parts. The first describes the case of a vessel sailing for a port or place belonging to an enemy without knowledge that the same is either besieged, blockaded, or invested, and provides that, in such case, the vessel may be turned away but not detained, nor her cargo, if not contraband, confiscated, unless after notice she shall again attempt to enter. The second describes the case of a vessel or goods which had entered into such port or place before it was besieged, blockaded, or invested, and declares that neither the one nor the other shall be liable to confiscation, but shall be restored to the owners thereof. These are the only cases described or provided for. A third, which occurs on the slightest reflection, is not mentioned. The case of a vessel going to a port or place which is besieged, blockaded, or invested, with notice of its being in that state when she commences her voyage, or previous to her receiving notice from the besieging, blockading, or investing party. This is left to the operation of the general law of nations, except so far as it may be affected in respect to compensation by the antecedent clause. Thus the fact, which is the foundation of the argument, fails, and with it, of course, the argument itself.

"'But had this been otherwise the conclusion would still have been erroneous; the two clauses are entirely independent of each other, and though they might both contemplate the same cases, in whole or in part, they do it with an eye to very different purposes.

"'The object of the first is to lessen the danger of misunderstanding by establishing this general rule—that whenever articles not commonly contraband become so from particular circumstances, according to the law of nations, they shall still

[1] "This argument at the board stood thus: Cases relative to a siege, etc., are fully provided for in the latter part of the article, and therefore the former part intended to embrace something more."

not be confiscated, but, when seized, the owners of them shall be indemnified.

"'The object of the last is to regulate some special consequences with regard to vessels and goods going to or which had previously gone to places besieged, blockaded, or invested, and in respect to which the dispositions of the law of nations may have been deemed doubtful or too rigorous. Thus it is held that the laws of nations permit the confiscation of ships and goods going to places besieged, blockaded, or invested. But this clause decides that if going without notice, so far from being confiscated, they shall not even be detained, but shall be permitted to go whithersoever they please. If they persist, after notice, then the contumacy shall be punished with confiscation. In both instances the consequence is entirely different from anything in the antecedent clause.

"'There, there is seizure, with compensation. Here, in one instance, seizure is forbidden and permission to go elsewhere is enjoined. In the other instances the offending things are confiscated, which excludes the idea of compensation. Again, the last part of the clause stipulates, in the case which it supposes, the restoration of the property to its owners, and so excludes both seizure and compensation. Hence it is apparent the objects of the two clauses are entirely foreign to each other, and that no argument nor inference whatsoever can be drawn from the one to the other.

"'If it be asked, what other cases there can be except those of places besieged, blockaded, or invested? And if none other, what difficulty in defining them? Why leave the point so vague and indeterminate? One answer, which indeed has already been given in substance, is that the situation of one of the parties prevented an agreement at the time; that not being able to agree, they could not define, and the alternative was to avoid definition. The want of definition only argues want of agreement. It is strange logic to assert that this or that is admitted because nothing is defined.

"'Another answer is that even if the parties had been agreed that there were no other cases than those of beseiged, blockaded, or invested places, still there would have remained much room for dispute about the precise cases, owing to the impracticability of defining what is a besieged, blockaded, or invested place. About this there has been frequent controversy; and the fact is so complicated, and puts on such a variety of shapes,

that no definition can well be devised which will suit all. Thence nations, in their compacts with each other, frequently do not attempt one, and where the attempt has been made it has left almost as much room for dispute about the definition as there was about the thing.

"'Moreover, is it impossible to conceive other cases than those mentioned above, in which provisions and other articles not generally contraband might, on rational grounds, be deemed so? What if they were going expressly, and with notice, to a besieging army, whereby it might obtain a supply essential to the success of its operations? Is there no doubt that it would be justifiable in such case to seize them? Can the liberty of trade be said to apply to any instance of *direct and immediate aid to a military expedition?* It would be at least a singular effect of the rule if provisions could be carried without interruption for the supply of a Spanish army besieging Gibraltar, when, if destined for the supply of the garrison in that place, they might of right be seized by a Spanish fleet.

"'The calumniators of the article have not had the candor to notice that it is not confined to *provisions*, but speaks of provisions *and other articles.* Even this is an ingredient which combats the supposition that countenance was intended to be given to the pretension of Great Britain with regard to provisions which, depending on a reason peculiar to itself, can not be deemed to be supported by a clause including other articles, to which that reason is entirely inapplicable.

"'There is one more observation which has been made against this part of the article which may deserve a moment's attention. It is this, that though the true meaning of the clause be such as I contend for, still the existence of it affords to Great Britain a pretext for abuse which she may improve to our disadvantage. I answer, it is difficult to guard against all the perversions of a contract which ill faith may suggest. But we have the same security against abuses of this sort which we have against those of other kinds, namely, the right of judging for ourselves, and the power of causing our rights to be respected. We have this plain and decisive reply to make to any uncandid construction which Great Britain may at any time endeavor to raise: "The article pointedly and explicitly makes the existing law of nations the standard of the cases in which you may rightfully seize provisions and other articles not generally contraband. This law does not author-

ize the seizure in the instance in question. You have, consequently, no warrant under the treaty for what you do."

"'The same disingenuous spirit which tinctures all the conduct of the adversaries of the treaty has been hardy enough to impute to it the last order of Great Britain to seize provisions going to the dominions of France.

"'Strange that an order issued before the treaty had ever been considered in this country, and embracing the other neutral powers besides the United States, should be represented as the fruit of that instrument! The appearances are that a motive no less imperious than that of impending scarcity has great share in dictating the measure, and time, I am persuaded, will prove *that it will not ever be pretended to justify it by anything in the treaty.*'

"In this last persuasion it appears that this writer has been mistaken, but his inducements to adopt it will hardly fail to convince those who shall be disposed to examine them with candor that, although the persuasion has not been countenanced by the event, it will not be brought into discredit by it. * * *

"2nd. We are next to enquire whether these orders are justified by necessity; Great Britain being, as alleged, at the time of issuing them threatened with a scarcity of those articles directed to be seized.

"I shall not deny that *extreme necessity* may justify such a measure. It is only important to ascertain whether that *extreme necessity* existed on this occasion and upon what terms the right it communicated might be carried into exercise.

"We are told by Grotius that the necessity must not be imaginary, that it must be real and pressing, and that even then it does not give a right of appropriating the goods of others until all other means of relief consistent with the necessity have been tried and found inadequate. Rutherforth, Burlamaqui, and every other writer who considers this subject at all will be found to concur in this opinion.

"No facts are stated to us by the agent of the crown from which we might be justified in inferring that Great Britain was pressed by a necessity like this, or that previous to her resorting to the orders of council other practicable means were tried for averting the calamity she feared. It is not to be doubted that there were other means. The offer of an advantageous market in the different ports of the kingdom was an

obvious expedient for drawing into them the produce of other nations. Merchants do not require to be forced into a profitable commerce. They will send their cargoes where interest invites; and if this inducement is held out to them in time it will always produce the effect intended.

"But so long as Great Britain offered less for the necessaries of life than could have been obtained from her enemy, was it not to be expected that neutral vessels should seek the ports of that enemy and pass by her own? Can it be said that under the apprehension (not under the actual experience) of scarcity she was authorized to have recourse to the forcible seizure of provisions belonging to neutrals without attempting those means of supply which were consistent with the rights of others and which were not incompatible with the exigency?

"After these orders had been issued and carried into execution the British Government did what it should have done before; it offered a bounty upon the importation of the articles of which it was in want. The consequence was that neutrals came with these articles until at length the market was found to be overstocked. The same arrangement, had it been made at an earlier period, would have rendered wholly useless the orders of 1795.

"I do not undertake to judge, for I have no sufficient data upon which to judge, whether at the time of issuing these orders there was or was not reasonable ground for apprehending that sort of scarcity which produces severe national distress or national despondency unless extraordinary measures were taken for preventing it.

"But it will not admit of a question that there was no ground for apprehending that such a calamity would happen *unless the government resorted to depredations upon neutral trade and seized by violence the property of its friends.*

"That such a recourse should not be placed in the front of the expedients for warding off an evil like this, seen only in perspective, is too plain for argument.

"I do not desire on this occasion to determine more than is necessary to the formation of a correct judgment upon the case before us, and hence it is that I content myself with the limited view I have here taken of this part of the subject.

"Let it now be supposed that the alleged necessity was such as warranted the orders of 1795 and the seizure under them. How does this vary the rule of compensation? Upon this sup-

position no more will be proved than that Great Britain might by force assume the preemption of the articles in question. But can it be imagined that she could assume this preemption upon any other terms than giving to the neutral as much as he could have obtained from those to whom he was carrying them?

"Great Britain might be able to say to neutrals 'You shall sell to us,' but it does not follow that she could also say 'You shall sell to us upon worse terms than you would have procured elsewhere in the lawful prosecution of your commerce.'

"The authorities already cited in a note will answer these questions satisfactorily. (Grotius, lib. 2, ch. 2, sec. 6, etc.; lib. 3, ch. 1, sec. 5, ch. 17, sec. 1, etc; 1 Ruth. 85, and Burlamaqui; Vattel, B. 3, ch. 7, sec. 122; 1 Ruth. 405; 2 Ruth. 586, 587.)

"But upon such a subject neither authorities nor arguments can be required."

Pinkney, commissioner, June 25, 1797, case of the *Neptune;* Article VII., treaty between the United States and Great Britain of June 19, 1797.

Opinion of Trumbull, Fifth Commissioner.

Opinion given in the case of the *Neptune*, Jeffries, master—Question of the right of blockade, and to prevent the introduction of provisions.

"This was an American vessel, bound to a port in France, with a cargo consisting of rice, tobacco, indigo, etc., American property, captured in June 1795, by one of His Britannic Majesty's frigates, acting under the general order of April 1795, which directed the bringing into British ports of all neutral vessels laden in whole or in part with provisions, and bound to ports of the enemies of Great Britain.

"Proceedings were had in this case, in the form which was adapted to the occasion, and which commenced with an order of the judge of the high court of admiralty, that the cargo should be sold to His Majesty's government, and resulted in a decree of the same court, that both vessel and cargo belonged as claimed to neutrals—an order of the court to restore the vessel, with freight, demurrage, and expenses—costs, both of captor and claimant, to be paid by His Majesty's government, and the value of the cargo to be paid by the same to the neutral owner.

"The vessel was, of course, restored as ordered, and the value of the cargo ascertained in the manner following, viz: The registrar and merchants proceeded, under an order of the

court, to make their report in the usual form, in which they stated the invoice price, and ten per cent thereon as the value of the cargo, to be paid by His Majesty's government to the neutral owners. Against this *ex parte* mode of sale, as well as against the measure of value, the claimant, by his agent, remonstrated to the registrar and merchants, while making up their report, as inadequate and unjust, inasmuch as the sum resulting from this mode of estimation was much below what would be the result at the current market price at the port of destination, or even at the port of London, requesting at the same time permission to sell the cargo himself under bonds that it should be sold and delivered in England. To this application and remonstrance he received for answer from the registrar and merchants, 'that, although his case was doubtless a hard one, yet, as they acted by the express order of government, they could give no more, being bound by instructions officially received, to give in all such cases ten per cent on the invoice price, as a fair mercantile profit.' The agent for the claimant, however, not satisfied with this answer pursued his inquiries further until he received from a high official character (as stated to us in his affidavit) the same answer, and an absolute refusal of his request for permission to sell the property himself under bonds that it should be sold in England. Concluding, then, as it was natural for one of His Majesty's subjects to do, that information so obtained was true and correct, and perceiving it to be useless and presumptuous for an individual to struggle further against an order of His Majesty's government, he abandoned any further attempt to obtain a remedy in the ordinary course of judicial proceedings, and being pressed by the necessity of meeting bills which had been drawn in America on the expected proceeds of this cargo, and which otherwise must have gone back, subject to such heavy damages as might prove ruinous to his correspondent there—but protesting at the same time against the injustice of the mode of sale and the inadequacy of the sum ordered to be paid, according to the report of the registrar and merchants—he received the same, and now comes before this board, claiming such further sum as shall appear to the board a full and adequate compensation for the loss and damage which he has sustained.

"A memorial, in the usual form, has been preferred to the board in this case, accompanied by sundry papers. Copies of

this memorial, and of these papers, have been submitted to the agent of His Britannic Majesty, in the usual manner, and the usual time has been allowed to him to lay before the board his objections in writing to the prayer of the memorial. Those objections have been received, and without offering any reasons exclusively applicable to this particular case, or arising out of any particular circumstances attending it, we find them to be general against the powers of the commissioners as extending to cases of this description; and they appear to rest, for much of their force, on the construction of the eighteenth article of the existing treaty between Great Britain and America. On the correctness of this general objection a difference of opinion exists at the board, which leaves the decision of the question to me.

"A just sense of the very high responsibility which devolves upon me, under such circumstances, induced me to form an early determination to give my opinion in writing on all such occasions—and that determination is strengthened by the painful and unfortunate frequency with which such occasions have hitherto recurred—in order that, in discharging this arduous and unpleasant part of my duty, I might impartially give their just weight to the arguments of each of the commissioners (all of whom, from the nature of their education and studies, unquestionably possess a degree of knowledge far superior to what I can pretend on subjects of this nature.) It was further my wish to have been indulged, on all such occasions, with the sight of the written opinion of each member of the board previous to giving my own. I should then have seen the precise and meditated arguments of learned men reduced to point, and divested of that looseness and inaccuracy of expression which too generally accompany verbal discussions; and those arguments thus correctly and visibly before me, would neither have been subject to be weakened by the incorrectness of memory, nor to be distorted by any misunderstanding arising from the rapidity of conversation. I have requested this indulgence in the present case; and if it should seem from my decision, that I have been less influenced by any of the arguments which I have heard, than those gentlemen who have made use of them may feel that they deserved, I hope to be forgiven.

"The numerous and concurring authorities which the gentlemen with whom I agree in opinion have in the course

their written arguments on this case quoted from the writings of the most eminent men appear to me so clear and conclusive as to render it equally unnecessary, as it would be presumptuous in me, to follow them in that mode of examining the subject. I shall therefore confine myself to such views of it as might naturally offer themselves to men of no extensive reading or profound reflection, and such as may appear, perhaps, more particularly to affect the equity than the law of the case.

"The subject obviously divides itself into two leading questions:

"First. Has the neutral claimant in this case sustained loss or damage by reason of an irregular or illegal capture or condemnation of his property?

"Second. Could the neutral claimant actually have obtained, had, and received, full and adequate compensation for such loss and damage, in the *ordinary course* of judicial proceedings?

"If the ship had been taken in the act of entering or attempting to enter a port or place actually besieged, blockaded, or invested, and known to the neutral master to be so, I believe there is little doubt but the capture, considered under the existing law of nations, would be regular and legal.

"But if with His Majesty's agent we admit that the existing treaty between Great Britain and America was in operation at the time of this seizure (although not then ratified), it will then follow undeniably that even if the ship had been stopped in the act of entering, or attempting to enter, a port or place actually besieged, blockaded, or invested, yet if the neutral master was ignorant of that fact he could not regularly and legally have been seized as prize, nor even detained. His case would have fallen under the provision of the third section of the eighteenth article of the treaty, and it would have been the duty of the captor to have notified to the neutral the state of the place, and (having prevented his entering such port) to have permitted him to proceed to any other port or place without interruption. If then, even in attempting to enter a port or place actually besieged, blockaded, or invested (the neutral master not knowing it to be so) it was inconsistent with this eighteenth article to seize or even to detain the ship, much less must such seizure or detention appear to be justifiable under that article, the ship being bound to a port not besieged, blockaded, or invested, for it is not pretended that Bordeaux (the port of destination in this case), or even any particular

port in France, much less the whole country, was at the period in question in such a state.

"But it is held that cases other than those of actual siege, blockade, or investiture, are evidently alluded to in the eighteenth article of the existing treaty, as justifying 'the seizure of provisions, or other articles going to the enemy, in certain cases.' This, however, does not appear to me to be correct. There is, indeed, an evident allusion to, or rather declaration of, a difference of opinion on this subject, on which the two negotiators finding it 'difficult to agree.' All decision appears to have been therefore intentionally waived; and in order that 'this difficulty of agreeing on the precise cases in which alone provisions, and other articles, not generally contraband, may be regarded as such,' might not become a source of future contention between the two nations, in consequence of the possible continuation of contrary opinions on this subject of special contraband, it was wisely stipulated 'that when provisions, or any such articles, so becoming contraband, according to the existing law of nations, shall for that reason be seized, the same shall not be confiscated, but the owners thereof shall be speedily and completely indemnified.' The stipulation extends only to cases where provisions, etc., shall become contraband, 'according to the existing law of nations.' Those appear to be limited in all the books to cases of actual siege, blockade, or investiture. It is however further alleged that 'every case where there exists a reasonable hope of reducing the enemy to terms of peace by famine,' is also within 'the spirit of the law.' But such a description must necessarily remain vague and indefinite, because it may always be questioned by the one party whether the hope entertained by the other was reasonable or not. No new cases or descriptions of contraband are either established or admitted by this eighteenth article, which, on the contrary, instead of increasing the restrictions and inconveniences of neutral commerce, and thus opening new sources of dispute and misunderstanding, I do conceive to have been intended (as several other articles of this treaty evidently were) to remove the grounds and lessen the probabilities of future mutual complaints; to extend, rather than to narrow, the benefits of the state of neutrality, and thus to diminish to mankind in general those inconveniences which are necessarily and unavoidably consequent upon every extensive war between great maritime nations. This article pro-

vided only for cases 'where provisions, or other article not generally contraband, may become so, according to the existing law of nations.' What is the universally acknowledged consequence of an attempt to carry contraband goods to an enemy, according to those existing laws? An unequivocal right not merely to seize, but *to confiscate without reserve.* But this eighteenth articles stipulates that provisions, etc., '*so becoming contraband*,' shall not be confiscated. How, then, does this article vary the law? Not by enlarging the description of contraband beyond what shall be consistent with the existing law of nations, and to the prejudice of the state of neutrality, but by stipulating, to the benefit of neutral commerce and of mankind at large, that even 'in certain cases where provisions and other articles not generally contraband, *may become so, according to the existing law of nations*, and for that reason be seized,' yet 'the same *shall not be confiscated*, but' (on the contrary) 'the owners thereof shall be speedily and completely indemnified.'

"The tenth article of the treaty appears to have been suggested by the same principle, which I believe to have animated the two eminent negotiators on other occasions—a sincere desire to diminish rather than to extend those evils which inevitably accompany the state of war; and this article, which is here, I believe, for the first time made part of a solemn engagement between two nations, will do honor to those who have here introduced it, in proportion as the long neglect of a stipulation so obviously just is unworthy of praise in the negotiations of past ages. Let me suppose that some metaphysical head should undertake to derive a right, under that article, to confiscate property in the public funds or debts due from individuals in the event of peace and good understanding, because such confiscation is prohibited only 'in any event of war or national difference.' The odd ingenuity of such an argument would excite our surprise, and perhaps call up a smile; yet would not this logic be nearly as sound as that which, from a stipulation to pay for goods 'become contraband in certain cases, according to the existing law of nations,' would infer a right to seize as contraband provisions, &c., in cases where they are manifestly not so according to that law?

"The argument in justification of the present seizure is then reduced to this, 'that the right of the belligerent to seize as contraband provisions going to the enemy extends to all cases

where there exists a reasonable hope or expectation of reducing an enemy to terms of peace by famine.' I willingly waive all those objections to this vague and indefinite principle, which arise in general from the difficulty of ascertaining what are cases in which a hope of this nature may reasonably be entertained, because I do not think it difficult to demonstrate that the case before us was not of that description.

"In Coxe's View of America, published in 1793, will be found a correct and official statement of the exports of the United States for the preceding year, 1792, from which we learn that the whole quantity of breadstuff exported from that country during that year was as follows, viz:

	Pounds.
"Of flour, 824,464 barrels, at 190 lbs. each, is	156,648,160
"Of wheat, 853,790 bushels, at 60 lbs. each, is	51,227,400
"Of maize, 1,964,973 bushels, at 60 lbs. each, is	117,898,380
"Of rice, 141,762 tierces, at 300 lbs. each, is	42,528,600
"And in all other articles of a nature convertible into bread, including ship-bread and biscuit	31,697,460
"Total of exports, pounds	400,000,000
"To this add for increase of weight by making into bread, one-fourth	100,000,000
"And we shall have, pounds of bread	500,000,000

"being all that could be made from the whole exports of America for the year 1792.

"In a work published in France in 1775, 'Sur la Legislation et le commerce de Grains,' regarded as one of the most estimable and correct works of the kind extant, may be found a note, at page fifty-nine of the first Paris edition, Chap. XIII., in which the author states his opinion of the quantity of corn or bread annually and daily consumed by the inhabitants of France and a very correct detail of the principles and inductions on which this opinion is grounded, from which it appears that the inhabitants of France were then estimated at twenty-four millions and that each inhabitant was estimated to require for food about two septiers or eight and two-thirds Winchester bushels of corn each year, equal to one and a half pounds of bread daily. In his estimate of the quantity of bread this author has been followed by Neckar and others, but almost all agree that the actual number of inhabitants in France exceeds his estimate. I will, however, follow him entirely, and by his estimate we shall have thirty-six millions of pounds of bread as the daily consumption of the French nation.

"We have before seen that all the corn, etc., exported from the United States of America in the year 1792 would have produced five hundred million pounds of bread. Dividing this sum by thirty-six million pounds, the amount of the daily consumption of France, we have as the result nearly fourteen days' bread for the people of that country. Fourteen days are the twenty-sixth part of a year. Supposing, then, that each person in France should prudently economize each day one twenty-sixth part of his customary allowance of bread, and instead of twenty-four ounces, eat somewhat more than twenty-three, and the same effect would be produced as by the importation of all that America could export.

"I am well aware that in a case of sudden alarm or apprehension of scarcity in a country habituated to ease and plenty, where the actual evil is magnified tenfold by the united operation of fear and avarice, the importation of such a proportion of foreign corn would be of vast importance by dispelling the fears of the timid and by opposing the dread of a falling market to a disposition to monopolize. Such was lately the state of England. The alarm (which is now known to have had little true foundation) was too sudden and universal to be remedied by the slow but certain operation of a system of economy only, and government wisely had recourse to the same passion which was the principal cause of the evil. A bounty on foreign corn was offered, and the importation of a quantity, comparatively very trifling, produced the most salutary and important effects. The public sale of this small quantity in the London market produced a reduction of price, and, of course, from every part of the country corn was hurried to market by those who before had been busily employed in hoarding and withholding it. But such was not the state of France at the period in question. There the people had long apprehended and sometimes felt a real degree of scarcity. The attempt to reduce them to terms of peace by famine had already been made in 1793 without success, although under circumstances much more favorable to the hopes of her enemies. The people had, of course, been trained to habits of economy, and had learned to rely on that resource whose operation, when once generally adopted, is infinitely more effectual than any aid which may be hoped for from foreign supplies. I must be permitted to observe that in the foregoing statement I have given the most unlimited extent to the argument against me, for in truth

almost all the wheat which is exported from the United States goes to Portugal, where, for the benefit of the manufactures, the importation of flour is prohibited, and almost all the maize or Indian corn is sent to the West Indies, and there forms a principal part of the food of the blacks, so that, deducting these two great articles from the account, it can scarcely be possible that even on extraordinary occasions more than one-half of the exports of America can find their way to France. Thus, in fact, this hope of reducing the French nation to terms of peace by famine (so far as the interruption of American commerce would influence) is founded on the supposition that the people of France may be reduced to the necessity of eating one fifty-second part less than their usual allowance of bread.

"But it may fairly be objected to the whole of this argument that it is altogether hypothetical, and that I have considered only the resources drawn from America, whereas I ought to consider that all supplies from abroad were intended to be intercepted by the entire interruption of neutral commerce. I am happy to have it in my power to give more correctness to this part of my argument, and to state from official documents what real effect was produced both by the orders of 1793 and by those of 1795.

"An important paper (No. 23 of the appendix to the third report of the committee of secrecy, printed in April 1797), showing the amount in value of the corn imported into and exported from Great Britain in the years 1793, 1794, 1795, 1796, and 1797, gives us correct and unquestionable information on this subject. It is there stated that the corn of all nations, either detained or brought into ports of Great Britain as prize, amounted to the following value, viz:

"In 1793 and 1794 to	£232,771 12s. 5d.
"In 1795 to	129,063 3s. 7d.
"In 1796 to	20,384 13s. 8d.

"I will suppose this entire quantity to have consisted in wheat, which, in the paper referred to (No. 23) is stated to be valued at 32s. the quarter or 4s. the bushel. At that rate of value the above several sums will give us the following quantities of wheat, viz:

"1793 and 1794, bushels, 1,163,860, at 60 lbs. each, is 69,831,600 lbs.

"1795, bushels, 645,316, at 60 lbs. each, is 38,718,960 lbs.

"1796, bushels, 101,923, at 60 lbs. each, is 6,115,380 lbs.

"Let it next be understood that the whole of this corn so captured or detained, at those several periods, was destined to ports of France, then we shall find that by their capture the French nation was actually deprived of the following part of their bread, viz:

"In 1793 and 1794, of almost two days' bread; in 1795, of something more than one day's bread, and that in 1796 they did not lose one breakfast.

"Such was the real effect produced by the operation of the orders of 1793 and 1795.

"At the time of the transaction which gave rise to the present discussion the trivial effect of the order of 1793 must have been known, and it is palpable, therefore, that the order of 1795 could not have been founded in any *reasonable* hope or expectation of thereby reducing the French nation to terms of peace by famine. An ardent and enthusiastic enemy can not *reasonably* be expected to make any considerable sacrifice of his animosities, his prejudices, or his pursuits in consequence of such very trifling inconveniences as we see were the consequence of the orders in question.

"From the foregoing observations I trust it sufficiently appears that the capture in question can not be justified by the law of nations, under the description of goods attempted to be carried to a place actually besieged, blockaded, or invested; nor yet under the eighteenth article of the existing treaty; nor yet under the broad idea of a reasonable hope of reducing the enemy by famine. It only remains to inquire whether there existed at the time any necessity on the part of the captor so pressing as to justify the act.

"The necessity which can be admitted to supersede all laws and to dissolve the distinctions of property and right must be absolute and irresistible, and we can not, until all other means of self-preservation shall have been exhausted, justify by the plea of necessity the seizure and application to our own use of that which belongs to others. Did any such state of things exist in Great Britain in April 1795? Were any means employed to guard against an apprehended, rather than an existing, necessity before the measure in question was adopted? And when a degree of scarcity was felt a few months later in the year was not the obvious and inoffensive measure of offering a bounty on corn imported effectual, and that speedily?

It can not, then, be presumed that the capture in question is any more to be justified by the plea of necessity than it is by that of right, and I must, therefore, conclude that the neutral claimant has in this case suffered loss and damage by reason of an irregular and illegal capture."

Trumbull, fifth commissioner, July 26, 1797, case of the *Neptune;* Article VII., treaty between the United States and Great Britain of November 19, 1794.

Case of Gonzales.

"In the case of Tomas Gonzales and Jesus S. de los Santos *v.* The United States, No. 632, the umpire is of opinion that it is not sufficiently proved that the claimants were Mexican citizens at the time of the origin of the claim, nor that the 2,700 pounds of lead, of which they claim the value, really belonged to them. Further, it appears from the evidence that the claimants first sent the lead to Las Piedras, but not having succeeded in selling it there they dispatched it on the 5th of May 1865 to San Antonio, in Texas. It must therefore have entered the territory of Texas very soon after that date, and at that time lead was certainly contraband of war and was liable to seizure. The proclamation of the President removing restrictions on commercial intercourse with the States lately in rebellion was not issued till the 22nd of May, and the further proclamation declaring that the insurrection which theretofore existed in the State of Texas was at an end bears the date of August 20th, 1866. The opinion of the umpire is that the original importation into Texas of the lead in question was a violation of the laws of the United States; that it was still contraband of war on the 15th of March 1866, when it was seized by the authorities of the United States, and that consequently its seizure and confiscation were justifiable."

Thornton, umpire, February 16, 1876, Convention of July 4, 1868, MS. Op. VI. 316.

3. BLOCKADE.

Case of the "Susan."

"The schooner *Susan*, an American registered vessel, owned by the claimant, sailed from Baltimore for the Gulf of Mexico on the 10th November 1824. On the 20th December following she was captured off the Mexican coast, and near the castle of San Juan de Ulloa, by the Mexican national schooner *Anahuac*. The claimant alleges in his memorial that the schooner

'was carried into Sacrificos and thence to Alvarado, where, as is understood, both the vessel and cargo were condemned.' He avers a total loss of both vessel and cargo, and claims indemnity from the Government of Mexico.

"In order to determine whether the claim preferred is valid, it becomes necessary to examine the cause of the capture and subsequent condemnation. The claimant alleges that the schooner was captured 'on the allegation of intention to trade with the castle of San Juan de Ulloa, then in possession of the Spaniards.' An original letter from Taylor, Sicard & Co., dated Vera Cruz, 9th January 1825, addressed to the claimant and filed by him as a part of his evidence in this case, states: 'On the 3rd instant the schooner *Susan*, Captain Newman, was brought in here as a prize, charged with the intention of being bound to the castle.' The United States consul at Vera Cruz, in a letter to the State Department, dated 5th January 1825, said, 'The day before yesterday an American schooner, the *Susan*, Captain Newman, was sent in here as a prize, having been captured off the castle with provisions, by one of the Mexican vessels of war.' These statements constitute all the evidence before the board which explains the cause of the capture. The subsequent condemnation and sale of the vessel and cargo by the Mexican authorities is admitted by the claimant, and is also stated in letters which he has filed as a portion of his evidence.

"No record of the proceedings and judgment of the prize court in Mexico has been presented to the board. We are therefore left to infer the grounds of the condemnation from the general statements of the cause of the capture above referred to. The claimant's counsel urges that 'the claim for the schooner *Susan* and her cargo is sustained upon the ground that they were not regularly condemned by a court of competent jurisdiction.' The board can not presume this in the absence of testimony to prove it. It is a material fact, the burden of proving which lies upon the claimant. It being admitted that the vessel and cargo were condemned by a prize court in Mexico, the board must presume that it was a court of competent jurisdiction, and that its proceedings were regular. If the record of the court was before us it might disprove both of these presumptions and sustain the ground assumed by the claimant.

"The fact alleged by the claimant that he has been unable

to procure a copy of the record does not change the presumption. Whether the absence of the testimony is caused by the unwillingness of the Mexican authorities to furnish it, or by the laches of the claimant, the duty of the board to regard the jurisdiction of the court as sufficient and its proceedings regular until the contrary is shown, remains unchanged.

"It remains, then, to inquire whether the cause of the capture and the circumstances under which it was made, as they are to be adduced from all the evidence in the case, would, under the law of nations, have justified a condemnation before a court of competent jurisdiction and whose proceedings were regular. At the time the capture was made Mexico and Spain were at war. The Spanish forces, after having been expelled from every other portion of the Mexican territory, at that time held possession of the castle of San Juan de Ulloa. The United States, as a neutral nation, could claim for its citizens only the rights which by the laws of nations neutrals hold in relation to belligerents. The Spanish forces in the castle could only obtain their supplies from the land by the permission of the Mexicans, who had possession of the city of Vera Cruz and of all the country around.

"It was an important object to Mexico to cut off the supplies of her enemies in the castle and thus compel them to surrender. She had an undoubted right by the law of nations to besiege the castle as well by sea as by land, and to treat as an enemy whoever might attempt to enter it or carry anything to the besieged. This doctrine is laid down by Vattel, B. 3, sec. 117, as follows: 'All commerce is entirely prohibited with a besieged town. If I lay siege to a town or only form a blockade I have a right to hinder anyone from entering and to treat as an enemy whoever attempts to enter the place or carry anything to the besieged without my leave.' Mexico asserted this right, and by a decree of 8th October 1823 'the fortress of San Juan de Ulloa is (was) declared to be in a state of blockade,' and all communication with the garrison and vicinity was declared to be absolutely cut off. On the 20th December 1824 another decree was published by which the strict blockade of the castle was continued and the provisions of the previous decree were declared to be in full force. More than a year had elapsed from the publication of the first decree when the *Susan* was captured 'off the castle.' The evidence filed by the claimant proves beyond a doubt that she sailed from the United

States for the purpose of disposing of her cargo at the castle. Her manifest specified her destination to be 'the Gulf of Mexico,' and not any particular port. The protest of the master, made before the United States consul immediately after the capture, states that the vessel was 'bound on a voyage from Baltimore to the castle of San Juan de Ulloa.' The same fact was again asserted by the master in an affidavit which he made at New Orleans in March 1825.

"The claimant's counsel insists that the capture of the *Susan* was illegal, because, as he alleges, 'she was captured out at sea,' and not in the vicinity of the castle. This assumption is not sustained by the testimony. Not one of the papers filed in the case contains such an allegation. The protest of the master does not specify the distance of the vessel from the castle when she was captured. If the vessel had been captured 'out at sea,' it is hardly to be presumed that the statement of so important a fact would have been omitted in the master's protest. But, besides this strong negative testimony, the assumption is disproved by the letter of the consul above referred to, in which he says the *Susan* was captured 'off the castle with provisions.'

"There can, then, be no reasonable doubt that the *Susan* sailed from Baltimore with a cargo of provisions for the castle of San Juan de Ulloa, which was then in a state of blockade, and that she was captured by a Mexican vessel-of-war while off the castle and attempting to violate the blockade.

"It is urged that, notwithstanding the decrees of blockade before referred to, there was no actual blockade of the castle, because there was not kept in the vicinity a sufficient maritime force to enforce it. It is true the law of nations requires a blockading power to keep a force sufficiently near the blockaded port 'to occasion an evident danger in entering.' The evidence in this case does not disclose the extent of the maritime force which Mexico kept in the vicinity of the castle. The board has no right to presume, in the absence of testimony, that a sufficient force to sustain the blockade was not kept there. The claimant who seeks to invalidate the decision of the prize court in Mexico upon this ground, should prove it. This he has wholly failed to do. That the force which Mexico kept there was sufficient to 'occasion an evident danger' to the *Susan* in entering, is sufficiently proved by the fact of her capture. It is also in evidence before the board that about that

time several captures of neutral vessels were made, on the allegation that they were attempting to violate the blockade. So far as the evidence upon this point goes, there is a decided preponderance in favor of the position that Mexico kept as large a maritime force in the vicinity of the castle as was necessary under the law of nations to give effect to the blockade. Besides, it is in evidence before the board that the Mexican land batteries at Vera Cruz commanded the approach to the castle, and that one vessel was sunk by them while discharging her cargo at the castle. Although the investment of a besieged post or fortress by a land force may not be, technically, a blockade, there can be no doubt of the principle that the besieging force has the same right under the law of nations to cut off supplies and to prohibit a trade with neutrals which is possessed by a blockading squadron. The object in both cases is the same—to force a surrender of the enemy by depriving him of the facilities to prolong the contest which a trade with neutrals might afford him; and the right to capture the property of neutrals trading with the enemy under such circumstances, is undoubted in either case.

"It is also insisted that the capture of the *Susan* was illegal because she was not warned off. The claimant has filed among his papers an affidavit made in New Orleans in March 1825, by the master and supercargo of the *Susan*, in which they state that 'on their passage from Baltimore to the castle of San Juan de Ulloa said vessel was not warned or ordered off by any Mexican cruiser previous to being captured by the *Anahuac*.' It is not essential to give validity to the capture of a neutral vessel entering a blockaded port that she shall be warned off. The fact of her being warned off is but an evidence of notice of the blockade, and the notice being proved *aliunde* is equally effective. The facts developed by the evidence in this case are sufficient to justify the presumption that the fact of the blockade was well known both to the owner and the master. The blockade had then been proclaimed more than a year. The proximity of New Orleans (where the owner resided) to Vera Cruz, the frequent communication between the two places, and the fact that the owner was extensively engaged in trade with that port, forbid the conclusion that he was ignorant of the blockade. He does not aver a want of notice in his memorial, nor is it shown by the testimony. The affidavit of the master and supercargo before referred to does not allege that they were ignorant of the blockade.

"The English courts of admiralty have decided that sailing for a blockaded port, knowing it to be blockaded, is a breach of the blockade from the departure of the vessel, and that she may be legally captured wherever found. From a careful examination of all the evidence adduced by the claimant, the board is satisfied that nothing is proved which would justify a decision that the judgment of the prize court in Mexico was in violation of the law of nations."

Memorial of *J. W. Zacharie:* Opinion of Messrs. Evans, Smith, and Paine, commissioners, February 3, 1851, act of Congress of March 3, 1849.

Case of the "Scott."

"This claim is similar in its essential features to that growing out of the capture of the schooner *Susan*, which has already been decided by this board not to be valid, and must be disposed of upon the principles which governed the decision of that case. Upon the application of the counsel for the claimant, the board has very carefully reexamined the grounds upon which that decision took place, and finds no occasion to reverse the judgment to which it was then conducted.

"The injury for which the indemnity is sought in the present case was occasioned by the firing of the Mexican batteries in the harbor of Vera Cruz upon the schooner [*Scott*], then lying at anchor near the castle of San Juan de Ulloa. This occurrence took place in January 1825, when the castle was in possession of some of the military forces of Spain, with which nation Mexico was then waging her war of independence. Spain had been before that time driven from all her possessions in Mexico, except this strong fortress, of which a small body of her troops had retained possession for a period of more than three years against the most strenuous efforts of Mexico to expel them. During a portion of that time very active hostilities were kept up between the castle and the Mexican batteries and forces on shore, and during other portions there was to a considerable extent a cessation of active operations and some degree of intercourse appears to have been carried on between the castle and the city. Peace was however by no means concluded between the two countries, and Spain had not yet relinquished her purpose of attempting the reconquest of Mexico. During the same year she made an unsuccessful effort to relieve the castle and to invade the Mexican territory. It was not until late in the autumn of that year that the Spanish troops in the fortress, having been reduced to the last

extremity, were compelled to surrender. Niles's Register of December 31, 1825, says: 'General Coppinger, late of Florida, commanded at San Juan de Ulloa at the time of its surrender, and certainly held out as long as he could. Cats and rats had been eaten to prevent starvation, and so reduced were the means of subsistence that sentinels died at their posts while under arms. More than four-fifths of the garrison perished from the scurvy.' This extract shows with what degree of vigilance and ability Mexico had carried on hostilities against the castle. Of the means which she employed to effect its reduction, some account is given by Mr. Ward in his book on Mexico, vol. 2, p. 69. On the 11th of March 1825, after an absence of about one year, Mr. Ward returned to Mexico, and says:

"'From the moment that we approached the shores of Vera Cruz an astonishing difference became visible in the state and appearance of every thing around us. The castle was, indeed, held by a Spanish garrison and the harbor closed in consequence to foreign vessels, but the firing had long ceased, the siege being converted into a blockade, in which a number of Mexican schooners and gunboats were employed, while the castle was occasionally supplied with fresh provisions by the Spanish flotilla from Havana. The island of Sacrificios, where we again anchored, and which I had left a year before a barren and desolate spot, had been converted into a regular fortification, under which the Mexican gunboats sought protection on the approach of the Spanish fleet. Mocambo, too, had assumed a formidable appearance.'

"These were the means which Mexico was then employing and had been employing to compel the surrender of the garrison.

"Of her purposes she had, as well by these means as by her public declarations, given notice to the world. A decree was issued on the 8th October 1823 declaring the castle of San Juan de Ulloa to be in a state of blockade; and by another decree of 20th December 1824 it was announced that the strict blockade of the castle was continued, and all the provisions of the previous decree were declared to be in full force. The works upon Sacrificos and Mocambo, both in the immediate vicinity of the castle and designed to aid in its reduction, were erected in 1824; and every indication of a more active effort on the part of Mexico to compel the garrison to surrender appears to have been given.

"In such a state of things the schooner *Scott* was cleared

from New Orleans for Vera Cruz, and sailed on the 20th day of December 1824. The claimant insists that she undertook a lawful voyage and was honestly bound for the Mexican port of Vera Cruz and not to the castle of San Juan de Ulloa; and he avers that she was fired upon and sunk by the Mexican batteries from an 'idle suspicion' that she intended to trade with the castle. This is a question of fact necessary to be in the first place clearly settled. The castle of San Juan, it is understood, entirely commands the harbor of Vera Cruz, and foreign vessels could not therefore with safety enter that port. Indeed it is well known that, owing to the possession of the fortress by the Spaniards and the hostilities between it and the city, Vera Cruz became in a great degree deserted, and all commercial business was transferred to Alvarado. (Ward's Mexico, vol. 2, pp. 6–7.) But in the opinion of the board there is very decided proof not only that it was the intention of the schooner to trade with the castle, but that the fact of trading had actually commenced at the time the firing was opened upon her by the Mexican batteries. The captain of the vessel upon his return to New Orleans, on the 3rd day of March 1825, noted a protest, in which he stated that 'he had experienced loss and damage on his outward passage by an attack on said vessel from the forts of Vera Cruz soon after she anchored near the castle, the particulars of which he would make known at more leisure,' and on the 8th of the same month he appeared with his mate and two of his crew and extended his protest, of which the following is an extract:

"'Nothing material occurred on the outward passage aforesaid, until the 4th of January last, when the weather being cloudy at 3.30 p. m. saw the castle of San Juan de Ulloa; at 4.30 p. m. got a pilot from that fortress; 5.20 p. m. came to anchor, etc. Got the boat out and the captain went on shore. At 6.40 the boat returned and brought off two launches from the castle for cargo. Ladened these launches and sent them ashore, when the fort at Vera Cruz fired one shot at the said schooner, which passed without doing much damage.'

"It is thus established beyond all controversy that the vessel was actually engaged in trade with the castle at the time she was fired upon by the Mexican batteries. Two launches had been loaded from her and sent to it before the firing commenced. Nor is there any reason to doubt that the attack, resulting in great injury to the vessel and cargo, was induced by this act of trading.

"It is urged that the cargo, as exhibited by the manifests, was not suited to the wants of the garrison, and it is hence inferred that the voyage was not in fact undertaken to the fortress. The proof is too clear to admit of any doubt upon the subject, even if the manifests were entitled to the most implicit confidence. Besides, it is well-known that many cargoes were landed at the castle, intended to be smuggled into the city in violation of the revenue laws of Mexico. This was especially the case prior to the decree of 8th October before referred to. Mr. Taylor, the consul of the United States at Vera Cruz, in a letter to the Department of State under date of April 6, 1823, says: 'The fort, too, is turned into a place of deposit or trading house, where cargoes are landed, deposited, or sold, and from thence smuggled into Vera Cruz.'

"It being established to the entire satisfaction of the board that the vessel and cargo at the time of the injuries complained of were actually engaged in carrying on trade with the castle of San Juan de Ulloa, then held by the Spanish arms, the question next to be decided is whether this was a violation of the belligerent rights of Mexico. It has been urged very strenuously on behalf of the claimant that it was not such violation; that the blockade of the castle was a mere paper blockade, not binding upon neutrals; that Mexico had not sufficient power to enforce it, or to cause it to be respected; that the schooner had never been warned off, without which it is contended that she was not liable to interruption.

"A blockade is understood to be, in strictness of language, applicable only to ports, harbors, or coasts, accessible by sea for commercial purposes. Its object is to harass the enemy by obstructing or annihilating his commerce, and thus to induce him to conclude a treaty of peace. It does not contemplate a surrender of the port or place blockaded, and is not to be regarded as a mere military operation. 'There is an important distinction,' says Duer on Insurance, vol. 1, p. 657, 'between a maritime blockade and a military siege. The sole object of the blockade is to distress the enemy by the suspension of his commerce. It does not generally look to the surrender or reduction of the blockaded port, nor does it imply the commission of any hostilities which the inhabitants are necessarily required to repel. On the other hand, the object of the military siege is to reduce the place, whether by capitulation or otherwise, into the possession of the besieging power.' There

can be little doubt that the purpose of Mexico, in its operations against the castle, whether by sea or land, was to effect its reduction. It was a military fortress, and not a commercial port. The suspension of its commerce or trade, if it had any, was in no way calculated to injure Spain, or to induce her to enter into a treaty of peace. The object of Mexico was to wrest from her enemy a strong and commanding military post, the possession of which enabled her to prolong the contest, and afforded facilities for renewed attempts at invasion and subjugation. Mexico had the unquestionable right to effect this important object in any mode she deemed suitable, conforming only to the law of nations, and the usages of modern warfare. She had the right to exclude all intercourse or communication whatever with the castle. The mode adopted appears to have been taken upon deliberation, and that it was entirely successful has been already shown by the extracts from Niles's Register before given. The following extract from Poinsett's Notes on Mexico, p. 23, shows the purpose and the mode of accomplishing it which Mexico had in view, if further proof upon that subject be necessary. Mr. Poinsett, on his way to the city of Mexico, was in Vera Cruz in October 1822, and, giving an account of an interview he had with General Santa Anna, then governor of the city, says: 'The governor took me aside to talk of his plans for taking the castle. He proposes to blockade it by water, to construct a battery on each extremity of the harbor to prevent the entrance of shipping, and to have I don't know how many mortars arranged behind the city to shower shells into the castle.' These plans appear to have been carried into execution; the decree of 8th October 1823 was promulgated, and the castle was eventually compelled to surrender.

"In the opinion of the board the principles of law applicable to merely commercial blockades do not apply to a state of things like this. The entire operation against the fortress must be regarded as a military one having in view and adapted to effect the reduction of a strong military post.

"It is said that there is no proof in the case showing that Mexico had the power to enforce the blockade. It might be sufficient to say that there is no proof to the contrary. But the argument seems to assume that the board is confined to the proofs which are presented by the claimant himself. It must be recollected that the proceedings before the commission

are altogether *ex parte*. No adverse party is present or has opportunity to be heard. If the board were to be confined to the claimant's own proof, it would be quite easy to sustain any claim whatever. Indeed, it is urged in the case of the *Susan* that when a capture is proved a sufficient claim is made out, unless it be shown by Mexico that there is justifiable ground for it; and not only so, but that Mexico must go still further and show a regular condemnation by a court of competent jurisdiction; and the rules of evidence applicable to trials at common law between individuals are cited to establish these positions. The board does not yield to this argument. Each claimant must establish every fact essential to the support of his claim. If the ground of reclamation be that a capture or a condemnation was unwarrantable, that must be established. There can be no such distinction here as exists in trials between individuals of a *prima facie* case sufficient to put the adversary on his defense, for the reason that there is no adversary. Neither Mexico nor the United States, who has assumed the obligations of Mexico, has the opportunity of repelling the proofs submitted by claimants except so far as public documents, furnished from the archives of the government, may be regarded as affording such testimony. The board does not, therefore, consider itself as limited to the papers which the claimants deem it for their interest to present to its consideration. Public events, facts, or occurrences of general notoriety, published accounts and documentary records are all suitable and proper to be weighed as evidence in their bearing upon particular cases.

"Judging from the evidence furnished by these and similar sources, the board is far from coming to the conclusion that Mexico was so deficient of means to enforce her decree of blockade that it was not obligatory upon neutrals. The harbor and the access to the castle were entirely commanded by the land batteries, while the gunboats and schooners of war before spoken of were sufficient to capture all commercial vessels hovering in the vicinity.

"These efforts and preparations on the part of Mexico must have been notorious to all persons trading in that quarter, and whoever undertook a voyage to the castle must be held to have entered upon it with full knowledge of all the hazards to which it was exposed. Indeed, there is evidence before the board, filed in another case by the present claimant, tending to show

that the existence of the blockade was so well known in New Orleans as to be guarded against by insurers, in policies of vessels bound to Vera Cruz. An opinion given by the supreme court of Louisiana in May 1837, in a suit upon a policy of insurance on the schooner *Constitution* and her cargo, is among the papers filed by the present claimant in that case. The court say: 'This action is brought on two policies of insurance, one on the schooner *Constitution* and the other on her cargo, from the port of New Orleans to Vera Cruz. Both vessel and goods are warranted to be American, and that the former shall not force the blockade.' The *Constitution* sailed upon her voyage in June 1824, and was soon after captured upon the allegation that she was bound for the castle. This capture, and the grounds upon which it was made, must have been known at New Orleans. The 'blockade' spoken of in the policy could be no other than the blockade so-called of the castle; and when it was known that vessels were actually seized and captured on pretense that they were bound to the castle, there is little ground for the argument that it was incumbent on Mexico to warn off vessels thus actually employed, before she could lawfully interrupt them.

"In the argument addressed to the board for a reexamination of the case of the *Susan*, it is said that the board had fallen into error in supposing that it had been admitted that the vessel had ever been condemned, and if so that it was by a prize court of competent jurisdiction. The memorial in itself does not, it is true, make that distinct admission, but the letter of Messrs. Taylor, Sicard & Co. of 9th January 1825 to the claimant says, speaking of the *Susan:* 'Vessel and cargo condemned and sold—a very summary process. We are ignorant of all the other facts save that of her capture and condemnation.' When therefore the memorialist asserts that 'it is understood' vessel and cargo were condemned, and files a letter from his correspondents containing the statement above quoted, the board did not suppose it would be going too far to consider the facts as admitted.

"But it is further urged that, if condemned, it was not done by a court of competent jurisdiction, and that the proceedings were not regular. And it is urged that Mexico at that time had no established courts competent to adjudge upon questions of prize. The board does not find any sufficient proof of these allegations. The letter of Messrs. Taylor & Co., before referred

to, says: 'Our W. T. has just been notified of the condemnation of the *McDonough's* cargo *by the Mexican tribunal of the place*, from which decision he appeals to the supreme court of Mexico.' There is no intimation that this was not a regular proceeding and a court of competent jurisdiction. It appears also in the case of the *Constitution* that proceedings were commenced and prosecuted before the same or a similar tribunal, from whose decision an appeal was also taken; and that these defenses were set up and conducted by Mr. Taylor, the consul of the United States at Alvarado. The house with which Mr. Taylor was connected were the correspondents of the claimant, and communicated to him intelligence of the capture of the *Susan*. Is it reasonable to suppose that Mr. Zacharie did not reply to that letter? That he did not apply for and obtain information of all the circumstances connected with the occurrences? That if there had been no regular proceedings, no condemnation, no proper court, he would not have been fully informed of it? Did all correspondence between the claimant and his commercial friends in reference to this matter cease with that first communication? It is wholly impossible to admit any such inferences. Since the organization of this board, it is true, the claimant has endeavored to obtain from Mexico the records of the proceedings in the case, and they have not been furnished. But is the board thence to infer that there was no court and no proceedings? These occurrences took place twenty-six years ago; and since that time Mexico has undergone many revolutions and suffered much civil commotion. Is it unreasonable to suppose that her omission to furnish documents called for may be owing to a much more excusable cause than has been attributed to her? That her archives and records may have been rifled and destroyed in some of the many scenes of violence and anarchy through which she has passed?

"If the injuries now complained of had in fact been sustained in the manner now stated, and without any justifiable cause on the part of Mexico, it is impossible to account for the long neglect of the claimant to seek the interposition of his own government, or to take any steps for obtaining redress. These claims were not presented to the joint commission under the convention of 1839, nor does it appear that they were ever in any way brought to the notice of the Government of Mexico. Mexico has therefore never had the opportunity of answering

the allegations or repelling the proofs upon which they rest. Nor were they brought to the notice of the Government of the United States until 1845. The motive for presenting them at that time was probably that they might be in condition to be presented to a new commission, if one should be provided for, with similar provisions to that of 1839. The claimant, it is true, addressed a letter to Mr. Livingston, then a member of Congress, in January 1825 upon the subject, but it does not appear to have ever been communicated to the government or made the ground of reclamation against Mexico. The consul of the United States, Mr. Taylor, also wrote the letter before referred to, stating the fact that the *Scott* had been fired upon by the Mexican batteries. But he only alludes to it as being the occasion of the renewal of hostilities between the city and the castle, and not as an aggression upon the rights of neutrals or an act unwarranted by the circumstances of the case. Is it reasonable to suppose that, if the wrongs complained of had been inflicted in the wanton manner stated, the claimant would have been so long silent? That the consul, of whose zeal in behalf of American interests there the board has many proofs, would not have exerted himself with his usual energy? Is it not rather more reasonable to conclude that through his correspondents there, who had every motive to defend his rights, he was fully informed of all that had taken place, and was assured that there was no ground upon which a reclamation through his own government could be sustained? The claimant assigns reasons why these claims were not presented to the joint commission, but in the opinion of the board they are quite insufficient to impair the very strong presumption growing out of his total omission to take any measures for obtaining redress at the time of the occurrences complained of, and for so long a period afterward.

"Exception is also taken, in the case of the *Susan*, to the conclusion which the board came to—that she was taken '*near the castle*'—and the assertion is reiterated that she was captured at sea. It appears by the protest of the master that the vessel was first sent into the 'port of Sacrificios,' which was nothing more than a place of shelter for the Mexican gunboats under the batteries there erected. If taken at sea, it is by no means probable that she would have been sent there, but directly to Alvarado, where she was finally taken. The consul, Mr. Taylor, states in the letter referred to in the former opinion

of the board, that she was taken '*off the castle*,' a phrase which implies that she was in its immediate vicinity.

"Without further extending this opinion, or enlarging upon other topics presented in the arguments of counsel, the board is constrained to adhere to the decision already made in the case of the *Susan*, and to decide that the claim set forth in the memorial of J. W. Zacharie for injuries to the schooner *Scott* and cargo is not valid."

Opinion of Messrs. Evans, Smith, and Paine, February 14, 1851, act of Congress of March 3, 1849.

Case of the "Julius Cæsar."

"Several claims growing out of the capture of the schooner *Julius Cæsar* were presented to the joint commission under the convention of 11th April 1839, in regard to which a difference of opinion existed between the American and Mexican members of that board, and they were referred to the umpire and by him returned without a decision thereon. These claims are now presented to this board, and the following facts are, in its opinion, established by the documents and proofs which were submitted to the umpire.

"The schooner *Julius Cæsar*, owned by citizens of the United States, laden with merchandise also belonging to citizens of the United States, having been regularly cleared from the port of New Orleans, sailed on the 12th day of April 1837, with several passengers on board, bound to Brazoria, Texas. When about four days out, off the mouth of the Sabine River, distant about seven miles, she was captured by the Mexican brig of war, *General Urrea*, the crew and passengers, with few exceptions, were taken on board the Mexican ship and confined in irons, a prize crew was put on board the schooner, and both vessels made sail for Matamoras, where they arrived. The passengers and crew of the schooner were taken to prison, where they were confined for about one month, were treated with great cruelty and indignity, and plundered of most of their personal effects. The vessel was condemned, together with her cargo, upon pretense of having violated a municipal law of Mexico, and was disposed of for the benefit of the captors.

"The Mexican commissioners at first attempted to justify the capture of the vessel, and also that of the schooners *Louisiana* and *Champion*, which took place about the same time, upon the ground that they were at the time violating a blockade declared by Mexico of the coast and ports of Texas.

This was not the reason, however, assigned for the capture at the time, nor upon which the condemnation took place, and was manifestly untenable for several causes. 1st. The pretended blockade had not been declared and made public a sufficient length of time to furnish a presumption that the captured vessels could have had notice of it. 2nd. It was not enforced by a sufficient blockading squadron to cause it to be respected. 3rd. The vessels were not warned off, as they should have been, before their capture could be justified. 4th. They were captured on the high seas before they reached the degree of longitude which was the eastern limit of the blockaded territory.

"It is quite unnecessary to go into any further detail of the circumstances of the capture of these vessels to show its illegality, inasmuch as it appears that the Government of Mexico has itself admitted it. In a dispatch from Mr. Forsyth, Secretary of State, to Mr. Martinez, the Mexican minister to this government, dated November 27, 1837, it is said: 'He [Mr. F.] would remark, however, that as the illegality of the capture of the *Julius Cæsar*, *Champion*, and *Louisiana*, for which indemnification was claimed in the note of the undersigned above referred to [note of May 27, 1837] *has since been admitted*, the papers sent herewith are intended to show the extent of the losses sustained.' It does not appear that the fact thus asserted by Mr. Forsyth was ever denied by the Mexican minister or his government, and it may therefore be safely taken as true that the capture of these vessels was a wrong inflicted upon the owners and others interested therein, for which Mexico is justly responsible. * * *

"In the opinion of this board the claims set forth in the memorials * * * are valid, and the board admits them accordingly."

Opinion of Messrs. Evans, Smith, and Paine, commissioners under the act of Congress of March 3, 1849.

Case of the "Champion."

"The schooner *Champion*, belonging to citizens of the United States, with a cargo of merchandise and several passengers on board, while in the prosecution of a voyage from New Orleans to the port of Matagorda, in Texas, was captured upon the high seas by a Mexican squadron under the command of Commodore Lopez, in latitude 27° 10′ N., and longitude 93° 27′ W., on the first day of April 1837. A prize crew was put on board, and under convoy of the Mexican brig of war, *General Urrea*,

she was taken to Matamoras. The crew and passengers were confined in prison and treated with great cruelty. The vessel, cargo, and personal effects of the passengers and crew on board were all, either by plunder or pretense of confiscation, appropriated to the captors. The circumstances of the case are precisely like those attending the capture of the schooner *Julius Cæsar*, and, for the reasons set forth in the opinion of the board in that case, the board is of opinion that the capture of the *Champion* was an illegal and unjustifiable act, for which the Government of Mexico is responsible."

Opinion of Messrs. Evans, Smith, and Paine, June 14, 1849, commissioners under the act of Congress of March 3, 1849.

Case of the "Louisiana."

"The schooner *Louisiana*, in the prosecution of a lawful voyage from New Orleans to ———, was captured on the 4th April 1837 by a Mexican vessel of war and ordered to Matamoras. She was laden with a cargo of tobacco, flour, and other provisions, designed for sale in Texas. Before reaching the port to which she was ordered by the captors she was retaken by the United States sloop of war *Natchez* and sent back to New Orleans. While in the possession of the Mexican captors some portions of the flour and provisions on board were taken and consumed by them, and in consequence of their unskillfulness as seamen, or from the want of proper attention, the schooner leaked badly and sixty-three bales of tobacco were so injured as to be wholly worthless. * * * For the reasons set forth in the opinions of this board in the cases of the *Julius Cæsar* and the *Champion*, and from the admission by Mexico referred to in those opinions that this capture was also illegal and unwarranted, this board is of opinion and does decide that the claim for losses and injuries sustained by * * * the capture of the schooner *Louisiana* is valid and allows the same accordingly."

Opinion of Messrs. Evans, Smith, and Paine, commissioners, June 15, 1849, under the act of Congress of March 3, 1849.

Case of the "Essex."

A kind of sequel to the foregoing claims on account of the seizure of the *Champion*, *Louisiana*, and *Julius Cæsar*, was the claim of Thomas B. Cotterell, owner and master of the American schooner *Essex*. This vessel was at Brazos, the port of Matamoras, in April 1837, partially laden with a cargo for Boston,

when the *General Urrea* was captured by the United States sloop of war *Natchez* because of the former's seizure of the vessels above mentioned. In the excitement growing out of the capture of the Mexican man-of-war, the American vessels then at Brazos were prohibited from departing, by order of General Bravo, then military commander of that department. Captain Cotterell alleges that the *Essex* was detained thirteen days, when, in consequence of the low stage of water upon the bar, it was difficult to cross, so that in crossing she struck heavily several times, receiving considerable injury. He claimed for demurrage, for the injury to the hull and sails of the vessel, and for other expenses incurred. It seems that the vessel, though left in the possession of the master and crew, was forcibly stripped of her sails with a view to prevent her departure. In regard to this claim, the commissioners under the act of 1849 said:

"The circumstances attending the capture of the *General Urrea* and the occasion which led to it are matters of public notoriety, and are proved in several cases pending before the board. It led to discussions between the two governments, which led to the restoration of the vessel to Mexico, although its capture was justified by the United States Government, and to a distinct admission by Mexico that the first aggression had been committed by the *General Urrea* by the capture of three American vessels, the *Champion*, the *Louisiana*, and the *Julius Cæsar*, without cause. The board is therefore of opinion that under all the circumstances the Mexican authorities had no just occasion to detain the American vessels then in port by reason of the capture of the *Gen. Urrea*."

Case of the "Hiawatha."

"The bark *Hiawatha;* Miller & Mosman, No. 398, and Ezekiel McLeod, assignee, No. 399, claimants for the vessel; Watkins & Leigh, No. 400; Dalgetty, Du Croz & Co., No. 401; William T. Marshall, No. 402, and the executors of Charles McEwen, No. 452, claimants for cargo.

"The *Hiawatha* was captured by the United States blockading fleet, in Hampton Roads, at the mouth of the James River, on the 20th May 1861, in attempting to pass through the blockading fleet on an outward voyage from Richmond, Va., for Liverpool. She was taken into the port of New York, and vessel and cargo there libelled in the United States district court, and condemned. (See report of the case in that court, Blatchford's Prize Cases, p. 1.) On appeal, first to the circuit

court and thence to the Supreme Court, the decree of the district court was affirmed, the opinion of the Supreme Court being delivered by Mr. Justice Grier, and a dissenting opinion being read by Mr. Justice Nelson, in which Chief Justice Taney and Justices Catron and Clifford concurred. (See report in the Supreme Court under title of 'The Prize Cases,' 2 Black, 635 to 699.)

"This was one of the first vessels captured during the war, and one of the first upon the validity of whose capture adjudications were had in the prize courts of both original and appellate jurisdiction. In the Supreme Court, where the case was argued in connection with those of several other vessels captured about the same time, and involving to some extent the same general principles, the question of the validity of the blockade established under the President's proclamations of 19th and 27th April 1861 (12 Stats. at L. 1258, 1259), and that of the liability of the property of persons domiciled within the insurrectionary States to capture on the high seas as enemy's property, were elaborately argued. The majority of the court sustained the validity of the blockade and the right of capture of property of citizens of the insurrectionary States upon the high seas as enemy's property. The minority of the court held 'that no civil war existed between the United States and the States in insurrection till recognized by the act of Congress of 13th July 1861 (12 Stats. at L. 255); that the President of the United States does not possess the power under the Constitution to declare war or recognize its existence within the meaning of the law of nations, which carries with it belligerent rights, and thus change the country and all its citizens from a state of peace to a state of war; that this power belongs exclusively to the Congress of the United States, and, consequently, that the President had no power to set on foot a blockade under the law of nations; and that the capture of the vessel and cargo in this case and in all cases before us in which the capture occurred before the 13th July 1861, for breach of blockade or as enemy's property, are illegal and void, and that the decrees of condemnation should be reversed, and the vessel and cargo restored.' (2 Black, 698, 699.)

"The case of the *Hiawatha* was this: She sailed from Liverpool on the 11th February 1861, with a cargo of salt for Richmond, Va.; thence to take cargo back to Liverpool. She passed Hampton Roads, at the mouth of the James River, on

the 23d April and arrived at City Point, the port of Richmond, a few miles below that city on the James River, on the 29th April. She completed the discharge of her outward cargo on the 10th May; immediately commenced lading with her return cargo, consisting principally of tobacco, and completed this lading on the 14th or 15th May. On the 16th she weighed anchor and attempted to go to sea without pilot or steam tug, but was prevented by head winds. On the 17th a tug attempted to take her out of harbor, but was prevented by the breaking of the towline. On the 18th she was taken in tow by another steamer and towed down the river to within about twenty miles of Hampton Roads. From this point she floated down with the tide toward the Roads, and on the 20th was boarded by an officer from a United States blockading vessel, who endorsed upon her register this notice:

"'This vessel (the *Hiawatha*) has been boarded by the United States blockading squadron, and warned not to enter any port in Virginia or south of it.

"'S. H. BROWN,
"'*Blockading Officer, United States Steamer Star.*
"'MAY 20, 1861.'

"On the same day, and while still floating with the tide in Hampton Roads, she was seized by the United States war steamer *Minnesota*, and thereafter taken into port and libelled, as above recited.

"President Lincoln's proclamation establishing a blockade of the ports of Virginia was issued 27th April 1861 (12 Stats. at L. 1259). Under that proclamation the blockade of the ports of Virginia upon the Chesapeake Bay and the James River was actually established by Commodore Pendergrast, and a proclamation made of same on the 30th April. On the 8th May Lord Lyons communicated to Mr. Seward a letter from the British consul at Richmond, dated 5th May, in which the consul had said to Lord Lyons:

"'There are parties here about to load the British ship *Hiawatha* at City Point for Liverpool, under the impression that she will be allowed free egress by the blockading squadron. I have told persons who are here representing the owners of the ship that I see no difficulty to the ship leaving in ballast; but to this they will not consent, as the ship came here expressly from Liverpool at a nominal freight to load a remunerative cargo back.'

"Lord Lyons stated to Mr. Seward the hardship of the case

of the *Hiawatha*, in case she should be compelled to return home in ballast in consequence of the blockade, of which, of course, her owners could have had no knowledge when they sent her out, and submitted the case for the consideration of the Government of the United States, requesting an early answer.

"Mr. Seward answered on the 9th May, enclosing a letter from the Secretary of the Navy, in which he said:

"'Fifteen days have been specified as a limit for neutrals to leave the ports, after actual blockade has commenced, with or without cargo, and there are yet remaining five or six days for neutrals to leave. With proper diligence on the part of persons interested I see no reason for exemption to any.'

"Lord Lyons again wrote Mr. Seward on the 9th May, acknowledging the receipt of Mr. Seward's letter and saying:

"'In order to avoid all possible mistake with regard to the *Hiawatha*, as well as to future cases of the same kind, I venture to request you to inform me whether I am right in concluding, from the statement just quoted, that the date of the shipment of the cargo is immaterial, and that vessels leaving the ports before the expiration of the fifteen days will be allowed to proceed with their cargoes, whether such cargoes were shipped before or after the actual beginning of the effective blockade.'

"This letter was answered by Mr. Seward on May 11, enclosing another letter from the Secretary of the Navy as follows:

"'In answer to Lord Lyons's letter of the 9th instant, I have the honor to inform you that neutral vessels will be allowed fifteen days to leave port after the actual establishment of the blockade, whether such vessels are with or without cargoes.'

"Lord Lyons responded to Mr. Seward on May 11, thanking him for his prompt information, reciting the correspondence, and saying:

"'I have consequently instructed Her Majesty's consuls to advise masters of British vessels that they are at liberty to take cargo on board as well after as before the commencement of the blockade, and that they will be allowed fifteen days to go to sea, whether with or without cargoes, and whether their cargoes be shipped before or after the actual commencement of the effective blockade.'

"On the same day Lord Lyons sent to the British consuls at Richmond and other ports a circular, as follows:

"'Neutral vessels will be allowed fifteen days to leave port after the actual commencement of the blockade, whether such vessels are with or without cargoes, and whether the cargoes

were shipped before or after the commencement of the blockade.'

"He also sent on the same day a dispatch to Rear-Admiral Sir A. Milne, of Her Majesty's navy, enclosing, with other documents, copies of the proclamation of the President of April 27, of the notice of blockade by Commodore Pendergrast of April 30, and saying:

"'The general result of inquiries made by me or other foreign ministers here as to the manner in which the blockade will be conducted appears to be—

"'1. That the date of the commencement of the blockade in each locality will be fixed by the issue of a notice by the commanding officer of the squadron appointed to blockade it. It does not, however, appear to be intended that such notice shall be officially communicated to the governments of neutral nations or to their representatives in this country.

"'2. That fifteen days from the beginning of the effective blockade will be allowed in every case for neutral vessels already in port to put to sea.

"'That until the fifteen days have expired, neutral vessels will be allowed to come out with or without cargoes, and whether their cargoes were shipped before or after the actual commencement of the blockade.

"'4. That, except in the last-mentioned particular, the ordinary rules of blockade will be strictly enforced.

"'5. The armed vessels of the neutral states will have the right to enter and depart from the blockaded ports.

"'I continue to be of opinion that, provided the blockade be effective and be carried on in conformity with the law of nations, we have no other course, in the absence of positive instructions from Her Majesty's government, than to recognize it.'

"In the decision of the cause in the district court, Judge Betts expressed the opinion that the correspondence between Mr. Seward and Lord Lyons did not constitute any relaxation of the general rule limiting the right of departure of neutral vessels from a blockaded port to such cargo as had been laden before receiving notice of the blockade; so that, if the *Hiawatha* had departed within the fifteen days allowed for departure after the establishment of the blockade, she would not have been entitled to take out the cargo laden after knowledge of the blockade (Blatchford's Prize Cases, p. 20). The Supreme Court, however, distinctly overruled Judge Betts upon this point, saying:

"'After a careful examination of the correspondence of the State and Navy Departments, found in the record, we are not

satisfied that the British minister erred in the construction he put upon it, which was that a license was given to all vessels in the blockaded ports to depart with their cargoes within fifteen days after the blockade was established, whether the cargoes were taken on board before or after the notice of the blockade. All reasonable doubts should be resolved in favor of the claimants. Any other course would be inconsistent with the right administration of the law and the character of a just government.'

"The British consul at Richmond gave to the master of the *Hiawatha*, on the 15th May, a certificate stating that, according to the best information attainable by him, the effective blockade at the mouth of the James River began on the 2d May. After the capture of the vessel correspondence ensued between Lord Lyons and Mr. Seward, in which Lord Lyons earnestly recommended the case of the *Hiawatha* to the favorable consideration of the United States Government, saying that it appeared 'that the master of this vessel was innocent of any intention to break the blockade, and that his not having passed the blockading squadron earlier was due to erroneous information or unavoidable detentions.' He also called attention to the cases of the *Haxall* and the *Octavia*, and expressed the hope that the Government of the United States would be disposed to extend to the *Hiawatha* the same favor which had been shown to those vessels.

"In another letter to Mr. Seward, Lord Lyons said:

"'I do not, of course, consider myself competent to make any comments upon the decision of Judge Betts on questions of law; nor do I ground my present application upon legal considerations at all. My desire is, in conformity with the learned judge's own suggestion, to obtain relief for the owners of the *Hiawatha* by an appeal to the equity and indulgence of the Government of the United States.'

"And again:

"'That, by giving relief to the memorialists, the United States Government would evince a spirit of comity and generosity which would be highly appreciated by the government of Her Majesty.'

"In the cases of the *Tropic Wind*, the *Haxall*, and the *Octavia*, those were vessels captured about the same time with the *Hiawatha*, and under similar circumstances had been released by order of the government, on the application of parties interested or their respective governments, the *Tropic Wind*

after judgment of condemnation, and the *Haxall* and *Octavia* before judgment.

"In cases No. 400 and 401, the memorials failed to show the respective claimants the owners of the portions of the cargo claimed by them, but showed those portions, respectively, to be the property of one David Dunlop, a resident of Petersburg, Virginia, who was shipping them to the claimants in performance of executory contracts between him and the respective claimants for that purpose.

"In the case of Wm. T. Marshall, No. 402, the memorial showed that the claimant was, at the time of the capture, domiciled in Richmond, Virginia.

"Demurrers were interposed in those cases, specifying these respective grounds.

"In the case of McEwen's executors, No. 452, the proofs showed the testator domiciled at Richmond down to about the time of the capture; but about that time, the proofs failing to show whether shortly before or shortly after, he returned to the domicil of his nativity in Great Britain, where he ever after remained until his death.

Arguments for the Claimants.

"On the part of the claimants it was contended that, irrespective of the strict rule of prize law applicable to the case of the *Hiawatha*, the case was one where in 'justice and equity' the claimants were entitled to indemnity, being without intentional fault, and, morally, at least, innocent of any intention to violate the blockade, or do any illegal or prohibited act; that the master of the vessel had used the utmost diligence in lading his vessel within the time which he was informed he was entitled to consume in lading it, and had been prevented from reaching Hampton Roads within the time limited by causes beyond his control; that he ought not to be made to suffer for the accidents that had deprived him of the services of a pilot and the aid of steam, nor for the winds that retarded the progress of his ship at sea, nor by reason of the master's failure, in the emergency of an unexpected war, to understand the exact legal significance of proclamations of the President, and the legal consequences of blockade; that at the time of the capture no war existed between the United States and the Confederate States by virtue of which the blockade of the Confederate ports could be lawfully established; that no such war could be taken as existing until recognized by the act of

Congress of 13th July 1861; that, consequently, the President had no power to set on foot a blockade of the ports in question under the law of nations prior to the 13th July 1861; that the capture of the *Hiawatha* and her cargo, whether for breach of blockade or as enemy's property, was illegal and void, and that by the terms of the President's proclamation the vessel was entitled to a warning indorsed on her papers by an officer of the blockading force, and was not liable to capture except for an attempt to leave port after such warning.

"As part of his argument, the counsel for the claimant cited and adopted the dissenting opinion of Mr. Justice Nelson in 'The Prize Cases' (2 Black, 682). He cited also the case of the *Neptunus*, 3 Rob. 110, 173, and *Medeiros* v. *Hill*, 8 Bing. 231.

Argument for the United States.

"On the part of the United States it was contended that, as a matter of fact, war actually existed between the United States and the Confederate States at and from the dates of the respective proclamations of blockade by the President on the 19th and 27th April 1861, Virginia having seceded by ordinance of her convention on the 20th April, and having actually and formally joined the Confederate States on the 27th April. That, war thus existing, the establishment of a blockade was within the constitutional powers of the President as the Chief Executive Officer of the United States and Commander in Chief of the Army and Navy. That certainly as to foreign nations his acts were to be regarded fully and completely as the acts of the United States, and the establishment of a blockade by him was its establishment by the nation. That the validity of the blockade so established by him was unquestioned by the Congress which met after the issuing of the proclamation and while it was in the course of enforcement, and that it was expressly legalized by the statute of 6th August 1861, which legalized and made valid the President's acts, proclamations, and orders after the 4th March 1861 'respecting the Army and Navy of the United States * * * with the same effect as if they had been issued and done under the previous express authority and direction of the Congress of the United States.' (12 Stats. at L. 326.) That the validity of this blockade had been fully recognized by the British Government as well as all other foreign powers as effectual and valid; citing the correspondence of Lord Lyons, above recited, and Prof. Bernard's

'Neutrality,' etc., p. 231*n*. That the proclamation of the President did not modify or assume to modify the law of blockade as held by the rules of international law, and that it was only in case of a vessel innocently approaching the blockaded port without notice that she was entitled to be duly warned off before becoming a subject of capture; citing on this point the *Columbia*, 1 Rob. 156; the *Vrow Judith*, *id.* 152; the *Betsey*, *id.* 332; the *Adelaide*, 2 *id.* 111; the *Calypso*, *id.* 298; the *Tutela*, 6 *id.* 181; 3 Phillimore, 394; Prof. Bernard's Neutrality, p. 236. That the misapprehension of legal rights by the master of the *Hiawatha* could not be taken into account as excusing his action in attempting to pass out through the blockade after the expiration of the time allowed him by the rules of international law and by the specific notice contained in the diplomatic correspondence above recited for that purpose, and that the accidents by which the claimants attempted to excuse the failure of the *Hiawatha* to leave within the permitted time could not be held to make her departure lawful or exempt her from capture.

"As to the argument of the claimant's counsel in favor of the rights of the claimant before this commission, under general principles of justice and equity outside of and beyond the principles of international law as held by the prize courts, the counsel for the United States held the same general line of argument as above reported under the case of the *Sir William Peel*, No. 243, and insisted that the fact of the Government of the United States having remitted its lawful claims for its own reasons in the cases of the *Tropic Wind*, the *Octavia*, and the *Haxall*, certainly could not be taken as any reason for enforcing as matter of right the same generosity in the case of the *Hiawatha*.

Decision of the Commission.

"The commission unanimously disallowed the claims of Watkins & Leigh, No. 400, and of Dalgetty, Du Croz & Co., No. 401, on the ground that the ownership of the portions of the cargo claimed by them, respectively, did not appear to be in them, but in a citizen of the United States. They also unanimously disallowed the claim of Wm. T. Marshall, No. 402, it appearing that he was permanently domiciled in the city of Richmond within the enemy's country.

"It makes awards in favor of the claimants for the vessel in Nos. 398 and 399, amounting to $25,369, and an award in

favor of the executors of McEwen, No. 452, in respect of McEwen's portion of the cargo, for $6,090, Mr. Commissioner Frazer dissenting from these three awards."

American and British Claims Commission, Article XII. of the treaty of May 8, 1871, Hale's Report, 130. See also Howard's Report, 91.

Case of the "Circassian."

"The steamship *Circassian;* Henry James Barker, mortgagee, No. 432, claimant for vessel; Overend, Gurney & Co., mortgagees, claimants for freight; The Royal Exchange Assurance Corporation and others, No. 444, claimants for cargo.

"The *Circassian* was owned by Zachariah C. Peason, of Hull, who had given mortgages to the amount of £25,000 upon the vessel, which mortgages were held by the claimant, Barker, No. 432. He had also assigned her outward freight to Messrs. Overend, Gurney & Co., No. 433, by way of security for indebtedness. The vessel sailed from Bordeaux, France, on the 7th April 1862, under the charter party hereinafter recited. She was captured by a United States cruiser on the 4th May 1862 on the high seas, off the coast of Cuba, taken into the port of Key West, and there libeled and condemned as prize. An appeal was taken to the Supreme Court, which court affirmed the decree of condemnation, Mr. Justice Nelson dissenting. The case is reported, with the dissenting opinion of Mr. Justice Nelson, in 2 Wallace 135 to 160.

"The vessel was chartered by the owners 11th February 1862 to 'J. Soubry, agent to the merchants of Paris,' being then on her way from London to Cardiff, to proceed thence with all convenient speed to Havre or Bordeaux, there to load; 'and being so loaded, shall therewith proceed to Havana, Nassau, or Bermuda, as ordered on sailing, and thence proceed to a port of America, and to run the blockade, if so ordered by freighters,' the owners agreeing 'not to cover more than half her value, say £20,000, by insurance against war risk.' The rate of freight agreed upon was $40 per ton, with 10 per cent primage. The vessel was loaded at Bordeaux, shipping receipts being given by the master in the following tenor (after specifying the merchandise shipped):

"'Which said merchandise I promise to convey in my said steamer (the dangers of the seas, machinery, and all other unavoidable accidents excepted) to the said port of Havana, there to receive orders for the final destination of my said steamer,

and there to deliver the same to Messrs. Brulatour & Co., or their order (or to order generally), he or they paying me freight in accordance with the terms of my charter-party, which is to be considered the supreme law as regards the voyage of said steamer, the orders to be received for her and her final destination.' A 'memorandum of affreightment,' given to Mr. Bouvet, one of the shippers, was found among the papers of the vessel, the translation of which is as follows:

"'*Memorandum of affreightment.*

"'Taken on freight of Mr. Bouvet, jeune, by order and for account of Mr. J. Soubry on board of the British steamer *Circassian*, Captain Hunter, bound to Nassau, Bermuda or Havana, the quantity of fifty or sixty-five tons, heavy or light, at the rate of $40 per ton for the heavy and the light, besides 10 per cent average and primage.

"'The merchandise must be put on board, including all delay, the day after notice, given by the broker having in charge the loading, under the penalty of all damages and the loss of the place on board, without recourse to judicial measures to prove the suit for non-execution of the present engagement.

"'Mr. J. Soubry engages to execute the charter-party of affreightment, that is to say, that the merchandise shall not be disembarked but at the port of New Orleans, and to this effect he engages to force the blockade, for account and with authority of J. Soubry.

"'LAIBERT, *Neveu.*

"'BORDEAUX, *the 15th February 1862.*

"'Sent a similar memorandum to the parties concerned.

"'P. DESBORDES.'

"Other papers were destroyed by the master of the *Circassian* after she had been stopped, and before she was boarded by the captors. The vessel was captured, as above stated, on the 4th May 1862. Five days previous to the capture—on the 29th April 1862—the city of New Orleans was captured by the navy and army of the United States, under Admiral Farragut and General Butler, and thenceforward continued in the possession of the United States to the termination of the war. A proclamation was issued by General Butler, dated 1st May, printed by some Federal soldiers in a printing office seized for that purpose, on the 2d May, and first generally published in the newspapers of the city on the 6th May; which proclamation declared, among other things, that 'the city of New Orleans and its environs, with all its interior and exterior defenses,

having been surrendered to the combined naval and land forces of the United States; and having been evacuated by the rebel forces, in whose occupation they lately were; and being now in occupation of the forces of the United States, who have to restore order, maintain public tranquillity, and enforce peace and quiet under the laws and Constitution of the United States, the major-general hereby makes known and proclaims the objects and purpose of the Government of the United States in thus taking possession of the city of New Orleans and the State of Louisiana. * * * All rights of property of whatever kind will be held inviolate, subject only to the laws of the United States,' etc. This proclamation also declared the city under martial law.

"In the case of the *Venice* (2 Wall. 276) the Supreme Court of the United States held that the military occupation of the city was to be considered as substantially complete from the date of this publication in the newspapers (6th May).

"On the 12th May President Lincoln issued a proclamation reciting the blockade, up to that time, of the port of New Orleans, with two other ports, and that the blockade of those ports 'may now be safely relaxed with advantage to the interests of commerce,' and declaring that the blockade of those ports 'shall so far cease and determine from and after the 1st day of June next; that commercial intercourse with those ports, except as to persons, things, and information contraband of war, may from that time be carried on, subject to the laws of the United States," etc. (12 Stats. at L. 1263, 1264.)

"Barker, as mortgagee of the vessel (No. 432), claimed £23,200, besides interest. Overend, Gurney & Co., assignees of the outward freight (No. 433), claimed £10,000, besides interest. The insurance companies and underwriters (No. 444) claimed £52,636, besides interest, the value of the cargo insured by them, abandoned by the owners, and paid for as for a total loss. Of the cargo thus insured, portions to the value of £11,503 were alleged to have been owned by British subjects and insured by the claimants, British underwriters. The remainder of the cargo, valued at £41,133, was admitted to have been owned by French merchants residing at Bordeaux, though insured by British underwriters. On the sale under the decree of condemnation the gross proceeds of the vessel were $107,000, United States currency; the gross proceeds of the cargo were $243,479.49 in the same currency.

Argument for the Claimants.

"On the part of the claimants it was maintained—

"1. That the immediate destination of the *Circassian* at the time of her capture was Havana, a neutral port; that this destination was a real one; and that the question whether her voyage was to extend beyond Havana was an open question, not to be decided until her arrival there; so that her capture before reaching Havana could not be considered a capture in the course of a voyage to a blockaded port; that until her arrival at Havana and departure thence for a blockaded port a *locus penitentiæ* existed, even if the original design had been that she should proceed from Havana to New Orleans.

"2. That notwithstanding the doctrines held by the prize courts of England and the United States, the more approved modern authorities overrule the doctrine of the *droit de prevention* and *droit de suite;* 'that is to say, the right of considering as guilty of a violation of the blockade every neutral vessel which has sailed for a place declared blockaded after knowledge of the notification, and of regarding in *flagrante delicto*, during the whole return voyage to its port of destination, every vessel which has left a blockaded port;' and hold as the better doctrine that 'the guilty vessel can only be seized, first, at the moment of violating the blockade by crossing the part of the sea which has been conquered by the blockading squadron; second, in the road or blockaded port, if the investing force can enter there, either by taking the port or by penetrating there by force or stratagem and carrying off the vessel; and, third, at the moment of attempting to go out—that is to say, when crossing the territory of a nation whose law it has violated, even although the departure in itself shall be innocent.' That under this doctrine the capture of the *Circassian* was unlawful on the high seas, even if her direct destination was a blockaded port.

"3. That by the terms of the President's proclamation of blockade, as well as by the rules of international law, the *Circassian* could not be lawfully captured until she had received due notice of the blockade by warning entered upon her register.

"4. That by the capture of New Orleans and the reduction of that city to the possession and control of the United States

before the capture of the *Circassian*, the blockade of that port had ceased; that the right of blockade being a purely belligerent right, and in respect of an enemy's port, of necessity terminates *eo instanti* on the capture of the blockaded port itself by the blockading belligerent; that in the case of New Orleans, not only was the fact of its capture in the month of April, and its permanent and complete occupancy and control by the United States from that time forward fully attested as a matter of history, but such possession and occupation was officially asserted and proclaimed by the proclamation of General Butler on the 1st May 1862; that this proclamation speaks from its date, and not from the time of its alleged general publication in the newspapers, erroneously assumed by the Supreme Court to have been on the 6th May, it in fact having been published in the *New Orleans Daily Picayune* on the 4th May 1862, as appeared by a copy of that paper produced before the commission; that the right to close or control the captured port by municipal regulation under the statute of 13th July 1861 (12 Stats. at L. 256, 257) was not only entirely distinct from but inconsistent with the belligerent right of blockade, and that the former right accrued when the latter terminated, upon the capture and complete possession of the city, and that, under the municipal regulations instituted, or to be instituted, in such case, plainly no capture could be made on the high seas, those municipal regulations not operating extraterritorially; that the blockade having thus terminated by the capture of New Orleans, the right of capture of the *Circassian*, if it had existed until then, necessarily terminated with the termination of the blockade, the vessel no longer being *in delicto*. That in regard to the claims of the insurance companies and underwriters in No. 444, those claims were the legitimate subject of reclamation before this commission, as well in respect of those portions of the insured cargo originally owned by French merchants as of those owned by British subjects; that upon abandonment and payment the title of the underwriters became absolute to all interest of the insured in the property, and to all right of reclamation in respect of the same, and that such title related back to the date of the insurance.

"The counsel for the claimants presented manuscript opinions of Doctors Phillimore and Lushington, and other counsel,

holding the capture of the *Circassian* illegal on account of the lack of previous warning as well as upon the ground of the previous capture and occupation of New Orleans. They also presented the dissenting opinion of Mr. Justice Nelson, in the case of the *Circassian* (2 Wall. 155), as a correct exposition of the law applicable to the case, and cited the following authorities: The Prize Cases (2 Black, 635); the *Amy Warwick* (2 Sprague, 123); the *Venice* (2 Wall. 259); Thirty Hogsheads of Sugar *v.* Boyle (9 Cranch, 191); The United States *v.* Rice (4 Wheat. 246); Fleming *v.* Page (9 How. 603); Cross *v.* Harrison (16 How. 164); The *Abby* (5 Rob. 253); The *Trende Soztre* (6 Rob. 390 *n*); The *Francisco* (10 Moore's P. C. R. 37); *Palli, Principes de droit pub. mer.* 180; Dana's Wheat. 687 *n;* The *Lizette* (6 Rob. 395); The *Empress* (Blatch. P. C. 659); Dean's Law of Blockade 2, 32; Lawrence's Wheaton, pp. 30, 100, 459, 510, 777 to 779, 810, 845, 848 to 850, 970; Wheaton's Life of Pinkney, 199 to 228; The *Dickinson* (1 H. and M. 31); *La Jeune Eugenie* (2 Mason, 409, 463; The *Louis* (2 Dods. 110); The *Antelope* (10 Wheat. 122); The *Marianna Flora* (11 Wheat. 442); Lawrence's Visitation and Search, 73, 79; Hudson *v.* Guestier (6 Cranch, 281); Race *v.* Himely (4 Cranch, 272); 2 Phill. 237; American State Papers, vol. 4, pp. 156, 158; The *Arthur* (1 Dods. 425); Hautefeuille, vol. 2, pp. 239, 244; Vos *v.* United States Insurance Company (1 Caines's Cases in Error, XXIV); Vandenheuvel *v.* Same (2 *id.* 217); Liotard *v.* Graves (3 Caines's Rep's, 239); Fitzsimmons *v.* The Newport Insurance Company (4 Cranch, 185); Hill *v.* United States (C. Cls. R.); The *Maria* (5 Rob. 365); The Maryland Insurance Company *v.* Wood (6 Cranch, 29); The *Admiral* (3 Wall. 614); Attorney-General's Opinions, vol. 1, p. 505; The *Frederick Molke* (1 Rob. 87); The *Rolla* (6 *id.* 372); The *Success* (1 Dods. 134); La Peyre *v.* United States, in U. S. Sup. Ct. MS. opin. not yet reported; Bynkershoek *de rebus bellicis*, c. XVI; The *Grey-Jacket* (5 Wall. 342); S. C. on motion (*id.* 370); Tudor's Leading Cases on Mercantile and Maritime Law, 887; Texas *v.* White (7 Wall. 789); Comegys *v.* Vasse (1 Peters, 210); Shepherd *v.* Taylor (5 *id.* 712); Trevol *v.* Bache (14 *id.* 95); Gill *v.* Oliver's Executors (11 How. 529); Jaudon *v.* Corcoran (17 *id.* 612); Gracie *v.* New York Insurance Company (8 Johnson's R. 237); Watson *v.* Insurance Company of North America (1 Binney, 47); Carlisle *v.* United States, in Sup. Ct. not yet reported.

Argument for the United States.

"On the part of the United States it was contended that the voyage of the *Circassian* was plainly undertaken with the purpose and intent of violating the blockade; that she was under express contract with her freighters to violate it, and was in the actual prosecution of the voyage with that purpose and destination when captured, and was thereby liable to capture and condemnation. (The *Columbia*, 1 Rob. 156.) That having full knowledge of the existence of the blockade, and having expressly undertaken its violation, no further notice or warning was necessary to justify her capture.

"That New Orleans, which had been fully and completely an enemy's city, and one of the enemy's chief marts from the outbreak of the rebellion in 1861 to its occupation by the Army and Navy of the United States on the 29th April, 1862—five days before the capture of the *Circassian*—had not been reduced to the fixed, stable, and assured possession of the United States at the time of that capture. That the mere *possessio pedis* of the city by the United States did not work the instant termination of the blockade, but that reasonable time after the actual possession must be allowed to determine whether the occupation was such a stable and permanent one as to justify the opening of the port as a port of the United States. That until such occupation was so established, New Orleans still remained an enemy's city as regarded the rights of neutrals to trade there.

"That time must be given after the actual occupation, reasonably sufficient to put in force the municipal regulations of the United States, with the apparatus of custom-houses and courts, through which such municipal regulations were to be enforced; and that until sufficient time had elapsed for that purpose, the belligerent right of blockade continued; that the blockade of New Orleans was not a blockade 'by the simple fact only,' but 'by a notification accompanied with the fact;' and such blockade continued within reasonable limitation till ended by like public notification. (The *Neptune*, 1 Rob. 170.)

"That the time fixed by the Supreme Court in the case of the *Venice* (2 Wall. 259) as the date of the assured possession by the United States, as determining the national character of the inhabitants of that city (6th May, 1862), was certainly the earliest date which could properly be assigned as that of assured possession by the United States for any purpose.

"That, in fact, the time necessary to establish the permanence and stability of possession, by the capturing belligerent, should fairly and properly be left, within reasonable limits, to his own determination, and that the date of 1st June, 1862, fixed by the President of the United States, by his proclamation of 12th May (12 Stat. at L. 1263, 1264), for the termination of the blockade, was within reasonable limits under the rules of international law; and that that date (1st June) should be considered the lawful and proper termination of the blockade.

"That, at the date of the capture of the *Circassian*, the city of New Orleans, though in the actual occupancy of the United States forces, had neither capitulated nor surrendered, but was still an enemy's city, deserted for the time by its garrison, but held only by an insignificant force, and what its chief civic officer, still avowing the adherence of the city to the Confederate cause, called 'the power of brutal force, not by choice or consent of its inhabitants.' (See letter of the mayor of New Orleans to Flag Officer Farragut, 4 Reb. Rec., doc. 523, 524; also, 2d Wallace, 141 *n;* and Parton's Butler in New Orleans, 282, 342.) That the military occupation of the city of New Orleans by the United States could not be extended by construction beyond the lines of actual military occupation, and that the city of New Orleans was not conterminous with the port of New Orleans as established by the statutes of the United States (9 Stat. at L. 458); but that the port which had been blockaded embraced territory outside the city, and not within the lines of actual military occupation. That such occupation of a portion only of the port could not be deemed, of itself, a termination of the blockade of the port.

"That the collection district of which New Orleans was the sole port of entry, included the entire extent of the navigation of the Mississippi River and its tributaries, covering thousands of miles of navigation, and large cities situated upon that river and tributaries (2 Stat. at L. 252; 4 *id.* 480). That a large extent of the country included within this district, and many important ports and towns within it, were still in the undisturbed control and occupancy of the enemy. That the blockade of New Orleans was in effect the blockade of the Mississippi River, and that until the United States were in complete and assured possession of all the mouths of the river as well as the entire port of New Orleans, the imperfect and

perhaps transient occupation of the city of New Orleans was not to be taken as terminating the blockade.

"That so far as the *Circassian* herself and her officers were concerned, sailing with the direct purpose and destination of violating the blockade, and without knowledge or notice either to them or their captors of any change of occupation of New Orleans, such an accidental, technical, and artificial objection to the rightfulness of her capture should not be allowed to change the character of a capture otherwise lawful, and convert it into an unlawful capture, without strict and conclusive proof of the facts relied on so to change the character of the capture.

"That, as to the claim of the insurance companies (No. 444), they had no standing before the commission in respect of the larger part of the cargo insured by them, the same having been the property of French merchants, not subjects of Her Britannic Majesty. That, by the terms of the treaty, jurisdiction is given to the commission only of claims 'growing out of injuries to the persons and property of British subjects.'

"That the gist of the injury here complained of was the wrongful capture of the *Circassian* and her cargo, the subsequent condemnation and sale being merely incidents of the capture in the course of the adjudication by the tribunals of the United States, as to its lawfulness, merely for the purpose of determining whether the capture should be ultimately adopted as the act of the United States. That, when captured, this part of the cargo was not the property of the subjects of Her Britannic Majesty. That the abandonment by the insured to the insurers after capture, the acceptance of such abandonment by the insurers, and payment as for a total loss, simply operated as a transfer to the insurers of the rights of the assured in respect of the capture; and that the insurers stood merely as subrogated to the rights of the owners at the time of the capture, and as their equitable assignees. That such transfer by operation of law gave to the insurers as equitable assignees no better standing before the commission than they would have in case of a claim for any other injuries to the persons or property of individuals not subjects of Her Britannic Majesty, but who had assigned their claim against the United States for such injuries to a British subject. That so far, therefore, as the property of these 'French merchants' on board the *Circassian* was concerned, no right of reclamation against the United States under the treaty existed in the claimants.

Decision of the Commission.

"The commission (Mr. Commissioner Frazer dissenting) made awards in favor of all the claimants. To the claimants in No. 432 the sum of $71,428; in No. 433, the sum of $20,450, and in 444 the sum of $133,296. I am advised that these respective sums in Nos. 432 and 444 were taken by the commission as the actual proceeds of the sales of the vessel and cargo, respectively, reduced from United States currency at its value at the date of sale to a gold basis, and without the allowance of any interest. The award in No. 444 covered as well the proceeds of the cargo belonging to the French merchants as the portions owned by British subjects."

American and British Claims Commission, Article XII. of treaty of May 8, 1871, Hale's Report, 141. See also Howard's Report, 124.

Mr. Frazer's Dissenting Opinion.

The dissenting opinion of Mr. Frazer was as follows:

"The only lawful object of a blockade is to injure the enemy. Hence there can not, consistently with public law, be a blockade of a port unless it be an enemy's port.

"But I am not prepared to say that the mere occupancy of a port, however precarious and temporary, by the belligerent maintaining the blockade thereof, is such a possession as makes the port no longer the enemy's, but that of the blockading belligerent, thereby terminating the blockade. I know of no authority which goes to that extent. In such a case I think the question must be regarded as one of first impression, open to the just influence of every consideration which should affect the decision of a new question.

"But I do not think this question is necessarily involved in the decision of the cases growing out of the capture and condemnation of the *Circassian*, and therefore I do not discuss it.

"There has been much criticism of the judgment of the Supreme Court in the case of the *Circassian* (2 Wall. 135). That judgment has been questioned in quarters entitled to great respect; and it has, on such occasions, uniformly, I believe, been assumed that at the date of the capture of the vessel (May 4, 1862) the port of New Orleans was in the possession of the United States, a possession which subsequent events proved to be (whatever may have been apprehended at the time) permanent and uninterrupted. And it has been assumed that the Supreme Court held that under such circumstances the blockade of the port was not brought to an end. This is a grave misapprehension, not only of historical facts but of the doctrine announced by the Supreme Court; and yet so easy to fall into that only by care can it be avoided. It is undoubtedly a fact of history that for several days prior to the capture at sea of this ship the military forces of the United States had actual possession of the city of New Orleans, were not there immediately menaced by any hostile force, and ever after held it. It is so natural to confound the city with the port of New Orleans that the error is not wonderful. And yet the distinction is very wide, and practically very important.

"The city of New Orleans, of which the United States held possession, was a municipal corporation possessing geographical boundaries defined by the laws of the State of Louisiana. The boundaries included at the utmost only so much of that larger territory called the parish of Orleans as lies on the left bank of the Mississippi River. But the national government, having by the Constitution the control of commerce and consequently the power to define the geographical limits of the ports of the United States, had, by act of Congress taking effect September 16, 1850, declared 'that the port of New Orleans shall be, and is hereby, so extended as to embrace the whole parish of New Orleans on both sides of the Mississippi River.' (9 Stats. at L. 458.) It was not the city merely, but the whole port which had been blockaded. And the question before the Supreme Court was not whether the possession of a port by a blockading belligerent puts an end to the blockade. It is a disregard of the facts so to state it, and it is a misapprehension of the decision of the court to suppose that it was reached by determining that question in the negative. The real question was deemed by the majority of the court to be whether possession of the *city* by the United States terminated its blockade of the *port*. It needs only a careful reading of the opinion of the Chief Justice to see that he saw clearly the difference between the city and the port of New Orleans; and an examination of the dissenting opinion of Judge Nelson will also show that he entirely confounded the city with the port.

"Is it possible to misunderstand the following language found in the opinion of the Chief Justice?

"'It (the blockade) applied not to the city alone, but controlled the port which includes the whole parish of Orleans and lies on both sides of the Mississippi, and all the ports on that river and on the lakes east of the city. Now, it may be well enough conceded that a continuous and complete possession of the city *and the port* and of the approaches from the Gulf would make a blockade unnecessary, and would supersede it. But at the time of the capture of the *Circassian* there was *no such possession.* Only the *city* was occupied, *not the port.*'

"Nothing can be more certain than that the Chief Justice *thought* there was an important and very practical distinction between the city and the port of New Orleans with reference to the question of blockade. If not, then this language, marking so clearly the difference between the two things and dwelling upon the fact that though the city was occupied by the Federal forces a very large part of the port was not so occupied, was idle verbiage, injected into the opinion for no purpose, unless it may have been to increase its volume!

"I think the Chief Justice was correct in supposing that the difference between the city and the port was of practical importance in the case. A little consideration will make this quite apparent.

"No rebel military force, it is true, occupied that part of the port (the right bank of the river, many miles in length) which was not occupied by the United States on the 4th May, 1862; but it was, *de facto*, territory of the rebel belligerent, nevertheless. Trade there was trade with the enemy, to prevent which is the lawful purpose of blockade. It is not necessary to the lawful blockade of an enemy's port that the enemy should hold it by the presence of a military force. Suppose, then, that on the 4th May

1862 the *Circassian* had steamed into the port with a view to discharge her cargo at any landing on the right bank of the river within the port, rebel merchants, noncombatants, being ready to receive it there and transport it into the interior, no portion of the goods being contraband, by what right, save that of blockade, could the Federal fleet have interfered to prevent it? The position and strength of that fleet, it is true, enabled it to capture, without fail, every vessel which might have attempted such a thing; but this physical ability to capture did not, *per se*, confer the right to exercise it; nor did it, *per se*, end the blockade. It is said that a municipal regulation might have been enacted prohibiting such importations or controlling them, and in execution of such an enactment the force at hand could have been employed, but this is no relief from the dilemma. The right by municipal regulations to close rebel ports and render trade with them unlawful was claimed by the United States very early in the rebellion. It was proposed, but the right to do so was denied by Great Britain and other neutral nations, and its exercise was forborne in deference to their protests. Even in the argument for the claimant in these cases the right of the United States to exercise sovereign rights (and belligerent rights at the same time) against the rebels to the prejudice of neutrals is earnestly combated by a gentleman who, as a writer upon public law, stands deservedly high as an authority, and who, in his published works, had before expressed the same opinion. Whatever may be true as to that, it is very certain that Great Britain, having contributed more than any other nation to induce the United States to forbear, by denying the right, can not now fairly claim for her subjects the benefit of a principle which at the time she so stoutly denied. Municipal regulations prohibiting neutral import trade with any part of the port of New Orleans not in Federal possession would have been as obnoxious to Great Britain as if a like attempt had been made at that time concerning Mobile, Charleston, or Savannah. The principle which would have justified it in the one case would have maintained it in all.

"If the consideration of the case left it doubtful whether the judgment of the Supreme Court was in accordance with public law, it would be our plain duty, according to all authority, to disallow these claims. So much deference in a case of doubt is due to a deliberate judgment of a court whose independence, impartiality, and learning has given it a character in Great Britain not less lofty than it possesses at home.

"But I do not doubt. Comments and criticisms upon the judgment of the court had fallen under my eye; trusting to which, I confess, I had been somewhat impressed with serious doubts (to say the least) of the legality of the condemnation. But a very careful study of the case shows that, in making such criticisms, no account has been taken of the important fact that the possession of the United States forces at New Orleans did not extend to the whole port when the ship was seized; no such entire possession being anywhere directly asserted. That the error is one of inference, resulting from the fact, doubtless, that the wider area of the port, as contradistinguished from the city of the same name, has usually escaped attention. It follows, therefore, that the principle supposed to be violated by the court was really not violated at all, and that the question was not that which has been sometimes supposed. It is not, I may

hope, improper to say that the best care and judgment which I am able to bring to the consideration of the case has resulted in a clear conviction that the condemnation of the *Circassian* was correct."

4. Claims for Damages for Alleged Unlawful Warning Off.

Cases of the "Boyne," the "Monmouth," and the "Hilja."

"These claims were three in number—that of Benjamin Whitworth and others, owners of the ship *Boyne*, No. 216; that of Andrew Ewing Byrne and others, owners of the ship *Monmouth*, No. 315; and that of Matthew Isaac Wilson, owner of the bark *Hilja*, No. 467.

"The *Boyne* (No. 216) sailed from Fleetwood, Lancashire, England, on the 25th March 1861, with a cargo of coals for Savannah, Georgia. On the 11th May, when near the entrance of the harbor of Charleston, S. C., she was boarded by an officer of the United States steam frigate *Niagara*, who made this entry upon her register:

"'Warned off the whole coast of the South by the United States steamer *Niagara*, May 11, 1861. Edward E. Potter, lieutenant, United States Navy.'

"In consequence of this warning she abandoned her voyage to Savannah and went to New York, where it was alleged that she disposed of the cargo of coal at a rate much less than it would have commanded in Savannah, and took a homeward freight from New York of much less value than she would have secured from Savannah. In fact, at the date of the warning no sufficient blockade had been instituted at Savannah or at any other port south of Charleston; the actual blockade of Savannah not having commenced until the 28th May. The memorial claimed damages by reason of loss on outward cargo, and on return freight below that which she would have earned from Savannah, and by detention of the vessel, £6,460 13*s.* 0*d.*, besides interest.

"The *Monmouth* (No. 315) sailed from Liverpool in March 1861, with a cargo of salt, under written instructions to proceed to Charleston and deliver vessel and cargo to consignees there; and if that port should be found blockaded, then to go to Savannah; and if he failed in getting a cotton freight at either Charleston or Savannah, then to go to St. Stephen, New Brunswick, and load with a cargo of deals for the return voyage. On the 12th May she arrived off the harbor of Charles-

ton; was boarded by an officer of the blockading vessel *Niagara*, and the following entry made upon her register:

"'Boarded; informed of the blockade, and warned off the coast of all the Southern States by the United States steamship *Niagara*, May 12, 1861.'

"The master thereupon abandoned his voyage to Charleston and Savannah and went to St. Stephen, New Brunswick, where he disposed of his cargo of salt and took his return cargo of deals. The memorial claimed damages by losses on her cargo of salt and of return freight, short of what she would have received from Savannah, and costs, and charges, and delay, to which she was necessarily subjected by her change of destination, £10,572 10*s*. 0*d*.

"The *Hilja* (No. 467) sailed from Liverpool on the 25th March 1861, in ballast, for Charleston, the memorial alleging that she intended to load on freight at that port or at Savannah, a return cargo of cotton for Liverpool. She was boarded by an officer of the United States steamship *Niagara* off Charleston Harbor, on the 12th May, and a warning entered upon her register substantially the same as in the case of the *Monmouth*. The memorial alleged that the captain of the *Hilja*, having an alternative destination to Savannah, was debarred from proceeding to that port by this warning; that she thereupon proceeded to Pugwash, but gave no information as to her earnings by her return freight. Damages were claimed to the amount of £6,101 3*s*. 7*d*., besides interest—the amount of freight which, it was alleged, the vessel would have earned by a return cargo of cotton from Charleston or Savannah.

"The sailing orders of the *Hilja* were not put in evidence nor accounted for, though it appeared that she sailed under written orders; nor was any evidence adduced as to her alternative destination to Savannah except that of the claimant himself, examined on notice, who, after many evasive and contradictory answers on cross-examination as to the destination of the vessel, finally summed up his evidence in this regard by saying: 'I think I mentioned to him verbally that if freights were better at Savannah he was to go there.' The claimant also testified that he had, through Mr. A. E. Byrne (claimant in No. 315), had correspondence with the British foreign office in respect to this warning off of his vessel, and that he had had like correspondence with Her Majesty's consul at Charles-

ton through Messrs. Robert Muir & Co., and that there had also been correspondence between Muir & Co. and himself, and between Henderson, the master of the vessel (since dead), and himself; but none of this correspondence was either produced or accounted for. No proof was made as to the avails of the return freight from Pugwash, except the general statement of the claimant in his deposition that 'the whole voyage brought in a loss;' and on cross-examination the claimant, when questioned as to his transactions in connection with violating the blockade during the war and furnishing aid to the Confederate government, declined to answer all such questions.

"It appeared that an actual blockade of the port of Charleston was established by the presence of a sufficient blockading force at the dates of the respective warnings of the three vessels.

"The three cases were argued and submitted together.

"On the part of the United States it was contended that the warning entered upon the register of these vessels, respectively, so far as applicable to any unblockaded ports, was without authority of the United States, a clear error on the part of the officer giving the warning, insufficient to preclude the further voyage of the vessels warned to any unblockaded port, and had never been adopted or ratified by the United States; that the case rested on the voluntary abandonment, by the masters of the *Monmouth* and the *Boyne*, respectively, of their alternative voyage to Savannah, upon an incorrect warning, unduly given by an unauthorized officer of the United States, and that for such loss no reclamation lay against the United States.

"In the case of the *Hilja* it was maintained on the part of the United States that the proof showed no alternative destination to Savannah; that the vessel was merely stopped from entering the blockaded port of Charleston, to which she was destined, and that no loss whatever was shown to have accrued to her, except that caused by her being prevented from entering that port, and that no proof was made of actual loss even in this respect; that the nonproduction, by the claimant Wilson, of the correspondence with the British foreign office, and with the British consul at Charleston, as well as his own correspondence with his captain, Henderson, and his agents at Charleston, Muir & Co., sufficiently indicated that the claimant then put his claim for compensation solely on the

ground of the illegality or insufficiency of the blockade of Charleston, and that the pretended alternative destination to Savannah was an afterthought, borrowed from the cases of the *Monmouth* and the *Boyne;* that his own testimony, on which he rested the case, was upon its face unworthy of credit.

"The counsel for the United States also claimed that in the case of an award of damages in any of these cases, the anticipated earnings by freights from Savannah, at high rates, could not be taken into account as elements of the award; that such anticipated earnings were speculative and illusory; that the evidence showed that the market at Savannah, in respect both of sales of the outward cargoes and of the rate of freights, was exceedingly irregular and violent in its fluctuations, and in effect a gaming market; that it could not be assumed that the vessels could have secured return cargoes at Savannah in season to leave within the time limited after the establishment of the blockade there, nor that they could have secured such rates of freight as were claimed in the respective cases; and that these claims were of substantially the same nature of speculative and uncertain prospective profits which were rejected by the tribunal at Geneva in the case of the claims for anticipated earnings and profits of captured vessels, claimed before that tribunal.

"The commission in the case of the *Boyne* (No. 216) unanimously made an award in favor of the claimants for $32,553.

In the case of the *Monmouth* (No. 315) they made an award in favor of the claimants for $40,843, Mr. Commissioner Frazer dissenting on the question of amount.

"In the case of the *Hilda* (No. 407) the claim was disallowed, Mr. Commissioner Gurney dissenting."

American and British Claims Commission, Article XII. treaty of May 8, 1871, Hale's Report, 150. See also Howard's Report, 100.

Opinion of Mr. Frazer.

On the general question involved in the foregoing cases Mr. Frazer, commissioner on the part of the United States, rendered the following opinion:

"The allowance of prospective earnings by vessels was denied by the tribunal at Geneva *unanimously*. It is not, so far as I am aware, allowed by the municipal law of any civilized nation anywhere. The reason is obvious and universally recognized among jurists. It is not possible to ascertain such earnings with any approximation to certainty. There are a thousand unknown contingencies, the happening of any of which will render incorrect any estimate of them, and hence result in injustice.

"Who can say that the *Monmouth* would have reached Savannah at all; that she could have procured a cargo of cotton at ¾d. per pound, the low-

est freight in proof? Who can say that she would have got better or as good rates as that? Why could she have done better? There is no reason. Who can say that she could have been laden and sailed before the blockade would have stopped her? The witnesses do not say so, but only 'if she had met no detention or accident.' Can this commission say so? It is palpable that we can only conjecture, and conjecture is no fit basis for an award of damages. We should have had evidence more satisfactory from the claimant, such as the prevailing rate of charter of such a vessel at the time and place. Under such circumstances we are left to estimate the value of the vessel for return cargo upon very unsatisfactory evidence. I base my estimate upon cotton freight at ⅛d. per pound, because there is, in my judgment, a greater probability, in view of all contingencies, that this is above rather than below a just estimate.

"These observations apply also to the case of the *Boyne*, heretofore decided. I now doubt whether this is not too much. It assumes that each contingency would have been avoided, the happening of any one of which would have prevented this vessel from doing as well as some others; and this assumption in favor of the claimant is quite as much as, in my judgment, we may make, with due regard to public law, as declared at Geneva, and to the principles of justice, as recognized everywhere.

"The *Monmouth* (No. 315). The President, by proclamation of April 19, 1861, gave public notice of a purpose to blockade the ports of South Carolina, Georgia, and of the States south thereof, announcing that a 'competent force *would* be posted' for that purpose. The proclamation announced further that any vessel approaching or attempting to leave 'either of said ports' with a view to violate 'such blockade,' would be warned by the commander of 'one of the blockading vessels,' who would indorse such warning and the date thereof on her register, and any subsequent attempt of the same vessel to enter or leave '*the blockaded port*' (certainly meaning every port covered by the warning) would result in capture. It can not be supposed that it was intended that this warning was to be repeated off each port blockaded.

"In these cases the warning was by a vessel blockading Charleston and off that port *before* there was any actual blockading force off Savannah, and was indorsed thus:

"'Boarded, informed of the blockade, and warned off the coast of all the Southern States by the United States steamship *Niagara*, May 12, 1861.

"'EDWARD C. POTTER,

"'*Lieutenant United States Navy.*'

"This warning was not, and is not, disavowed. It must therefore have the same effect as if the officer giving it had been expressly instructed by the highest authority to give it in that form. It must be regarded as the act of the United States, and was notice to the vessel that all the southern ports embraced within the proclamation were then actually blockaded, and that any subsequent attempt of the vessel warned to enter any of such ports would result in capture.

"A vessel bound for Savannah, thus warned, it is true, might have disregarded the warning, and could lawfully have proceeded to Savannah because there was not in fact any force blockading that port. If captured

she would unquestionably have been discharged with damages by the prize court.

"But must the neutral merchantman run the hazard of attempting to enter Savannah? Had she found there an actual blockade and been captured, her previous warning would have been good, and her condemnation as good prize would have been certain. There is in the facts every element of a strong obligation upon the United States, and in favor of a vessel which, on the faith of the warning given, fully respected it, and by so doing suffered loss, to make good that loss. The neutral vessel, ignorant as to the facts, had a right to act upon the warning; and I am compelled to hold that, in doing so, she acted with all prudence and propriety, and that, judging, as her captors must at the time, any other course would have been rashness and folly. A regard for the interests of his owners, as well as respect for the United States, required that the master should abandon any purpose to enter Savannah.

"These observations apply also to Nos. 216 and 467."

5. Doctrine of Continuous Voyage.

Case of the "Springbok."

"The bark *Springbok*, John Riley, manager, etc., No. 442, claimant for vessel; S. Isaac Campbell & Co. and Thomas Stirling Begbie, No. 316, claimants for cargo.

"This vessel was captured by a United States cruiser on the 3d February 1863 on the Atlantic Ocean, about one hundred and fifty miles east of Nassau, New Providence; was taken into the port of New York, and there libeled in the district court. That court rendered a decree of condemnation of both vessel and cargo. (See the report of the case, Blatchford's Prize Cases, pp. 434–463.) The claimants appealed to the Supreme Court, which affirmed the judgment of condemnation of the district court as to the cargo, but reversed it as to the vessel, adjudging restitution of the vessel, but without costs or damages to the claimants. (5 Wall. 1.)

"The claimant John Riley, No. 442, claimed as manager of the London A 1 Insurance Association, the A 1 Guarantee Insurance Association, and the Colonial A 1 Insurance Association, insurers of the vessel, and who had, on abandonment by the owners, paid as for a total loss. He claimed an award for £4,615, besides interest, damages for the detention of the vessel, loss of profits, and costs and expenses in the prize courts.

"The claimants S. Isaac Campbell & Co. and Begbie claimed £68,378, the alleged value of the condemned cargo, and costs and expenses in the prize courts. The facts of the

case as appearing before the prize courts are sufficiently set forth in the reports of the respective courts above cited.

"In addition to the proofs before the prize courts the claimants gave evidence before the commission tending to show that the actual and ultimate destination of the cargo was Nassau, and that it was intended to be there sold in open market by the agent of the owners.

"This evidence consisted of the testimony of the agent of the claimants at Nassau to that effect, certain letters from the claimants to said agent proved by him, and general proofs showing that there was at Nassau a market for the various kinds of merchandise constituting the cargo of the vessel.

"Neither of the claimants for the cargo placed himself upon the stand to testify as to the actual destination or the intent of the owners in relation to it. The claimant Begbie was examined as a witness in behalf of Mr. Riley, the claimant in No. 442, and on his examination in chief testified merely that the cargo of the *Springbok* was to be discharged at Nassau; that there was no agreement for the continuance of the voyage, or for the employment or engagement of the vessel after her arrival at Nassau; and that the captain of the vessel knew nothing of the ownership of the cargo. On cross-examination he declined to answer as to whether he was, in the years 1862 or 1863, engaged in blockade-running speculations, and whether he was, at the time of her capture, the owner of the *Gertrude* or her cargo (this being the vessel referred to in the report of the case in the Supreme Court, and the proofs upon the condemnation of which were invoked in the case of the *Springbok*).

"On the part of the United States evidence was given showing both the firm of S. Isaac Campbell & Co. and Begbie actively and largely engaged in blockage-running ventures, and in supplying by contract the Confederate Government with military supplies. These proofs included original contracts and letters between the claimants S. Isaac Campbell & Co. and the Confederate secretary of war, and other officials, showing contracts by that firm, running through the years 1862 and 1863, for cannon, rifles, swords, accoutrements, gunpowder, shells, clothing, etc., in large quantities, and delivery of the same to the Confederate government under such contracts to the amount of several hundred thousand pounds. Also evidence showing the claimant Begbie a contractor with the Confederate government for the establishment of lines of fast

steamers, to run in the service of that government between the blockaded ports of the Confederate States and ports in the West Indies.

Arguments for the Claimants.

"On the part of the claimants it was contended that the proofs in the prize court failed to sustain the conclusions of the district court that the vessel 'was knowingly laden in whole or in part with articles contraband of war, with intent to deliver such articles to the aid and use of the enemy,' that the true destination of the ship and cargo was not Nassau, a neutral port, and for trade and commerce, but some port lawfully blockaded by the forces of the United States, and with intent to violate such blockade, and further that the papers of the vessel were simulated and false. That they also failed to sustain the conclusions of the Supreme Court, 'that the cargo was originally shipped with an intent to violate the blockade, that the owners of the cargo intended that it should be transshipped at Nassau into some vessel more likely to succeed in reaching safely a blockaded port than the *Springbok*, that the voyage from London to the blockaded port was as to cargo both in law and in the intent of the parties one voyage, and that the liability to condemnation, if captured during any part of that voyage, attached to the cargo from the time of sailing.'

The counsel for the claimants further contended that the proofs filed for the first time before this commission conclusively rebutted these conclusions of each of the prize courts, and established the ultimate destination of both ship and cargo to be Nassau, the cargo to be there sold in open market.

"The counsel called attention to an error in the opinion of the Supreme Court in stating sixteen dozen swords and ten dozen rifle bayonets as forming part of the cargo of the *Springbok*, when in fact the proofs showed the vessel to have carried only one sample case containing one dozen cavalry swords and one dozen rifle bayonets; and to the fact that, on the sale of the cargo, the entire proceeds of the swords and bayonets and of the army and navy buttons, were only $270 out of the gross proceeds of the entire cargo of nearly $250,000; and that, including the army blankets, saltpeter, and all that portion of the cargo which could be regarded for any purpose as *quasi* contraband, the proceeds of such alleged contraband goods were less than one per cent of the proceeds of the entire cargo. He urged that the judgment of the Supreme Court sustained

'extreme pretensions of belligerent right to subjugate neutral commerce to its necessities,' which ought not to be sustained by this international tribunal; that, to sustain the doctrine of liability to capture on the theory of 'continuous voyage,' it must appear that the cargo was intended as a part of the original and planned adventure to be carried from the neutral port to the enemy's port; that the extreme doctrine in this regard had been stated by the Supreme Court in the case of the *Bermuda* (3 Wallace, 515), as follows:

"'A voyage from a neutral to a belligerent port is one and the same voyage, whether the destination be ulterior or direct, and whether with or without the interposition of one or more intermediate ports, and whether to be performed by one vessel or several employed in the same transaction and in the accomplishment of the same purpose.'

"That the measure of this doctrine, as applied by the Supreme Court to the case of the *Bermuda*, was as follows:

"'What has already been adduced of the evidence satisfies us completely that the original destination of the *Bermuda* was to a blockaded port; or, if otherwise, to an intermediate port, with intent to send forward the cargo by transshipment into a vessel provided for the completion of the voyage.'

"That, with the doctrine of continuous voyage as thus limited and defined, nothing in the case of the *Springbok* involves any necessary controversy; but that this doctrine ought not to be extended so as to make guilty a trade between neutral ports to which the intercepted voyage was actually and really confined, by surmise, conjecture, or moral evidence not of a further carriage and further carrier, but only of a probability that such supplementary further carriage and *some* supplementary further carrier may or must have been included in the original scheme of the commercial adventure. That such a fiction of continuous voyage for the case of all trade between neutral ports, which has its stimulus from the state of war, made the belligerent prize court master of neutral commerce, and in fact established a paper blockade of the neutral ports in question, and left their commerce at the mercy of the belligerent. That the whole history of prize jurisdiction on the doctrine of continuous voyage shows that the province of probable reasoning has been confined to the question of intent, while the *corpus delicti*—the voyage to the enemy port—must be proved with the same definiteness of vehicle, port, and process of execution as is confessedly essential when the voyage is direct and simple.

"That the original capture of the *Springbok* was wholly unjustifiable; that the visitation and search disclosed nothing which rendered her voyage amenable to further molestation; that there was nothing in the vessel, her cargo, or her papers, her position, or the circumstances of her capture, justifying the cruiser in sending the vessel into port for libel, on the speculation that it might be that the cargo was to go forward, and if so, that fact perhaps might be provable; that it was a marked case of spéculative seizure and detention, not upon indications which the visit and search at sea disclosed, but for the purpose of a visitation and search in the prize courts for independent, extraneous, and argumentative grounds of suspicion.

"That the trial in the prize court violated the essential principles of the prize jurisdiction as established between belligerents and neutrals, and in which the latter find the limits of their exposure and submission. That the rule of the prize courts, that condemnation could only be justified upon the proof furnished by the vessel itself, her papers, and cargo, and the depositions of those on board, is not a mere matter of practice or form, but is of the very essence of the administration of prize law. That, accordingly, the invocation by the captors of the papers from the cases of the *Gertrude* and the *Stephen Hart* as part of the primary proofs on which to condemn the *Springbok* and her cargo, was unprecedented, acknowledged by the Supreme Court to be irregular and not in accordance with the rules of proceeding in prize, and was not a mere irregularity in form, but was subversive of the principles of prize jurisdiction.

"That the passing of condemnation without giving the claimants an opportunity for further proof was a manifest injustice, and that the absolute condemnation without such opportunity for further proofs was contrary to the rightful system of prize jurisdiction.

"That the presence of the trivial amount of contraband (as held by the prize court) could not be regarded either as evidence of its own destination or of that of its accompanying innocent cargo to an ulterior market, nor as ground for condemnation independent of the question of intended breach of blockade; citing on this point Dr. Gessner's Droit des Neutres sur Mer, p. 122, as follows:

"'It is wrong to seize contraband goods in a neutral vessel

when they are in such small quantities that their inoffensive character is thereby established. The *bona fides* is a question to be determined by all the circumstances of the case, among which the quantity is a very material ingredient.'

"In addition to the above, the counsel for the claimant cited the following:

"The letter of Sir Wm. Scott and Sir John Nicholl to Mr. Jay, 3 Phillimore, 551; Story on Prize Courts (by Pratt), pp. 3 to 10, 17, 18, 24 to 26; Wheaton's Elements, part 4, c. 2, § 15; Trumbull's Reminiscences of his own Times, 193; the decision of the Geneva Tribunal upon the case of the *Florida*, acquitted in the vice-admiralty court at Nassau on the charge of violation of the neutrality act of Great Britain; the *Polly*, 2 Rob. 361; the *Maria*, 5 *id.* 635; the *William*, *id.* 385; the *Thomyris*, Edwards's Reps. 17; 3 Phillimore, 358; 5 Rob. 334.

"On the part of the claimants of the vessel it was contended, in addition to the positions above stated, that it was found by the Supreme Court that her papers were regular and her voyage a *bona fide* one between London and Nassau; that the papers were all genuine, and there was no concealment of any of them, and no spoliation; that the owners were neutrals, appeared to have no interest in the cargo, and could have had no knowledge of its alleged unlawful destination; that these conclusions of the Supreme Court upon the evidence before it were strengthened and completely sustained by the additional testimony taken before the commission; that the grounds on which the Supreme Court denied costs and damages to the claimants of the vessel, to wit, misrepresentation by the master on his examination as to his lack of knowledge of the grounds on which the capture was made, and the fact that he had signed bills of lading which did not state truly and fully the nature of the goods contained in the bales and cases mentioned in them, were unsustained as matters of fact by the evidence, and, even if sustained, were in themselves not of the least significance, and did not and could not affect the interests or issues involved in the capture; that, so far as the vessel and her owners were concerned, her voyage was honest, her papers fair, and the good faith of the charter party absolute and unimpeachable, and the declarations and conduct of her captain not so obnoxious to just criticism as to justify the infliction of punishment upon the innocent owners.

Argument for the United States.

"On the part of the United States it was maintained that the conclusions arrived at by the Supreme Court as above stated, and upon which the decree of that court condemning the cargo was based, were fully sustained by the evidence before the prize court. That the claimants of the cargo had, by the judgment of the Supreme Court, full notice of the grounds on which the cargo was condemned, those grounds relating principally to their own previous conduct in furnishing military supplies to the Confederate Government and in running the blockade, and to the presumption raised by the circumstances of the case as to their own design and intention in regard to the destination of the cargo. That, notwithstanding this notice, they had failed to avail themselves of the opportunity afforded them before the commission to testify as to the facts and conclusions thus found by the Supreme Court; and that in the case of Mr. Begbie, when placed upon the stand involuntarily, he had refused to answer concerning these very matters. That this failure and refusal to testify on the part of the claimants was to be taken as in effect an admission of the correctness of the conclusions of the court.

"That by the evidence adduced before the commission the fact was fully established that all these claimants of the cargo were extensively engaged in running the blockade, and also in furnishing military supplies to the enemy. That the facts thus proved went strongly to confirm the conclusions of the court that the cargo was destined and intended for transshipment to and delivery in the Confederate States, and not for a market at Nassau. That they also established that these claimants legally and morally were not neutrals, but enemies of the United States actually engaged in the prosecution of the war against those States; and that, as such, their property on the high seas was liable to capture without regard to the question of blockade. That the question of national character in such case was always a question of the individual national character of the owner, and not of his national character as established by paramount allegiance, citing the *Anna Catherina*, 4 Rob. 119; the *Vigilantia*, 1 *id.* 1; the *Vriendschap*, 4 *id.* 166, and the authorities cited in 3 Phillimore, 605, 606. That these proofs also precluded the claimants from a standing before this commission as neutral British subjects. That as to the vessel, the capture and condemnation of the cargo being

lawful, the seizure of the vessel and taking her into port was also lawful as the sole means of reaching the cargo which was lawful prize, and that in such case the vessel was not entitled to costs or damages.

Decision of the Commission.

"The commission unanimously disallowed the claim for the cargo in No. 316. In the claim for the vessel, No. 442, they unanimously awarded to the claimant the sum of $5,065. I am advised that this award was made in respect of the detention of the vessel from the date of the decree of the district court to the date of her discharge under the decree of the Supreme Court, the latter decree having established that the vessel should have been discharged by the decree of the district court."

American and British Claims Commission, Article XII. of the treaty of May 8, 1871, Hale's Report, 117. See also Howard's Report, 138.

6. Capture in Neutral Waters.

Case of the "Sir William Peel."

"The *Sir William Peel*, Edwin Gerard, No. 243, claimant for himself and insurers and underwriters.

"This case and the three following cases, of the *Dashing Wave*, the *Volant*, and the *Science*, were intimately connected in character and circumstances, and were argued and submitted together. The *Sir William Peel* was captured by a United States war vessel on the 11th of September 1863 while lying at anchor at the mouth of the Rio Grande, the stream dividing the territories of the United States from those of Mexico, and upon which, about forty miles from its mouth, lay on the right bank the Mexican port of Matamoras, and on the left bank the United States port of Brownsville, then in possession of the Confederate forces. The place at which she lay was held by the United States prize courts to be within Mexican and neutral waters. She was taken by the captors into the port of New Orleans, there libeled in the district court of the United States, and on the 6th of June 1864 a decree of restitution was rendered in that court, certifying reasonable cause of seizure, and providing 'that the question as to costs and expenses be reserved for further action.' From this decree the United States appealed to the Supreme Court. Subsequently, on the hearing in the district court of the question

thus reserved, the following decree was made on the 3d of June 1865:

"'On the preliminary trial of this cause, considering that the position of the *Sir William Peel*, when captured, was a matter of doubt, and with a view to set this question at rest, the court allowed the captors further proof, and extended to the claimants the same privilege if they chose to accept it.

"'The result of the whole testimony satisfied the mind of the court that the *Sir William Peel* was captured when anchored south of the line dividing the waters of the Rio Grande, and when, therefore, she was in neutral waters. On that ground the court decreed her restitution; but entertaining grave doubts as to the object of her voyage, so grave, indeed, that, but for this consideration, that she was captured in neutral waters, the court should have decreed her condemnation, it is now ordered and decreed that the costs and charges consequent upon the capture be paid by the claimants, and that damages be refused.'

"From this decree the claimants appealed to the Supreme Court of the United States. Both appeals were heard together in the Supreme Court, and that court affirmed the judgment of restitution, including its certificate of reasonable cause of seizure, rendered June 6, 1864, and reversed the decree of 3d of June 1865, charging the claimants with costs, and remanded the case to the district court, with directions that no costs or expenses be allowed to either party as against the other. The case in the Supreme Court is reported in 5 Wallace, 517 to 536. The opinion of that court, delivered by Chief Justice Chase, is as follows:

"'Regularly in cases of prize no evidence is admissible on the first hearing, except that which comes from the ship, either in the papers or the testimony of persons found on board.

"'If upon this evidence the case is not sufficiently clear to warrant condemnation or restitution, opportunity is given by the court, either of its own accord or upon motion and proper grounds shown, to introduce additional evidence under an order for further proof.

"'In the case now before us some testimony was taken preparatory to the first hearing, of persons not found on board the ship, nor, indeed, in any way connected with her.

"'This evidence was properly excluded by the district judge, and the hearing took place on the proper proofs.

"'Upon that hearing an order for further proof was made, allowing the libellants and captors on the one side, and the claimants on the other, to put in additional evidence; and such evidence was put in accordingly on both sides.

"'The preparatory evidence on the first hearing consisted of

the depositions of the master of the ship, the mate, and one seaman. No papers were produced, for none were found on board; a circumstance explained by the statement of the master, that all the papers belonging to the vessel, except the lightermen's receipts for the cargo, were with the English consul and the consignees of the ship at Matamoras.

"'The depositions established the neutral ownership of the ship and cargo. They proved that the *Sir William Peel* was a British merchantman; that she had brought a general cargo, no part of which was contraband, from Liverpool to Matamoras; that this cargo, except an inconsiderable portion, had been delivered to the consignee at the latter port; that the cotton found on board was part of her return cargo; that it was owned by neutrals, and had a neutral destination; and that the ship, when captured, was in Mexican waters, well south of the boundary between Mexico and Texas.

"'This proof clearly required restitution. The order for further proof was probably made upon the rejected depositions, which, though inadmissible as evidence for condemnation, may have been allowed to be used as affidavits on the motion for the order.

"'The further proof, when taken, was conflicting.

"'The weight of evidence, we think, put the vessel, at the time of capture, in Mexican waters; but if the ship or cargo was enemy property, or either was otherwise liable to condemnation, that circumstance by itself would not avail the claimants in a prize court. It might constitute a ground of claim by the neutral power, whose territory had suffered trespass, for apology or indemnity. But neither an enemy, nor a neutral acting the part of an enemy, can demand restitution of captured property on the sole ground of capture in neutral waters.

"'We must therefore look further into the case.

"'There is some evidence which justifies suspicion. Several witnesses state facts which tend to prove that the *Peel* was in the employment of the rebel government, and that part, at least, of the cotton laden upon her as return cargo was in fact rebel property.

"'There are statements, on the other hand, which make it probable that the *Peel* was in truth what she professed to be, a merchant steamer, belonging to neutral merchants, and nothing more; that her cargo was consigned in good faith by neutral owners for sale at Matamoras, or to be conveyed across the river and sold in Texas, as it might lawfully be, not being contraband; that the cotton was purchased by neutrals and on neutral account, with the proceeds of the cargo or other money.

"'In this conflict of evidence we do not think ourselves warranted in condemning, or in quite excusing, the vessel or her cargo. We shall therefore affirm the decree by the district

court, and direct restitution, without costs or expenses to either party as against the other.'

"This opinion sufficiently states the facts of the case as appearing by the evidence in the prize court, and those facts were not substantially changed by any evidence taken before the commission.

"The claim before the commission was prosecuted by Edwin Gerard as assignee of the owners of the vessel and cargo, and as attorney in fact for the insurers and underwriters, some one hundred and fifty in number. The vessel and cargo were fully insured against capture as well as other losses; and upon the capture the owners abandoned vessel and cargo to the underwriters, who accepted the abandonment and paid as for a total loss. Pending the case in the district court, forty bales of cotton, part of the cargo, were sold by order of the court, and the proceeds paid into the registry of the court. And pending the case on appeal in the Supreme Court, the vessel, her tackle, stores, etc., and the remainder of her cargo having been appraised at the sum of $857,642, United States currency, were, by order of the court, delivered to the claimants on their furnishing stipulations in the said appraised value with security. The claimants claimed the sum of £35,314 16s. 9d., the sum of the amounts paid by the insurers to the assured less the net salvage obtained by the sale of the vessel and cargo, and the further sum of $369,000, demurrage from the 11th September 1863 to the 15th September 1864, besides interest on both said sums.

Argument for the Claimant.

"The counsel for the claimant filed, in No. 391, a general argument applicable to the cases of the *Sir William Peel*, the *Dashing Wave*, the *Volant*, the *Science*, and the *Geziena Heligonda*. In this argument he maintained that the Rio Grande being the common boundary between Mexico at peace and Texas at war with the United States, and the navigation of the river being, by the law of nations as well as by the treaty of Guadalupe Hidalgo, free and common to the citizens of both republics, the United States could not lawfully blockade that river so as to interfere with the free ingress and egress of neutral vessels engaged in trade with Matamoras, or with the right of such vessels to lie at anchor in the roadstead at the mouth of the Rio Grande, while engaged in lawfully discharging or receiving cargoes on neutral account through the custom-house

at Matamoras, or so as to interfere with inland trade carried on across the Rio Grande, from Mexico to Texas or from Texas to Mexico. That the British trade with Matamoras was a legitimate trade according to established principles of public law. That these doctrines were fully recognized by the Supreme Court of the United States in the case of the *Peterhoff* (5 Wallace, p. 28), and by the courts of the United State in other cases, notably that of the *Labuan* in the district court of the southern district of New York. That it had also been fully recognized by the Secretary of State of the United States, in the diplomatic correspondence with the British legation, concerning the cases of the *Labuan*, the *Magicienne*, the *Peterhoff*, the *Sir William Peel*, and other cases; and by the legislative authorities of the same in appropriations for payment of the awards in the cases of the *Labuan*, etc.

"That, notwithstanding the recognition by the courts and executive and legislative authorities of the United States of these principles, in practice they had been disregarded, and British merchant vessels, whether found on the high seas and destined to the mouth of the Rio Grande, with cargoes consigned to Matamoras, or anchored off the mouth of the river and engaged in good faith in the discharge of neutral cargoes for Matamoras, and in taking on board cargoes purchased at that port on neutral account, had been subjected to capture and adjudication as maritime prize.

"That these captures had been the subject of earnest but temperate remonstrance on the part of Her Majesty's government, and were regarded as violations of the just maritime rights of Great Britain, and as assumptions of belligerent power not warranted by the law of nations.

"That the claims arising out of these captures were among the most important in the contemplation of Her Majesty's government in the establishment of the Joint High Commission, and by that commission, in the provisions of articles 12 to 17 of the treaty providing for the establishment and conduct of this commission. That this commission had full jurisdiction of the claims in question, and to review and overrule the final judgments of the prize courts of last resort of the United States.

"That by the terms of the treaty, and of the 'solemn declaration' subscribed by the commissioners pursuant to the provisions of the treaty, they were to decide each and all of

the claims 'according to justice and equity.' That this provision gave to the present commission a broader and more comprehensive power than was given by the seventh article of the treaty of 1794 between the United States and Great Britain (8 Stats. at L. 121) to the commission provided for by that article, which was required to decide the claims referred to it according to 'justice, equity, and the laws of nations.' That the omission of the last named element of the prescribed rule of conduct from the present treaty was significant. That under the present treaty the judgments of the American prize tribunals were to be tested in each case by this commission according to the principles of 'justice and equity' only. That 'whether the law of nations justifies those decisions or not, unless they are *also* justified in the conscientious judgment of the commissioners by justice and equity, the compensation which they fail to give must be awarded to the parties.' That 'the inquiry is not limited to the question whether the law of nations entitled the claimants to compensation, but extends beyond that narrow range, and its broad scope is whether the parties are equitably entitled, under all the circumstances surrounding the cases, to receive indemnification for their losses.' That it was the intention of the framers of the treaty to confer upon this commission 'a more extensive jurisdiction, and greater power to do justice than was exercisable by the prize courts of the United States deciding according to the law of nations.' That the technical rule of the prize courts, that 'probable cause' not merely excuses, but in some cases justifies, a capture, is a hard rule, 'admitted to be opposed to the fundamental ideas of justice and equity,' and 'only to be justified upon grounds which justify the extreme severity of the other operations of war.' That therefore this commission was not bound to refuse damages in cases of restitution to the claimants, even 'if they should think that the appellate prize court was warranted in its decision that there existed, in the sense of the prize law, probable cause of capture.'

"That if, however, itshould be held that the only inquiry to be instituted by the commission in such cases is, 'whether there were such reasonable grounds of suspicion as constitute what is technically called probable cause of capture,' the commissioners should nevertheless adjudicate according to their own judgment of the facts and the law constituting the foundation of probable cause, 'unembarrassed by the special and

technical rules of the prize code.' That though the commission is not therefore bound by the principles held by the prize courts in their adjudications, but has a larger and more equitable jurisdiction, yet the decisions of prize courts of the highest authority have established the duty of condemning captors in costs and damages where they have unjustly interfered with the operation of lawful neutral commerce. In this connection the counsel cited the cases of the *Elizabeth*, 1 Acton, 10; the *Ostsee*, 9 Moore's P. C. R. 150; the *Gerasimo*, 11 id. 88; the *Newport*, id. 187.

Argument for the United States.

"In answer to these propositions in the general argument the counsel for the United States fully admitted the propositions as held and recognized by the judicial, executive, and legislative authorities of the United States, that the *bona fide* trade with Matamoras was a legitimate trade; that the United States could not lawfully blockade the mouth of the Rio Grande or the port of Matamoras, or any other Mexican port, nor interfere with the legitimate ingress or egress of neutral vessels engaged in trade with Matamoras, or with the right of such vessels to lie at anchor in the roadstead at the mouth of the Rio Grande while engaged in the *bona fide* discharge or receiving of neutral cargoes for or from that port.

"He denied that in practice the United States had violated these principles or undertaken to assert rights inconsistent with them, but maintained that, on the contrary, the State Department of the United States, in its diplomatic correspondence, had recognized their validity; insisting only that the question of the application of these principles to the facts of each particular case was to be determined by the regular prize tribunals, which might be safely trusted to do entire justice in every case.

"That the decisions of those courts in the various cases referred to by the counsel for the claimant fully recognized those principles and applied them to the facts appearing in each case; and that in the disposition not only of those cases, but generally of all the prize cases arising during the war, those courts had carefully adhered to the principles of international law as recognized in the prize courts of all civilized countries, and had extended to neutral vessels and cargoes a degree of protection, to say the least, quite as ample and complete as that afforded by the prize courts of Great Britain

under the learned and widely known and recognized decisions of Sir William Scott and his successors in those courts.

"He admitted fully the jurisdiction of the commission, and their power and duty under the treaty to review the final judgments of the prize courts of ultimate resort of the respective nations as not conclusive upon the respective governments which might intervene on behalf of their subjects against the judgments of those courts, such jurisdiction having been long since fully established by the direct decision of the commission upon that question and not having since been disputed.

"As to the rules and principles by which the commission were to be governed in their decisions upon these cases, he maintained that the rule prescribed by the treaty, that the commissioners should 'impartially and carefully examine and decide, to the best of their judgment and according to justice and equity,' had in no respect abolished or changed those well-settled principles, in accordance with which the tribunals of the civilized world have been accustomed to decide upon the validity of captures and the respective rights of belligerents and neutrals in relation to them. That 'justice and equity' were not to be attained by a disregard of judicial precedents and established principles of judicial proceeding.

"That to adopt the doctrine propounded by the counsel for the claimant was to substitute the mere fancy or caprice of a tribunal acting without guidance or authority for those sound rules established and followed by judicial tribunals, in the light of the learning and experience of ages, for the very furtherance of 'justice and equity.' That true 'justice and equity' are recognized by all judicial tribunals, municipal or international, as attainable only by well-defined and settled rules and principles of general application. That if this idea is lost sight of, substantial justice as well as substantial equity is at an end; and the rights of parties are committed to the absolute and uncontrolled will and caprice of the judicial officer, instead of the protection of the law.

"That while, therefore, the right of the commission to sit in judgment upon the validity and correctness of the judgments of the prize courts of the United States upon these cases is not now questioned, such validity and correctness are to be determined only in accordance with the settled principles of prize law, as recognized by the two countries.

"That in reviewing the judgments of the highest appellate

courts of either of the two countries, high contracting parties to the treaty, the high reputation of those courts respectively, the weight uniformly given to the decisions of each by the other and the rules of international comity and mutual respect dictate that such judgments are not to be rashly or hastily overruled or reversed; but only on a clear showing of a violation of the rules of international law *in re minime dubia*. That the question to be decided in these cases is whether injustice has been done to the subjects of Her Britannic Majesty by the judicial tribunals of the United States; and that the commission certainly can not find that such injustice has been done, unless they find that the well-settled principles of international law have been violated by those tribunals.

"In answer to the proposition of the claimant's counsel, that the rule of the prize courts disallowing damages to the claimant where 'probable cause' appears for the capture, is one of extreme severity as against the neutral trader, 'opposed to the fundamental ideas of justice and equity,' and 'a hard rule, admitted to be such by all writers on the law of nations,' the counsel for the United States cited the language of Dr. Lushington, in the case of the *Leucade* (2 Spinks, 236), as follows:

"'Lord Stowell administered the prize law on great and comprehensive principles. His object was that, on the whole, equal justice should be done to the rights of the belligerent and the just claims of neutral nations; but he did not seek in each particular case to do the most perfect justice. Many passages in his judgments might be cited to show this; whereby he declared that, though there might be hardships in particular cases, both to captors and especially neutrals, yet, on the whole, the balance was in favor of the neutral rather than against him. Lord Stowell used to say, though blockade was a hardship on a neutral, and the right of search was a hardship on a neutral, yet it was to be recollected the whole trade was always open to them—the carrying trade in time of war. He used always to say, and rely greatly on that rule of law, that, in the first instance, the case should be heard on the evidence of the claimants themselves, namely, the ship's papers and depositions.

"'In the case of the *Diligentia* (1 Dods. 404), where the captors complained of what Lord Stowell was about to do, Lord Stowell made the same answer. He told them, though they might complain in particular instances, yet he must adhere to the general principle, though the consequences might press hard upon them. Now, no person more readily acknowledged the truth of the principle, that a claimant should be indemnified for a capture made without probable cause, than Lord

Stowell; no one more powerfully manifested it; but that will necessarily presuppose that the court is in possession of the truth.

"'It is equally contrary to common justice that a captor should be mulcted in costs and damages where he has faithfully performed his duty, and had, in truth, adequate cause for the seizure. Yet this cause of seizure might not appear on the face of the depositions and ship's papers. So it might be in blockade cases, and in numerous others which might be stated.'

"In the case of the *Sir William Peel* the following additional points were made on behalf of the United States:

"1. That the vessel and cargo not having been charged with costs under the final decree of the Supreme Court, the only question before the commission was as to the right of the owners to damages; that the claimants were in no position to make such claim before the commission; that any right to damages in the prize courts was barred by the first decree of the district court of 6th June 1864, which adjudged reasonable cause of seizure, and that from this decree or from any part of it the claimants had never appealed; that the 'question as to costs and expenses' reserved by that decree was plainly the question only whether costs and expenses should be allowed against the claimants, their right to claim costs and expenses against the captors being barred by the certificate of 'reasonable cause of seizure' contained in the same decree; that the claimants, having failed to appeal from so much of this decree as certified reasonable cause of seizure, must be considered, in the language of the letter of Sir William Scott and Dr. Nicholl to Mr. Jay (3 Phillimore, 554), to have 'acknowledged the justice of the sentence in that respect,' and that within the rule of practice already settled by the commission the claimants, having neither appealed nor rendered any reason for not having appealed, their claim must be disallowed; that the only effect of the second decree of the district court of 3d June 1865, from which the claimants did appeal, was to charge the claimants with the costs and charges of the captors, and that on their appeal from this decree they had had full relief by the judgment of the Supreme Court; that it had never been possible for the Supreme Court to award damages in favor of the claimant had they been so disposed, such damages being barred by the certificate of probable cause in the first decree of 6th June 1864 from which the claimants had

not appealed; that the claimants had therefore no standing before the commission to claim damages.

"2. That the proofs before the prize court fully sustained the finding of that court of probable cause; and that the depositions of Clark and Haggard, taken in the district court, but rejected by that court on the purely artificial and technical rule that such evidence must come in the first instance from the vessel herself and those on board of her, were here competent evidence under the terms of the treaty, and entitled to be weighed by the commission without regard to such artificial rule of exclusion; and that those depositions not only greatly strengthened the case made before the prize court as one of probable cause, but in connection with the other proofs would have amply warranted a decree of condemnation.

"3. That the fact that the vessel was taken in neutral waters in no respect changed the case as to the respective rights of captors and claimants. That in such case it was only the neutral power whose waters had been violated that had cause of complaint; and such power only could be heard to raise the question of violation of her waters. That if the United States by this capture had violated any rights of Mexico, that was a question to be settled between the United States and Mexico. That so far as the questions between these claimants and the United States were concerned, the case stood in all respects the same as if the vessel had been captured upon the high seas.

"In support of this point the counsel of the United States cited the *Purissima Concepcion*, 6 Rob. 45; the *Etrusco*, 3 id. 31; the *Twee Gebroeders*, id. 162; the *Eliza Anne*, 1 Dodson, 244; the *Diligentia*, id. 412; the *Anne*, 3 Wheat. 447; 2 Twiss, 448; the *Anna*, 5 Rob. 373; the *Vrow Anna Catherina*, id. 15.

"4. That by abandonment, acceptance of the same, and payment as for a total loss, the entire right to any and all reclamation for damages or for the proceeds of the vessel passed from the owners of the ship and cargo to the insurers, and this irrespective of the question of the illegality of the contract of insurance, the contract being an executed one by the voluntary act of the parties. That these insurers were not to be taken as parties to the memorial, which was that of Mr. Gerard. That Gerard himself had derived by his assignment from the owners no title, their claims having vested in the insurers. And that if the assignment to him would otherwise have con-

veyed any interest, it was void as a champertous contract by which Gerard, an attorney, without any previous interest in the transaction, had purchased the claim as a matter of speculation and for the purpose of its prosecution against the United States. That by the law of England the purchase of a chose in action by an attorney for the purpose of prosecution was illegal; that the same rule prevailed in most, if not all, of the United States; and that in practice it ought to prevail in international law. That such champertous purchases of claims, void by the common law of both countries, should not be recognized as lawful transactions, or be permitted as the basis of claims to be prosecuted by one of those governments against the other.

"5. That the contracts of insurance by these insurers with the assured were deliberate contracts to indemnify British subjects for the consequences of attempted violation of the belligerent rights of the United States; that such contracts, when sought to be enforced in the courts of the United States, would be held void by those courts; that like contracts, in relation to attempted violation of the belligerent rights of Great Britain, if prosecuted in the courts of that kingdom, would be held void by her courts; that therefore in an international tribunal constituted by solemn treaty between the two governments, the comity of nations and a proper regard by one friendly government for the rights of another should preclude the admissibility of such claims. That these contracts of insurance were distinguishable from 'war risks' recognized by all nations as legitimate subjects of insurance, and such as were discussed among the American claims before the tribunal at Geneva; those were assurances of the merchant vessels of a belligerent against capture by their enemy, and such as are recognized in all wars of maritime nations as a permissible and necessary means to the preservation of any commerce whatever to a belligerent; but these are deliberate contracts to indemnify a neutral who, by carefully excluding the 'free from capture' clause, admits that he is engaged in an attempt to violate the belligerent rights of a friendly nation. That though the violation of blockade by a neutral is not held by international law to be strictly a crime, it is an unfriendly act, prejudicial to the character and interests of the neutral government of which the violator is a citizen, and to her honest and legitimate traders, and calculated to promote discord

and hostility between friendly nations. That a contract to indemnify the citizen of a neutral government against the lawful consequences of his own wrongful act against a friendly government, should never be made a ground of reclamation by the government of the wrong-doer against the injured government, nor be countenanced by an international tribunal organized as a means of amicable settlement between two such governments.

Answer for the Claimants.

"On the part of the claimants it was contended in answer that the Supreme Court of the United States had in effect passed upon all the questions involved in the prize court, and had finally adjudged that the claimants should not have damages against the captors; and had determined that the fact of the capture having taken place in the waters of Mexico, a neutral and friendly nation, did not make the capture a wrongful one as between the captors and the claimants, Mexico not having intervened. That on the proofs in the case there were no such circumstances of suspicion as to afford probable cause of capture within the doctrines of the prize courts. That if no such probable cause within the rules of those courts existed, it was plain, from the proofs before the commission, that actual injustice had been done to the owners of the vessel and cargo; that the vessel was engaged in a legitimate commerce; and that, according to justice and equity, the claimants should be reimbursed for the losses in consequence of the capture ultimately adjudged a wrongful one, even though the capture were held excused by the doctrine of probable cause under prize law. That the capture of the vessel within the neutral waters of Mexico was in violation of international law, and absolutely illegal and void. That the doctrine of the prize courts that such a capture could only be questioned by the government whose territory had been violated, applied only to the case of an enemy ship captured in neutral waters and not to the case of a neutral vessel so captured. That, even if that doctrine applied in the last-named case, it was only as a technical rule of the prize courts requiring an intervention there by the government whose territory had been violated, and was not applicable in the case of an international tribunal, which should be controlled by the consideration that the capture was an illegal one under international law.

"The counsel for the claimant cited Dana's Wheaton, §§ 171,

426, 428, 429, 430; the *Vrow Anna Catherina*, 5 Rob. 18; Lawrence's Wheaton, 215 *n*, 715; Wheaton on Captures (appendix), 341; the *Anne*, 3 Wheat. Rep. 435; the *Richmond*, 9 Cranch, 102; the *Peterhoff*, 5 Wall. 28; the *Bermuda*, 3 Wall. 557.

"The counsel for the claimant also maintained that the insurers and underwriters were to be deemed parties to the memorial by Mr. Gerard, as their attorney in fact; that the assignment to Gerard was a valid one; and that the contracts of insurance were also valid and entitled to recognition and protection under international law.

Award of the Commission.

"The commission (Mr. Commissioner Frazer dissenting) gave the claimants an award for $272,920. I am advised that the award was placed by the majority of the commission on the ground that the capture within the neutral waters of Mexico was absolutely illegal and void, and that the claimants were entitled to make reclamation on that ground, irrespective of any question of complaint or intervention on the part of Mexico.

Case of the "Dashing Wave."

"The brig *Dashing Wave;* Charles Le Quesne *et al.*, No. 395, claimants for vessel; Edwin Gerard, No. 244; Simpson & Pitman, No. 396; McDowell & Halliday, No. 397; The Thames & Mersey Insurance Company (limited), No. 427, and the British and Foreign Marine Insurance Company (limited) *et al.*, No. 428, claimants for cargo.

"This vessel was captured while at anchor off the mouth of the Rio Grande on the 5th November 1863; was taken into the port of New Orleans and there libeled in the United States district court. A decree was made in that court 16th June 1864 adjudging restitution of the vessel to the claimants; from which decree the United States appealed to the Supreme Court. Further proceedings were had in the district court on the question of costs and damages, and on the 3d June 1865 a decree was made adjudging that the costs and charges consequent upon the capture be paid by the claimants, and that damages be refused to them.

"From this decree the claimants appealed to the Supreme Court. The Supreme Court affirmed the decree of the district court restoring the vessel and cargo, but directed that the costs and expenses consequent upon the capture be ratably apportioned between the vessel and the shipment of coin hereinafter named, and that the residue of the cargo be exempted

from contribution. The district court determined, upon the proofs, that the vessel when captured was anchored south of the line dividing the waters of the Rio Grande, and was therefore in neutral waters.

"The Supreme Court held, on the contrary, that the proofs clearly showed her to have been anchored north of the division line above named and within the waters of Texas, then in possession of the enemies of the United States. The case in the Supreme Court is reported in 5th Wallace, pages 170 to 178; to which report reference is made for the statement of the peculiar facts of the case. No proofs were made before the commission substantially changing the facts as there stated.

"Many of the questions involved in this case were identical with those involved in the case of the *Sir William Peel* above reported, and therefore need not be again stated.

"Edwin Gerard, No. 244, claimed as assignee of the insurers of Messrs. F. De Lizardi & Co., the alleged owners of 12,000 British sovereigns, a portion of the cargo upon which, together with the vessel, the cost and expenses consequent upon the capture were apportioned by the decree of the Supreme Court.

"Simpson & Pitman, No. 396, and McDowell & Halliday, No. 397, claimants as owners respectively of parts of the cargo exempted from contribution by the final decree, claimed damages by the depreciation of the cargo during its detention, and for costs and expenses to which they had been subjected.

"The insurance companies, Nos. 427 and 428, claimed respectively as insurers of portions of the cargo in like manner exempted from contribution and which had been duly abandoned to them as insurers, and payments made by them respectively as upon a total loss.

"Upon the two last-named claims of the insurance companies, questions were raised on the part of the United States, as to the validity of the contract of insurance in the same regard reported above in the case of the *Sir William Peel*, and also as to the right of the insurance companies to recover in respect of portions of the cargo owned by persons not appearing to have been British subjects. This last-named question was subsequently more distinctly raised and passed upon in the case of the *Circassian*, and will be hereafter reported under that case.

"The commission unanimously disallowed all the claims.

Case of the "Volant."

"The brig *Volant*, John Amy *et al.*, No. 388, claimants for vessel; Edwin Gerard, No. 245, claimant for cargo.

"This vessel was captured on the 5th November 1863, at the mouth of the Rio Grande, taken into the port of New Orleans, and there libeled. By a decree rendered on the 11th June 1864, the district court condemned the vessel and cargo as lawful prize. From this decree the claimants appealed to the Supreme Court, which court reversed the decree of condemnation, but held that the capture was justified by 'probable cause,' and adjudged restitution of the vessel on payment of costs and charges. The case is reported in the Supreme Court in 5th Wallace, pp. 179, 180. It appeared that the vessel, when captured, was anchored within Texan waters.

"The claimants in No. 388 claimed as owners of the vessel for reimbursement of the costs and charges paid by them, and for damages by the detention of the vessel.

"Mr. Gerard, in No. 245, claimed, as assignee of the insurers of the cargo to whom the same had been abandoned, and who had paid as for a total loss, about $40,000, besides interest, for depreciation of cargo after the seizure, including the value of ninety-three cases of brandy, alleged to have been abstracted from the vessel while in custody of the officers of the district court.

"The questions involved in respect to this vessel are substantially covered by the report of the foregoing case of the *Sir William Peel* and by the report of the case in 5th Wallace.

"The claim of Amy and others, No. 388, in respect of the vessel, was unanimously disallowed by the commission.

"In the case of Mr. Gerard, No. 245, the commission made an award in favor of the claimant for $1,785, Mr. Commissioner Gurney dissenting. I am advised that this award was made in respect of the brandy abstracted while in charge of the officers of the district court; and that the other claims for damages in the case were disallowed.

Case of the "Science."

"The bark *Science*, Thomas E. Angell and others, claimants No. 391.

"This vessel was captured at the same time and place with the *Dashing Ware* and the *Volant*, libeled in the same court, and the same decrees entered respectively as in the case of the *Dashing Ware*, and the same appeals taken by the respective parties to the Supreme Court. That court

affirmed both judgments of the district court restoring the vessel and charging her with the costs and expenses of capture, finding upon the proofs that she was, when captured, anchored within Texan waters, and that no excuse appeared for her being there. The case in the Supreme Court is reported in 5th Wallace, pages 178, 179.

"The counsel for the claimants, in addition to the points above cited in the case of the *Sir William Peel* applicable to this case, contended that the capture was one made in bad faith; that the *Science* had arrived off the mouth of the Rio Grande on the 11th August; that immediately on her arrival she was boarded by an officer of a United States blockading vessel, who examined her papers and inspected her cargo, and permitted her to anchor and discharge her outward cargo and take on board a large portion of her return cargo; that the only allegation made by the capturing officer was that her outward cargo had included cloth of the character and description used for Confederate uniforms; that this allegation constituted no ground of capture, and even if originally it might have afforded probable cause of capture, it certainly could not after the vessel had been allowed to lie three months in the offing and take on board a valuable cargo of over 300 bales of cotton; that the fact of her being at anchor within Texan waters, if it existed, did not of itself constitute probable cause, there being no evidence in the case to indicate an intention of violation of the blockade; that, by international law and under the treaty of Guadalupe Hidalgo, the roadstead at the mouth of the Rio Grande was an open roadstead, where neutral vessels trading with Matamoras had a right to lie at anchor, whether north or south of the conventional line between the United States and Mexico established by that treaty; and that the United States could no more lawfully interfere with the enjoyment of that right than they could with the right of vessels in course of the same trade to navigate the mouth and current of the river; that the right to the navigation of the Rio Grande included the right to the means without which such navigation could not be reasonably enjoyed—among others, the right to moor in the roadstead at its mouth; that, even if the United States could claim an exclusive right to occupy the waters north of this line for the purpose of blockade, a vessel honestly engaged in trade with Matamoras, and anchoring for that purpose on the Texan side of the line, was

entitled to notice or warning before it could be treated as intruding on forbidden ground, and that a seizure without such notice was unjustifiable; that, in fact, the proofs failed to establish that the vessel was lying north of the dividing line, and that the blockading vessels, by omitting to apprise her that she anchored in a place which they deemed an improper one, and by permitting her to be there and take on board her return cargo, were estopped to allege that her position was an unlawful one.

"The claimant's counsel cited the *Terecita*, 5 Wall. 180; Madeiros *v.* Hill, 8 Bing. 231; Nailor *v.* Taylor, 9 Barn. & Cres. 718; Carrington *v.* Merchants' Insurance Company, 8 Peters, 517; Mr. Jefferson's paper on the navigation of the Mississippi, 1 Am. State Papers, 254.

"On the part of the United States it was contended that the *Science* and the other vessels of her class could not enter by reason of their draught of water, and never attempted to enter the mouth of the Rio Grande or to reach the port of Matamoras; that, conceding her full right to navigate that river and the waters through which its mouth was to be approached, and even for that purpose to pass over the blockaded waters of the Confederate States, it did not follow that she had the right, for her own convenience and for the delivery of her cargo into the lighters, to cast anchor within those blockaded waters, and there lie for weeks in a position from which access, by means of lighters to the blockaded coast, was easier, by night or by day, than that to the neutral port for which her cargo professed to be destined; that the United States were lawfully entitled to blockade, and did blockade the seacoast of Texas, and that such blockade would be wholly nugatory if a vessel in the condition of the *Science* could claim and exercise the right to cast anchor within the blockaded waters and within three miles of the enemy's coast, from which it was evident that she could, with great facility, hold communication with that coast.

"The commission awarded to the claimant the sum of $45,684, Mr. Commissioner Frazer dissenting."

American and British Claims Commission, treaty of May 8, 1871, Hale's Report 100–114. See also Howard's Report, 102, 107, 114, 118, 120.

Mr. Frazer's dissenting opinion.

Mr. Frazer delivered, in the cases of the *Sir William Peel*, the *Volant*, and the *Science*, the following dissenting opinion:

"1. The remarks made in the general argument for the claimants urging that claims of this character were intended to be referred to this commis-

sion by Article XII. of the treaty, seem unnecessary, inasmuch as our jurisdiction of the cases is not questioned, and can not be.

"If it is intended to infer that there must be an *award of damages*, from the fact that there is *jurisdiction*, I can not admit the inference. *Jurisdiction is merely the power to hear and decide*, and necessarily involves the duty of deciding favorably or adversely as the circumstances shall warrant.

"2. In like manner the somewhat extended remarks of the general argument to establish that *bona fide* trade with the Mexican port of Matamoras was not a violation of the blockade, and could not lawfully be reached by the blockade, may be put out of the case. No such thing was ever, for a moment, pretended by the United States. If, however, it is intended to suggest the inference that damages must be awarded for these captures because it was adjudged that these vessels were in fact engaged in that *bona fide* trade, then I deny the inference. The reason is a good one for discharging the vessel, but it has little to do with the question whether damages should be given. That depends upon the inquiry, was there good *apparent* cause for making the capture.

"3. In view of the instructions to the blockading fleets (satisfactory to Lord Russell), of the contemporaneous disavowals of Mr. Seward, and of the uniform decisions of the American prize courts, there is no warrant for the assumption (p. 21) that 'these captures were intended to affect the trade between Great Britain and Mexico.'

"4. The doctrine that this commission may, by its decisions, disregard the law of nations, in deference to whatever undefined notions of 'equity and justice' the several members of the commission may happen to entertain from time to time, is to me a very great surprise. It brings to mind the remark of an eminent English law judge, resisting the establishment of the jurisdiction of the courts of equity in that country, to the effect that decisions in equity depended upon the individual conscience of whosoever happened to be chancellor, and were therefore as uncertain as the length of the chancellor's arm or foot! From such equity as that he might well have wished the deliverance of his country. The injustice of his reproach is, however, seen in the fact that 'equity follows the law'—abides by it—not only obeys but maintains it, and administers justice according to a system of known and established principles sanctioned by precedent; that it does not depend upon the individual conscience of the judge.

"What is the law of nations which it is insisted this commission may disregard? All definitions of it are in accord, substantially, and none of them better than Blackstone's, 'that which regulates the conduct and mutual intercourse of independent states with each other by *reason* and *natural* justice." It is the natural law applied to nations in their relations with each other, so far as they have consented that it shall be thus applied. It is wanting in some of the essentials of strict law, however; it is not prescribed by a common superior, and its only sanction is the public opinion of Christendom. Nor is it a complete code having an established rule for all questions that may arise. It is yet in the period of its growth; but whenever it does speak it utters the rule which the wisdom of the nations has by common consent found to be most in consonance with reason and natural justice. When it gives a rule for the government of a given case, it furnishes the full measure of international obligation in that case—is the only standard by which conduct in that case can be

properly tested. In other words, it ascertains what is 'equity and justice' between nations.

"If seeking to pay a compliment to the eminent men who negotiated the treaty, I think one would hardly choose to say, 'they authorized the mixed commission at will to substitute for the rules of right which have been sanctioned by all Christian powers and the courts of both countries the individual notions of the commissioners thereafter to be chosen.'

"The application sought of the proposition alluded to is, in substance, that, though the facts before the prize court fully justified its judgments, according to the international law as even the British courts would themselves declare it to-day, yet this commission may, upon some imaginary ground of equity, be bound nevertheless to award damages. I can only say that no such result can occur here, except over the most emphatic and decided dissent with which I can oppose it.

"The *Science* (No. 391) was found at anchor in the roadstead outside the mouth of the Rio Grande, within less than a marine league of the Texas shore, which was blockaded. Her outward cargo, then discharged, had consisted in part of Confederate gray cloth (290 bales). She was, in fact, consigned to Matamoras, and really had discharged her cargo there. Matamoras was forty miles up the river. The Texas shore was accessible and less than two and a half miles distant. Captured November 5, 1863; had been there since August 12.

"The *Dashing Ware* (No. 395) was found at anchor near the *Science*, but further within American waters. No part of her cargo was war material. There were, however, two boxes (£12,000) of gold coin, £7,000 of which belonged to one Caldwell, whose nationality was unknown, but it is evident he was not British. It appeared from papers on board that at his request Lizardi & Co., British merchants, shipped it as theirs, the bill of lading (p. 193) containing the unusual recital that it was 'all British property.' She had discharged no part of her cargo. Caldwell had requested this shipment to be made by Lizardi & Co., as their property, in their name, with £5,000 to be advanced by them to him, if their consignee at Matamoras approved of proposed investments of it. He had specially requested that it be insured, 'including the war risk' (p. 200). She was, in fact, bound for Matamoras.

"Caldwell made no claim, but a claim was made on behalf of Lizardi & Co. for the whole £12,000, averring that 'no other persons are interested therein,' and sworn to by their attorney. Also, in the same behalf and to the same broad extent, by Armando Brothers, to whom the consignee had indorsed the bill of lading.

"The *Volant* (No. 388) was captured in American waters, the same as the *Science* and the *Dashing Ware*, loaded by the same brokers who loaded the *Science*, and had Confederate gray cloth (15 bales), being balance of invoice sent by *Science*. The remainder of her cargo was blankets, shoes and woolen stockings, and brandy. She had not discharged her cargo. The invoice on board described the cloth (p. 73) as four bales *blue mixed*, one *dark mixed*, ten *sky blue*. It seems that the whole was mixed, no *sky blue* whatever. The manifest showed boots, but *no shoes*.

"The *Sir William Peel* (No. 243) was captured at the mouth of the Rio Grande, in Mexican waters. She had been there about three months. Her cargo, as per manifest, had been mostly discharged at Matamoras,

and she had taken 904 bales of cotton, part of her return cargo. She had two 25-pound guns mounted, considerable ammunition, small arms, tomahawks, cutlasses, etc., for boarding; engines six feet below water line Burden, 1,044 tons. Signal lights were on her at night.

"A Confederate officer, it was sworn, claimed to have received arms from her, landed on the coast of Texas at night; and this was not contradicted, though there was opportunity. There is other strong inculpatory evidence, which is, however, contradicted, tending to show both the inward and outward cargoes to have been Confederate property.

"The question in all these cases is, whether or not there was probable cause for capture. The cargo of each of them was adapted to the Texan market, and there is little doubt that it was expected ultimately to find sale there, whether first to enter into the general stock of Matamoras, or merely to observe the form of passing through that place in transit to Texas.

"It seems from the evidence that the merchandise unladen at the mouth of the Rio Grande for Matamoras was conveyed to the latter place either in small steamers by the river, or in wagons by land. It seems also that this land transportation by wagons was likewise practicable on the Texas side from the coast at the mouth of the river.

"It was a matter of notoriety that enormous supplies of military as well as other goods for consumption in the Confederacy had been introduced through Texas *direct*, until the blockade of that coast was made effective, and afterwards through Matamoras. It was equally notorious that there was in Texas a great demand for such goods when these vessels were seized; and that it was the policy of the rebel authorities to ship cotton abroad rather than sell it at home.

"These considerations are mentioned to show the strong temptations which existed to introduce goods, and especially arms and ammunition (which could not go through Matamoras) into Texas direct. And if accomplished, it would avoid Mexican custom-house scrutiny, duties, charges, and detentions, and all the inconveniences which flow from circuitous and indirect methods.

"Inasmuch as watchful Federal cruisers were present almost constantly, any attempt by day to put goods upon the Texas shore would have been too hazardous for probable success. If done at all, it must have been under cover of darkness and in small quantities at a time and by the use of small boats. This would consume time, and would be greatly facilitated by nearness of the ship to the Texas shore.

"The *Science*. The foregoing observations apply in all these cases. With a burden of only 300 tons, the length of her visit (nearly three months) was of itself remarkable. She had the strong temptation to violate the blockade, and she had placed herself so near the Texas shore that she had the opportunity to do it. These circumstances of suspicion she created and did not explain. If a ship may thus put herself so near a blockaded shore for months, where, under cover of the night, she can land her cargo upon it, and this without any peril or cause of suspicion, then, indeed, the right of blockade is less valuable to a belligerent than I believe it to be.

"I am thus led to the conclusion not merely that the judgment of the

Supreme Court in the case of the *Science* was not clearly wrong, but that that judgment was clearly right.

"The *Dashing Ware*. The foregoing remarks apply with equal force to the case of the *Dashing Ware*, except that she had but recently arrived at the place where she was seized; and in this case there is superadded the facts concerning the coin of Caldwell. A Mexican would have no occasion thus to conceal his ownership. A Mexican would not have feared to make claim in the prize court. He was either Mexican or Confederate, for his country had political troubles. The conclusion is difficult to avoid that he was an enemy and his property liable to capture, contaminating all that belonged really to Lizardi & Co.

"I perceive no error in the judgment of the Supreme Court in this case, except in its failure to condemn the coin as lawful prize.

"The *Volant* is a case much like the *Dashing Ware*. There was no simulated ownership of cargo, but there was an apparent effort to mislead by the invoice as to the cloth—to conceal the fact that it was Confederate gray.

"I see no sufficient reason to hold in this that the judgment of the Supreme Court was wrong.

"The *Sir William Peel* differs from the other cases in the fact that she was captured in Mexican waters, where she had a right to be; though it seems from the evidence that she had previously been in Texan waters. In all other respects the case is stronger against the ship than in either of the others. It is only by giving her the benefit of doubts that I can say she should not have been condemned. I am very clearly of opinion that there was abundant reason for seizing her and sending her in for adjudication.

"That she was taken in Mexican waters was a violation of the sovereignty of Mexico, but not of the rights of the ship and cargo, which could not be interposed for their protection except by Mexico, was the doctrine held by the Supreme Court. I think the proposition is fully supported by reason and the principles of justice, and that it is a sound principle of international law, best in accord with the adjudged cases."

On the question of the assessment of damages in the case of the *Sir William Peel*, Mr. Frazer delivered the following dissenting opinion:

"Concerning the assessment of damages in the case of the *Sir William Peel* (the judgment of the Supreme Court of the United States being deemed erroneous by my colleagues), I felt constrained to dissent upon an important point.

"The ship and nearly all the cargo having been restored, it was material to ascertain the value of the property so restored at the date of restitution. If it was then worth as much as when captured, the only legitimate damages, it seemed to me, would be its use during the period of detention, together with costs and expenses. The value, I thought, should be taken at the time and place of restitution, and not at a different time. It had been ascertained at that time by an appraisement by the prize court, one of the appraisers being an agent of the claimants. This appraisement was in round numbers, in gold, £67,500. But the claimants chose, at very great expense, to take the property to England, where they sold it, realizing only £39,600; from which has been deducted all expenses of

removal to England, insurance, and other expenses of its preservation and care after restitution (a very considerable aggregate) and these net proceeds, deducted from the value at the time of capture, have been taken as a part of the damages awarded. I could not resist the conclusion that the claimants had, after restitution, sacrificed the property for but little more than half its value; and I could not agree that the United States should suffer that loss. It constitutes about three-fourths of the large sum awarded in the case."

In the case of the Dutch brig *Geziena Heligonda*, Walter Easton, trustee, claimant, No. 390, the claim was disallowed apparently on the ground that, although the vessel was ostensibly on a voyage from Liverpool to Matamoras and back, she was, when captured, seeking to enter the blockaded port of Brazos Santiago, in Texas (Hale's Report, 127; Howard's Report, 123).

7. Sale of Belligerent Ship in Neutral Port.

Case of the "Georgia."

"The steamship *Georgia*, Edward Bates, M. P., claimant, No. 429.

"The memorial of the claimant in this case recited that the *Georgia* was an armed vessel of the Confederate States; that she came into the port of Liverpool on or about the 2d May 1864; was there disarmed and advertised for sale; and that the claimant, on the 2d June 1864 purchased her without any armament, and paid for her in good faith the sum of £15,000 sterling, her full value at the time of the purchase; that he immediately changed her internal arrangements to fit her for use as a merchant steamer, and on the 18th July 1864 chartered her to the Portuguese Government for a voyage to Lisbon, Portugal, having spent a large sum of money in the alterations and fittings to adapt her for carrying passengers and cargo pursuant to the terms of the charter party; that under the charter party the vessel was laden by the Portuguese Government with coals for the use of the vessel, and duly cleared at Liverpool on her voyage to Lisbon; that while pursuing that voyage, 'in a peaceable manner and in violation of no law whatsoever,' she was unlawfully captured on the high seas by the United States ship of war *Niagara;* was taken into the port of Boston, there libelled in the United States district court, and condemned as lawful prize; that an appeal was taken from the decree of the district court to the Supreme Court of the United States, which on the hearing affirmed the decree of condemnation. The claimant claimed an award for £27,654, besides interest.

"To this memorial the United States demurred as setting

forth no valid claim against the United States; in that the memorial showed the vessel to have been an armed vessel of war of the so-called Confederate States of America, which were, during the whole period of the transactions set forth in the memorial, at war with the United States; that she entered the neutral port of Liverpool in her character as such armed vessel of war, and was there purchased by the claimant, her armament having been first removed, with full knowledge of her former character as such vessel of war, belonging to a power at war with the United States; that such purchase carried no title to the claimant as against the United States or as against their right to capture the vessel as a vessel of war; and that her subsequent capture by the United States, as set forth in the memorial, was a lawful and valid capture, and the vessel was properly and lawfully condemned by the prize courts.

"The counsel for the United States submitted the case on demurrer on the opinion of the Supreme Court, delivered on the affirmance of the decree of condemnation (7 Wall. 32) and without further argument.

"Her Britannic Majesty's counsel filed an argument in behalf of the claimant, in which he contended that the doctrine held by the Supreme Court as establishing liability of the vessel to capture after her disarmament and sale was unsound and unsustained by the authorities cited in the opinion. He cited and discussed the authorities cited by the Supreme Court in its opinion, to wit: The *Minerva*, 6 Rob. 397; the *Baltic*, 11 Moore's P. C. R. 145; Story's Notes on the Principles and Practice of Prize Courts, 63; Wildman, vol. 2, p. 90; and contended that these authorities did not sustain the conclusions of the Supreme Court on which the decree of affirmance was based.

"The claim was unanimously disallowed."

American and British Claims Commission, treaty of May 8, 1871, Article XII. Hale's Report, 139. See also Howard's Report, 153.

8. Miscellaneous Cases.

Case of the "Constitution."

"This claim is for the value of a vessel called the *Constitution* and her cargo, taken near the castle of San Juan de Ulloa in 1824 by the Mexican vessel of war *Igualen*, and sent into Alvarado. She was condemned with her cargo by a prize court, and on appeal the sentence was affirmed. * * * The prize

court condemned the vessel because she was sailing without a paper showing her character, and thus, they say, she was violating the cruising ordinance of Mexico. How far a state may regulate commerce within her own waters it is unnecessary to inquire in this case, since the vessel was captured on the high seas; and the right of capture in such cases is, in the absence of treaty stipulations, dependent on the law of nations. It is not directly settled by the public law what shall be the form of certificate to protect the vessels of neutral nations sailing on the high seas in time of war. A bill of sale containing a description of the vessel, with proof of citizenship in the owner, may be sufficient. Yet most if not all the nations of Europe require that vessels shall be provided with registers, passports, sea letters, or some certificate emanating from the state, or by its authority, proving the character of the vessel. The *Constitution*, a foreign-built vessel (her former name being changed by the purchaser), was purchased by Cheti, a citizen of the United States, and by the laws of the United States was not entitled to any certificate from the public establishing her ownership or character. The bill of sale under which the owner claimed to navigate his vessel did not contain a description of the vessel except in the name, and, though attested, as was also the citizenship of the owner, by a notary public, would seem to justify the detention of the vessel by the captors. We think the case before the prize court admitted further proof for the claimant. In cases analogous, where the question of prize if determined on the vessel's papers would have justified her condemnation, the courts have permitted the claimants to make further proof; as in the case of a vessel's sailing from necessity without a register, or its accidental loss, and also where the vessel was visited and some of her papers necessary for her defense were taken away. But in such cases the courts have ordered the vessels to be restored on payment of the captors' expenses. We think, under the circumstances, that the vessel should not have been condemned upon the ground set forth in the judgment of the prize court at Alvarado, and the claimant was therefore entitled to restitution of the property.

"The board decides that the claim for the value of the vessel at Alvarado is a valid claim against Mexico, and the same is accordingly allowed."

Case of *Zacharie, assignee of, Cheti*, opinion of the commissioners, Messrs. Evans, Smith, and Paine, under the act of Congress of March 3, 1849.

Case of the "Oriente."

A Mexican vessel named the *Oriente*, ostensibly bound from one Mexican port to another with a cargo of salt, put into New Orleans, which was then blockaded by the naval forces of the United States, under alleged stress of weather. She was seized on suspicion of having intended to run the blockade, and, on the strength of certain alleged irregularities in her papers, her crew were taken off and she was sent to New York to be libeled for condemnation. The district attorney at New York examined the case and, finding insufficient cause for detention, advised the Treasury that the vessel be released. This advice the Treasury did not accept, but kept her in custody for several months longer, when she was discharged without trial. The commission, while admitting that the original detention was justifiable, in order that the suspicions might be investigated, held that the refusal to discharge the vessel, after the suspicions had been shown to be unfounded, was wrongful, and allowed damages for it.

Eduardo Berron v. *The United States*, No. 358, convention of July 4, 1868, MS. Op. I. 47.

Case of the "Empress."

"The bark *Empress*, John Loft, mortgagee, claimant, No. 387.

"This vessel was captured off the mouth of the Mississippi River in November 1861, sent into the port of New York and there libelled for adjudication as prize in the district court. The district court adjudged condemnation of vessel and cargo. (Blatchford's Prize Cases, 175.) An appeal was taken to the circuit court of the United States for the same district, under the practice then existing, which court reversed the judgment of the district court and awarded restitution (*id.* 659), but without costs or damages to the claimants. Pending the proceedings in the prize court the vessel was sold and the proceeds, less the costs taxed against the same, were paid into the hands of the proctors of the claimants in the prize court, Pearson and others, the owners of the vessel.

"The memorial alleged that this money was attached in the hands of the proctors by creditors of Pearson, and that Pearson's interest in the same was appropriated to the payment of the debts due from him to the attaching creditors. The claimant, Loft, alleged himself the holder of a mortgage given by the owner, Pearson, to him to secure the sum of £1,000 and interest,

which mortgage was wholly due and unpaid. It alleged that the claimant had never received any notice of the capture of the bark, except as he learned the fact from the owners some time after the capture, and that he was then informed by the owners that they were taking the necessary and proper steps in the law courts for the purpose of protecting their interests.

"The memorial also alleged that the bark, at the time of her capture, was worth the sum of £4,000, and that it became largely depreciated in value by being suffered to remain without repairs, and without proper care being taken of it during the time it was detained prior to the sale. The claimant claimed the amount of his mortgage, £1,000 and interest.

"His counsel contended that the decree of the circuit court having ordered the restitution of the vessel to the claimants free of all costs and charges, it was plain that that decree had not been executed, over $2,000 having been retained from the proceeds as costs and charges, and the proofs failing to show that the remainder of the proceeds even were ever paid over in any manner under the decree of the court.

"On the part of the United States, it was contended that from the memorial itself it appeared that the proceeds of the vessel were regularly paid over to the proctors of the owners, the only claimants appearing in the prize court, excepting only costs allowed by the court as claimants' costs out of the fund. That it further appeared from the memorial that these funds thus paid over to the proctors were appropriated by regular judicial process to the payment of claims of attaching creditors of the owners. That if the claimant, Loft, as mortgagee, had a valid lien upon the vessel that lien could have been followed against the proceeds due, had he seen fit to take the necessary steps for that purpose; and that he having failed to do so, his lien had been lost by his own negligence. That, as to the sum withheld for costs, nothing appeared to show that that sum was excessive in amount, or was improperly withheld; and that if such had been the case, the remedy of the claimant or of his mortgagor, who represented his interests before the prize court, was ample before the courts themselves. That the whole case showed no ground of international reclamation on behalf of this claimant.

"The commission unanimously disallowed the claim."

American and British Claims Commission, treaty of May 8, 1871, Article XII. Hale's Report, 125. See also Howard's Report, 149.

Case of the "William L. Richardson."

The *William L. Richardson*, a registered American schooner, the property of Cory Willustun and George Goodrum, citizens of the United States, on October 11, 1864, cleared from San Francisco, under the command of Goodrum, for La Paz, Territory of Arizona, on the Colorado River. On board of the schooner there were 100 kegs of powder belonging to the Arizona Mining Company, a New York corporation, then engaged in mining in Arizona, the powder, as was alleged, being intended for use in that business. When the schooner was in the Gulf of California, near the port of La Paz, in Mexico, she was brought to by shots from the French war steamer *Diamant*, and was boarded. The officer in command of the boarding party demanded the schooner's papers, which were delivered up under protest, and the schooner herself was towed to a point about eight miles from La Paz, where the hatches were opened and the powder taken possession of by authority of the commander of the *Diamant*.

On these facts damages were claimed, on behalf of Willustun and Goodrum, for the freight on the powder, for the detention of the schooner for ten days, and for the breaking up of their freighting line on the Colorado River, amounting in all to $10,000; and, on behalf of the Arizona Mining Company, for the taking of the powder and for the injury to the company's business resulting from its loss.

At the time when the schooner and cargo were seized, the coast of the Gulf of California was guarded by French cruisers, but no formal blockade of the Mexican ports in that quarter had been declared. It appeared, however, that an order had been given by the French authorities to the French consul at San Francisco not to certify any invoice of powder to any port in Mexico; and the seizure of the vessel and the appropriation of the powder were justified by counsel for the French Republic on the ground that the presence of the *William L. Richardson* so near the western shores of the Gulf of California, and near the port of La Paz, in Mexico, warranted the conclusion that the powder was destined for a Mexican port. The bill of lading and the testimony showed that the powder was blasting powder.

Argument of counsel for France.

It was claimed by counsel for France that the powder had been condemned by a French tribunal as prize of war. No record of the [redacted]demnation was produced, but a certificate was furnished,

made by the minister of the navy and of the colonies, that 100 kegs of powder were captured on board the ship *Richardson* by the French *aviso*, the *Diamant*, of the naval division of the Pacific; that the seizure of the powder, regarded as contraband of war, had been held to be valid by the council of prizes; that its value, amounting to 1,303 francs and 70 centimes, had been the subject consequently of distribution among the captors, and that the production of a copy of said judgment was not possible, the archives of the council of prizes having been burned in 1871. Upon this certificate it was contended by counsel for the French Government that, as to the powder, the claim was barred by the second article of the convention, as interpreted by the diplomatic representatives of the two governments; that the decision of the case by the imperial council of prizes was final; that its decision that the powder was contraband of war affected the vessel; that the claims of Goodrum and Willustun should be rejected for the reason that the ship was engaged in transporting goods contraband of war, and consequently that no claim for detention for the purpose of searching the vessel and taking therefrom such goods could be maintained.

Reply of counsel for the United States.

Counsel for the United States in reply, said:

"By the treaty of 1853 between Mexico and the United States the United States was entitled to the free navigation of the Gulf of California for the purpose of availing itself of the river Colorado, which is wholly within our jurisdiction. The *Richardson* sailed from San Francisco, as it appears from the record, without knowledge that a blockade had been declared. She was sailing at the time of the arrest in waters to which we had free access by the treaty, and that right of access was not disturbed by the circumstance that France had engaged in war with Mexico. Those waters remained free to us for all our purposes. If war existed, and a blockade had been declared, then, of course, we had no right to run the blockade. If this vessel had been engaged in running the blockade, she was subject to seizure. But the mere fact that she was using the waters of the United States—this vessel being a vessel of the United States—gave her an absolute right to be where she was. She was precisely in the situation in which a vessel clearing from Halifax, in Nova Scotia, and bound to the Bermuda Islands, which were British possessions, would have been during our war with reference to the blockade on our coast. It would not have been competent for one of our blockading vessels to have seized a British ship when thus on her way by the ordinary course, or out of her way by stress of storm. The seizing vessel must know, before laying hands on a neutral ship, or even ordering her to heave to, that she was out of her proper course by her own motion, and that the diversion from the proper

course must have been of such a nature as to show that she was intending to run the blockade. Otherwise the assaulting party is culpable, and otherwise there would be no freedom of the sea. The *Richardson* was moving toward the mouth of Colorado River by the direct line, as may be seen by the map. She was hugging the coast, to be sure—the western coast of the Gulf of California; but that was the line of direct movement toward the mouth of the Colorado River. The idea that she should have taken the middle of the Gulf, or the eastern shore, is absurd, as the western coast was the nearer way, and she had a right to use it. I say further that even if there was evidence that she intended to land at La Paz, in Mexico, the most that could have been done by a blockading vessel was to intercept her and give her notice that she could not enter a port of Mexico. That is what the *Diamant* was bound to do. She had no right to board the *Richardson*. The *Richardson* was equipped with clean papers, and bound from San Francisco to a port on the Colorado River. She was in waters which by treaty we had a right to use. Therefore the French vessel had no right, even if the master had absolute knowledge that the *Richardson* intended to enter La Paz, in Mexico, to do anything more than to notify her of the blockade. Therefore the French vessel was in fault altogether. That fact established carries with it the whole of this case. * * *

"We were upon a water on which we had a right to sail our ships, and upon two grounds—first, that it was an open sea; secondly, if it was not an open sea, it was water within the jurisdiction of Mexico, and if it was within the jurisdiction of Mexico, then we had a right to sail upon it by virtue of the treaty of 1853. Therefore we had a right to be upon that water at that particular time, unmolested by any government on the face of the earth. If Mexico and France were at war, the only limitation upon that right would be the right of France to enforce against us the rules of war in reference to blockade. All that the *Diamant* had a right to do was to warn us off if she thought we were bound to a port of Mexico with articles contraband of war, or to aid the belligerent."

By the action of a majority of the commission, Baron de Arinos and M. Lefaivre, the cases were dismissed for want of jurisdiction. Commissioner Aldis dissented from the decision of the majority, and reserved the right to file an opinion. That right, however, in the end was not exercised by him. It was understood that the majority of the commission accepted the certificate of the minister of the navy and of the colonies as satisfactory proof that the case had been judicially disposed of, conformably to the diplomatic agreement between the two governments.

The Arizona Mining Co. v. *The Republic of France*, No. 13; *George Goodrum* v. *The Republic of France*, No. 16; *W. W. Willustun and W. J. Dutton, Executors of the Estate of Cory Willustun*, v. *The Republic of France*, No. 17; Boutwell's Report, 197. Commission under the convention between the United States and France of January 15, 1880.

Case of the "Anahuac."

The memorialists stated that in the year 1863, while they were in partnership and residing temporarily at the city of Acapulco, in Mexico, they became the owners by purchase of a steamship called the *Anahuac* and of a schooner called the *Teresa*, both of which were employed by them in the transaction of their business as merchants. The evidence disclosed the fact that, although the purchase money was paid by memorialists, the conveyance was made to a Mexican named Barrera. The reason given by Barrera for this arrangement was that Masson and Tripler, being American citizens, could not own a vessel and carry on the coasting trade under the flag of Mexico. In February 1864 the vessels left Acapulco for Puerto Angel, in Mexico, where the cargo was delivered and a return cargo taken on board. Upon their return from Puerto Angel the *Anahuac* was boarded by an officer from the French man-of-war *Le Rhin*. Shortly afterward two launches from a French frigate called the *Pallas* were sent, and the men and officers from the launches took possession of the two vessels. The vessels making the seizure were a part of the blockading squadron which was then engaged in support of what was called the "imperial party" in Mexico, under the lead of Maximilian, in opposition to what was known as the "republican government," or "liberal government," in that country. The *Anahuac* was used as a dispatch boat for a time, and there were proceedings by which the vessel and cargo were declared to be prize of war by a local prize court, but when the case was brought before the imperial council of prizes it was decreed that the vessel should be restored, in conformity with a decree of March 29, 1865, by which it was provided that restoration should be made in all cases where vessels and cargoes had not been "definitively condemned." The proceeds of the cargo when sold were deposited to the credit of whomsoever it might concern in the *caisse des invalides de la marine* at Paris. It appeared that the vessel was never restored, the reason given being that it was not practicable to find the owners.

The majority of the commission, Baron de Arinos and M. Lefaivre, made an award in each case, in the terms following:

"WASHINGTON, *March 26, 1884.*

"The cargo of the *Anahuac* was sold by the French authorities, and the proceeds of the sale, amounting to 6,829 francs and 57 centimes, were deposited with the 'caisse des invalides

de la marine' of France. The court of prizes of France decreed restoration of said cargo, or of its proceeds, to its owner.

"We award that the French Government shall pay a sum equal to one-half of said proceeds deposited with the 'caisse des invalides de la marine' of France, amounting to three thousand and four hundred and fourteen francs and 78½ centimes to the claimant, as owner of one-half of the cargo of the *Anahuac*, with interest at the rate of 5 per cent per annum from April 1st, A. D. 1864; and when said award shall have been paid by the Government of the French Republic to the Government of the United States of America, the French Government shall be subrogated to the rights of the claimant to the said one-half of the sum of six thousand eight hundred and twenty-nine francs and 57 centimes, deposited as aforesaid, with accruing interest.

"The rest of the claim is disallowed."

Commissioner Aldis added the following:

"While I assent to the above allowance, I must respectfully express the opinion that the further sum of $4,888 ought to be allowed for the Mexican dollars, which I think were taken by the French military authorities."

William C. Tripler v. *The French Republic*, No. 4, and *Thomas Masson* v. *The French Republic*, No. 15, Boutwell's Report, 195: Commission under the convention between the United States and France of January 15, 1880.

CHAPTER LXVII.

NEUTRALITY.

1. Cases under Article VII. of the Jay Treaty.

Provisions of the Article.

Article VII. of the treaty between the United States and Great Britain of November 19, 1794, commonly called the Jay Treaty, recites that "whereas certain merchants and others, His Majesty's subjects, complain that in the course of the war" then pending between Great Britain and France, "they have sustained loss and damage by reason of the capture of their vessels and merchandise, taken within the limits and jurisdiction of the [United] States and brought into the ports of the same, or taken by vessels originally armed in ports of the said States: It is agreed that in all such cases where restitution shall not have been made agreeably to the tenor of the letter from Mr. Jefferson to Mr. Hammond, dated at Philadelphia, September 5, 1793, a copy of which is annexed to this treaty, the complaints of the parties shall be and hereby are referred to the commissioners to be appointed by virtue of this article, who are hereby authorized and required to proceed in the like manner relative to these as to the other cases committed to them, and the United States undertakes to pay to the complainants or claimants in specie, without deduction, the amount of such sums as shall be awarded to them respectively by the said commissioners, and at the times and places which in such awards shall be specified, and on condition of such releases or assignments to be given by the claimants as in the said awards may be directed; and it is further agreed that not only the now-existing cases, * * * but also all such as shall exist at the time of exchanging the ratifications of this treaty shall be considered as being within the provisions, intent, and meaning of this article."

The origin of these stipulations has been traced in the history of the commission under the article in question.[1] The cases

[1] Supra, I. Chapter X.

that came before the commission will now be examined, with a view to ascertain the principles on which they were determined. In this relation it is necessary to refer to certain preliminary facts.

Case of the "Grange."

When M. Genet, the French minister, arrived at Charleston in April 1793 he sent the frigate *Embuscade*, in which he had come to the United States, on to Philadelphia, intending himself to make the journey by land. On the way to Philadelphia the *Embuscade* fell in with and captured the British ship *Grange*, in the Delaware Bay. On the advice of the Attorney-General of the United States that the Delaware Bay was within the jurisdiction and protection of the government, a request was made to Genet to cause the *Grange* and her cargo to be restored. With this request he complied.[1]

Fitting out of Privateers.

This act was an exception to his general course of conduct. Having brought with him a large number of blank commissions, he busily employed himself after his arrival in the United States in the fitting out and arming of vessels as privateers. Among the earliest of this class were *Le Citoyen Genet*, *Le Sans Culottes*, and *Le Vainqueur de la Bastille*, from Charleston; *L'Anti-George*, which was soon lost, from Savannah; *Le Carmagnole* and *Le Petit Démocrat*, from the Delaware River; *Le Républicain*, which was soon captured; and *Le Roland*, from Boston. These vessels took numerous prizes, which Genet refused to cause to be restored, though some of them were seized within the waters of the United States.

Washington's proclamation of neutrality.

At this time the United States had neither statutes nor precedents on the subject of neutrality, nor had the duties of neutrals ever been clearly defined. The first step in the development of the government's neutral policy was the issuance by Washington, April 22, 1793, of the following proclamation:

"By the President of the United States.

"A PROCLAMATION.

"Whereas it appears that a state of war exists between Austria, Prussia, Sardinia, Great Britain, and the United Netherlands, of the one part, and France on the other, and the duty and interest of the United States

[1] Am. State Papers, For. Rel. I. 148, 150.

require that they should with sincerity and good faith adopt and pursue a conduct friendly and impartial toward the belligerent powers:

"I have, therefore, thought fit by these presents to declare the disposition of the United States to observe the conduct aforesaid towards those powers respectively; and to exhort and warn the citizens of the United States carefully to avoid all acts and proceedings whatsoever which may in any manner tend to contravene such disposition:

"And I do hereby also make known that whosoever of the citizens of the United States shall render himself liable to punishment or forfeiture under the law of nations, by committing, aiding, or abetting hostilities against any of the said powers, or by carrying to any of them those articles which are deemed contraband by the *modern* usage of nations, will not receive the protection of the United States against such punishment or forfeiture; and, further, that I have given instructions to those officers to whom it belongs, to cause prosecutions to be instituted against all persons who shall, within the cognizance of the courts of the United States, violate the law of nations, with respect to the powers at war, or any of them.

"In testimony whereof I have caused the seal of the United States of America to be affixed to these presents, and signed the same day with my hand.

"Done at the city of Philadelphia, the 22d day of April 1793 and of the Independence of the United States of America the 17th.

"GO. WASHINGTON.

"By the President:

"TH. JEFFERSON."[1]

The foregoing proclamation was communicated by Mr. Jefferson, as Secretary of State, to the ministers of the belligerent powers with the following letter or note:

"PHILADELPHIA, *April 23, 1793.*

"SIR: As far as the public gazettes are to be credited, we may presume that war has taken place among several of the nations of Europe, in which France, England, Holland, and Prussia are particularly engaged. Disposed ourselves to pursue steadily the ways of peace, and to remain in friendship with all nations, the President of the United States has thought it expedient, by the proclamation, of which I enclose you a copy, to notify this disposition to our citizens, in order to intimate to them the line of conduct for which they are to prepare; and this he has done without waiting for a formal notification from the belligerent powers. He hopes that those powers, and your nation in particular, will consider this early precaution as a proof, the more candid as it has been unasked, of the sincere and impartial intentions of our country, and that what is meant merely as a general intimation to our citizens shall not be construed to their prejudice in any courts of admiralty, as if it were conclusive evidence of their knowledge of the existence of war, and of the powers engaged in it. Of this we could not give them conclusive information because we have it

[1] See Am. State Papers, For. Rel. I. 140; *United States* v. *Henfield*, Wharton's State Trials, 49.

not ourselves; and till it is given to us in form, and so communicated to them, we must consider all their acts as lawful which would have been lawful in a state of peace.

"I have, etc., TH. JEFFERSON."

Complaints of Violations of Neutrality.

May 8, 1793, Mr. Hammond, the British minister, informed Mr. Jefferson that two British brigantines, the *Four Brothers* and the *Morning Star*, had been brought by the French frigate *Embuscade* into Charleston, where they had been condemned as prize by the French consul, who was assuming to exercise the powers of a court of admiralty. He also called attention to the fact that a considerable quantity of arms and military accoutrements, purchased by an agent of the French Government, was about to be exported from New York.

On the 15th of May Mr. Jefferson replied that the judicial act performed by the French consul at Charleston was not warranted by the usages of nations nor by treaty, and consequently was a mere nullity, and that it involved a disrespect to the United States to which the government could not be inattentive. As to the shipping of arms and munitions of war, he said that the citizens of the United States were "free to make, vend, and export arms," subject to the penalty of confiscation if such arms should be seized by any of the belligerents on the high seas.

Decision of the United States District Court at Philadelphia.

The *Embuscade* was neither fitted out nor armed in the United States, and her captures, unless made within the jurisdiction of the United States, did not in themselves involve the government in any responsibility. Numerous captures were, however, made by the privateers that were fitted out and armed in the United States. On the 5th of June 1793 Mr. Jefferson informed Mr. Genet of the decision of the President that the fitting out of such privateers involved a violation of the rights and duties of the United States as a neutral, and asked that they be required to depart from the ports of the United States. Prior to this time *Le Citoyen Genet* had seized the ship *William*, of Glasgow, and the brigantine *Active*, of Bermuda; and at least four vessels had been taken by *Le Sans Culottes*, among which was the brigantine *Fanny*, of London. Both the *William* and the *Fanny* were brought into the port of Philadelphia, and the interposition of the courts was invoked

to secure their restitution. Judge Peters, of the district court of the United States at Philadelphia, decided in June 1793 that he had no jurisdiction in the matter, even though the capture was made within the territorial limits of the United States.[1]

Hamilton's Instructions to Collectors of Customs.

The court having declared itself incompetent to intervene, the President decided to act for himself. The diplomatic correspondence on the subject is reviewed in another place.[2] August 4, 1793, Alexander Hamilton, as Secretary of the Treasury, issued to collectors of customs the following instructions:[3]

Instructions to the collectors of the customs.

"[Circular.]

"PHILADELPHIA, *August 4, 1793.*

"SIR: It appearing that repeated contraventions of our neutrality have taken place in the ports of the United States without having been discovered in time for prevention or remedy, I have it in command from the President to address to the collectors of the respective districts a particular instruction on the subject.

"It is expected that the officers of the customs in each district will, in the course of their official functions, have a vigilant eye upon whatever may be passing within the ports, harbors, creeks, inlets, and waters of such district, of a nature to contravene the laws of neutrality, and upon discovery of anything of the kind will give immediate notice to the governor of the State and to the attorney of the judicial district comprehending the district of the customs within which any such contravention may happen.

"To assist the judgment of the officers on this head I transmit herewith a schedule of rules concerning sundry particulars which have been adopted by the President as deductions from the laws of neutrality established and received among nations. Whatever shall be contrary to these rules will, of course, be notified as above mentioned.

"There are some points which, pursuant to our treaties and the determination of the Executive, I ought to notice to you.

"If any vessel of either of the powers at war with France should bring or send within your district a prize made of the subjects, people, or property of France, it is immediately to be notified to the governor of the State in order that measures may be taken, pursuant to the seventeenth article of our treaty with France, to oblige such vessel and her prize, or such prize when sent in without the capturing vessel, to depart.

[1] *Findlay* v. *The Ship William*, 1 Peters' Adm. 12; *Moxon* v. *The Fanny*, 2 Id. 309. Accompanying the report in the former case there is an apologetic note in which it is stated that "the facts were not accurately investigated," and that "the whole of the case was novel in the United States."

[2] Supra, I. Chapter X.

[3] Am. State Papers, For. Rel. I. 140; British Counter Case and Papers, Geneva Arbitration, American reprint, 564.

"No privateer of any of the powers at war with France coming within a district of the United States can, by the twenty-second article of our treaty with France, enjoy any other privilege than that of purchasing such victuals as shall be necessary for her going to the next port of the prince or state from which she has her commission. If she should do anything besides this, it is immediately to be reported to the governor and the attorney of the district. You will observe, by the rules transmitted, that the term 'privateer' is understood not to extend to vessels armed for merchandise and war, commonly called with us letters of marque, nor, of course, to vessels of war in the immediate service of the government of either of the powers at war.

"No armed vessel which has been or shall be originally fitted out in any port of the United States by either of the parties at war is henceforth to have asylum in any district of the United States. If any such armed vessel shall appear within your district, she is immediately to be notified to the governor and attorney of the district, which is also to be done in respect to any prize that such armed vessel shall bring or send in. At foot is a list of such armed vessels of the above description as have hitherto come to the knowledge of the Executive.

"The purchasing within and exporting from the United States, by way of merchandise, articles commonly called contraband, being generally warlike instruments and military stores, is free to all the parties at war and is not to be interfered with. If our own citizens undertake to carry them to any of those parties, they will be abandoned to the penalties which the laws of war authorize.

"You will be particularly careful to observe, and to notify as directed in other instances, the case of any citizen of the United States who shall be found in the service of either of the parties at war.

"In case any vessel shall be found in the act of contravening any of the rules or principles which are the ground of this instruction, she is to be refused a clearance until she shall have complied with what the governor shall have decided in reference to her. Care, however, is to be taken in this not unnecessarily or unreasonably to embarrass trade or to vex any of the parties concerned.

"In order that contraventions may be the better ascertained, it is desired that the officer who shall first go on board any vessel arriving within your district shall make an accurate survey of her then condition as to military equipment, to be forthwith reported to you, and that prior to her clearance a like survey be made, that any transgression of the rules laid down may be ascertained.

"But as the propriety of any such inspection of a vessel of war in the immediate service of the government of a foreign nation is not without question in reference to the usage of nations, no attempt is to be made to inspect any such vessel till further order on the point.

"The President desires me to signify to you his most particular expectation that the instruction contained in this letter will be executed with the greatest vigilance, care, activity, and impartiality. Omissions will tend to expose the Government to injurious imputations and suspicions, and proportionably to commit the good faith and peace of the country, objects of too much importance not to engage every proper exertion of your zeal.

"I am, etc.,

"ALEXANDER HAMILTON.

"SCHEDULE OF RULES.

"1. The original arming and equipping of vessels in the ports of the United States by any of the belligerent parties for military service, offensive or defensive, is deemed unlawful.

"2. Equipments of merchant vessels by either of the belligerent parties in the ports of the United States, purely for the accommodation of them as such, is deemed lawful.

"3. Equipments in the ports of the United States of vessels of war in the immediate service of the government of any of the belligerent parties which, if done to other vessels, would be of a doubtful nature as being applicable either to commerce or war, are deemed lawful; except those which shall have made prize of the subjects, people, or property of France coming with their prizes into the ports of the United States, pursuant to the seventeenth article of our treaty of amity and commerce with France.

"4. Equipments in the ports of the United States, by any of the parties at war with France, of vessels fitted for merchandise and war, whether with or without commissions, which are doubtful in their nature as being applicable either to commerce or war, are deemed lawful; except those which shall have made prize, etc.

"5. Equipments of any of the vessels of France in the ports of the United States which are doubtful in their nature as being applicable to commerce or war are deemed lawful.

"6. Equipments of every kind in the ports of the United States of privateers of the powers at war with France are deemed unlawful.

"7. Equipments of vessels in the ports of the United States which are of a nature solely adapted to war are deemed unlawful; except those stranded or wrecked, as mentioned in the eighteenth article of our treaty with France, the sixteenth of our treaty with the United Netherlands, the ninth of our treaty with Prussia; and except those mentioned in the nineteenth article of our treaty with France, the seventeenth of our treaty with the United Netherlands, the eighteenth of our treaty with Prussia.

"8. Vessels of either of the parties not armed, or armed previous to their coming into the ports of the United States, which shall not have infringed any of the foregoing rules, may lawfully engage or enlist therein their own subjects or citizens, not being inhabitants of the United States; except privateers of the powers at war with France, and except those vessels which shall have made prize, etc."

Jefferson's note of September 5.

September 5, 1793, Mr. Jefferson addressed to Mr. Hammond the following note:[1]

"PHILADELPHIA, *September 5, 1793.*

"SIR: I am honored with yours of August 30th; mine of the 7th of that month assured you that measures were taken for excluding from all further asylum in our ports vessels armed in them to cruise on nations with which we are at peace, and for the restoration of the prizes, the *Lovely Lass*, *Prince William Henry*, and the *Jane of Dublin*, and that,

[1] Am. State Papers, For. Rel. I. 174.

should the measures for restitution fail in their effect, the President considered it as incumbent on the United States to make compensation for the vessels.

"We are bound by our treaties with three of the belligerent nations, *by all means in our power*, to protect and defend their vessels and effects in our ports or waters, or on the seas near our shores, and to recover and restore the same to the right owners when taken from them. If all the means in our power are used, and fail in their effect, we are not bound by our treaties with those nations to make compensation.

"Though we have no similar treaty with Great Britain, it was the opinion of the President that we should use towards that nation the same rule, which, under this article, was to govern us with the other nations, and even to extend it to the captures made on the *high seas*, and brought into our ports, if done by vessels which had been armed within them.

"Having, for particular reasons, forborne to use *all the means in our power* for the restitution of the three vessels mentioned in my letter of August 7th, the President thought it incumbent on the United States to make compensation for them; and though nothing was said in that letter of other vessels taken under like circumstances and brought in after the 5th June and *before the date of that letter*, yet, where the same forbearance had taken place, it was and is his opinion that compensation would be equally due.

"As to prizes made under the same circumstances and brought in *after the date of that letter*, the President determined that all the means in our power should be used for their restitution. If these fail, as we should not be bound by our treaties to make compensation to the other powers in the analogous case, he did not mean to give an opinion that it ought to be done to Great Britain. But still, if any cases shall arise subsequent to that date the circumstances of which shall place them on similar ground with those before it, the President would think compensation equally incumbent on the United States.

"Instructions are given to the governors of the different States to use all the means in their power for restoring prizes of this last description found within their ports. Though they will, of course, take measures to be informed of them, and the general government has given them the aid of the custom-house officers for this purpose, yet you will be sensible of the importance of multiplying the channels of their information, as far as shall depend on yourself or any persons under your direction, in order that the governors may use the means in their power for making restitution. Without knowledge of the capture they can not restore it. It will always be best to give the notice to them directly; but any information which you shall be pleased to send to me also at any time shall be forwarded to them as quickly as distance will permit.

"Hence you will perceive, sir, that the President contemplates *restitution* or *compensation* in the cases, before the 7th of August, and *after* that date, *restitution*, if it can be effected by any means in our power; and that it will be important that you should substantiate the fact that such prizes are in our ports or waters.

"Your list of the privateers illicitly armed in our ports is, I believe, correct.

"With respect to losses by detention, waste, spoliation, sustained by vessels taken as before mentioned, between the dates of June 5th and August 7th, it is proposed, as a provisional measure, that the collector of the customs of the district and the British consul, or any other person you please, shall appoint persons to establish the value of the vessel and cargo at the time of her capture, and of her arrival in the port into which she is brought, according to their value in that port.

"If this shall be agreeable, and you will be pleased to signify it to me, with the names of the prizes understood to be of this description, instructions will be given accordingly to the collectors of the customs where the respective vessels are.

"I have the honor to be, etc.,

"TH. JEFFERSON."

In explanation of this letter it may be observed that it was on the 5th of June that Jefferson informed Genet of the President's decision that the fitting out and arming of privateers by the belligerent powers in the ports of the United States was unlawful, and also of the President's desire that all privateers that had been so armed should depart. The decision and the desire were both disregarded. On the 7th of August, therefore, the President, having determined to carry his decision into effect, caused Genet to be acquainted that he considered it the duty of the United States either to restore or to make compensation for prizes taken subsequently to the 5th of June by privateers fitted out of their ports, and that in future the United States would take "efficacious measures," both to prevent the fitting out of such privateers and to exclude them from their jurisdiction; but, as to vessels taken and brought in between June 5 and August 7, it was left to Genet to cause the restitution to be made, in default of which the United States undertook to make compensation, looking to France for reimbursement. Among the vessels in this category were the *Jane of Dublin*, the *Lovely Lass*, and the *Prince William Henry*, British vessels, taken between the 28th of June and the 24th of July by *Le Citoyen Genet*. As they were not restored, the United States by the note of September 5 engaged to make compensation for them, as well as for any others in the same category. As to vessels brought in after the 7th of August, the President promised restitution, if it could be effected "by any means in our power;" but in respect of such vessels no compensation was admitted to be due, unless there should be some forbearance to use all the means of restitution.

should the measures for restitution fail in their effect, the President considered it as incumbent on the United States to make compensation for the vessels.

"We are bound by our treaties with three of the belligerent nations, *by all means in our power*, to protect and defend their vessels and effects in our ports or waters, or on the seas near our shores, and to recover and restore the same to the right owners when taken from them. If all the means in our power are used, and fail in their effect, we are not bound by our treaties with those nations to make compensation.

"Though we have no similar treaty with Great Britain, it was the opinion of the President that we should use towards that nation the same rule, which, under this article, was to govern us with the other nations, and even to extend it to the captures made on the *high seas*, and brought into our ports, if done by vessels which had been armed within them.

"Having, for particular reasons, forborne to use *all the means in our power* for the restitution of the three vessels mentioned in my letter of August 7th, the President thought it incumbent on the United States to make compensation for them; and though nothing was said in that letter of other vessels taken under like circumstances and brought in after the 5th June and *before the date of that letter*, yet, where the same forbearance had taken place, it was and is his opinion that compensation would be equally due.

"As to prizes made under the same circumstances and brought in *after the date of that letter*, the President determined that all the means in our power should be used for their restitution. If these fail, as we should not be bound by our treaties to make compensation to the other powers in the analogous case, he did not mean to give an opinion that it ought to be done to Great Britain. But still, if any cases shall arise subsequent to that date the circumstances of which shall place them on similar ground with those before it, the President would think compensation equally incumbent on the United States.

"Instructions are given to the governors of the different States to use all the means in their power for restoring prizes of this last description found within their ports. Though they will, of course, take measures to be informed of them, and the general government has given them the aid of the custom-house officers for this purpose, yet you will be sensible of the importance of multiplying the channels of their information, as far as shall depend on yourself or any persons under your direction, in order that the governors may use the means in their power for making restitution. Without knowledge of the capture they can not restore it. It will always be best to give the notice to them directly; but any information which you shall be pleased to send to me also at any time shall be forwarded to them as quickly as distance will permit.

"Hence you will perceive, sir, that the President contemplates *restitution* or *compensation* in the cases, before the 7th of August, and *after* that date, *restitution*, if it can be effected by any means in our power; and that it will be important that you should substantiate the fact that such prizes are in our ports or waters.

"Your list of the privateers illicitly armed in our ports is, I believe, correct.

"With respect to losses by detention, waste, spoliation, sustained by vessels taken as before mentioned, between the dates of June 5th and August 7th, it is proposed, as a provisional measure, that the collector of the customs of the district and the British consul, or any other person you please, shall appoint persons to establish the value of the vessel and cargo at the time of her capture, and of her arrival in the port into which she is brought, according to their value in that port.

"If this shall be agreeable, and you will be pleased to signify it to me, with the names of the prizes understood to be of this description, instructions will be given accordingly to the collectors of the customs where the respective vessels are.

"I have the honor to be, etc.,

"TH. JEFFERSON."

In explanation of this letter it may be observed that it was on the 5th of June that Jefferson informed Genet of the President's decision that the fitting out and arming of privateers by the belligerent powers in the ports of the United States was unlawful, and also of the President's desire that all privateers that had been so armed should depart. The decision and the desire were both disregarded. On the 7th of August, therefore, the President, having determined to carry his decision into effect, caused Genet to be acquainted that he considered it the duty of the United States either to restore or to make compensation for prizes taken subsequently to the 5th of June by privateers fitted out of their ports, and that in future the United States would take "efficacious measures," both to prevent the fitting out of such privateers and to exclude them from their jurisdiction; but, as to vessels taken and brought in between June 5 and August 7, it was left to Genet to cause the restitution to be made, in default of which the United States undertook to make compensation, looking to France for reimbursement. Among the vessels in this category were the *Jane of Dublin*, the *Lovely Lass*, and the *Prince William Henry*, British vessels, taken between the 28th of June and the 24th of July by *Le Citoyen Genet*. As they were not restored, the United States by the note of September 5 engaged to make compensation for them, as well as for any others in the same category. As to vessels brought in after the 7th of August, the President promised restitution, if it could be effected "by any means in our power;" but in respect of such vessels no compensation was admitted to be due, unless there should be some forbearance to use all the means of restitution.

Prohibition of French Consuls to Exercise Prize Jurisdiction.

September 7, 1793, Mr. Jefferson addressed a letter to the French consuls, requiring them to cease to exercise prize jurisdiction.[1] This letter was as follows:

"PHILADELPHIA, *Sept. 7, 1793.*

"SIR: Finding by the protests of several of the consuls of France, by their advertisements in the public papers, and other proceedings, and by other sufficient testimony, that they claim and are exercising within the United States a general admiralty jurisdiction, and in particular assume to try the validity of prizes, and to give sentence thereon, as judges of admiralty, and, moreover, that they are undertaking to give commissions within the United States, and to enlist or encourage the enlistment of men, natives or inhabitants of these States, to commit hostilities on nations with whom the United States are at peace, in direct opposition to the laws of the land: I have it in charge, from the President of the United States, to give notice to all the consuls and vice-consuls of France in the United States, as I hereby do to you, that if any of them shall commit any of the acts before mentioned, or assume any jurisdiction not expressly given by the convention between France and the United States, the exequatur of the consul so transgressing will be immediately revoked, and his person be submitted to such prosecutions and punishments as the laws may prescribe for the case.

"I have the honor to be, etc.,

"TH. JEFFERSON.

"Citizen FRANCOIS DUPONT,
"*Consul, Philadelphia.*
"Citizen MOISSONIER,
"*Vice-Consul, Maryland.*
"Citizen MANGOUNT,
"*Consul, Charleston.*
"The Citizen HAUTERIVE,
"*Consul from the Republic of France, at New York.*"

Extent of Territorial Protection.

In the discharge of the neutral obligations by which the Government of the United States acknowledged itself to be bound, it became necessary to determine the distance from the coast to which the duty of protection extended. On this subject Mr. Jefferson addressed to Mr. Hammond the following note:

"GERMANTOWN, *November 8, 1793.*

"SIR: The President of the United States, thinking that, before it shall be finally decided to what distance from our seashores the territorial protection of the United States shall be exercised, it will be proper to enter into friendly conferences and explanations with the powers chiefly interested in the navigation of the seas on our coasts, and relying that convenient occasions may be taken for these hereafter, finds it necessary in the

[1] Am. State Papers, For. Rel. I, 175.

mean time to fix provisionally on some distance for the present government of these questions. You are sensible that very different opinions and claims have been heretofore advanced on this subject. The greatest distance to which any respectable assent among nations has been at any time given has been the extent of the human sight, estimated at upward of twenty miles, and the smallest distance, I believe, claimed by any nation whatever is the utmost range of a cannon ball, usually stated at a sea league. Some intermediate distances have also been insisted on, and that of three sea leagues has some authority in its favor. The character of our coast, remarkable in considerable parts of it for admitting no vessels of size to pass near the shores, would entitle us, in reason, to as broad a margin of protected navigation as any nation whatever. Reserving, however, the ultimate extent of this for future deliberation, the President gives instructions to the officers acting under his authority to consider those heretofore given them as restrained for the present to the distance of one sea league or three geographical miles from the seashores. This distance can admit of no opposition, as it is recognized by treaties between some of the powers with whom we are connected in commerce and navigation, and is as little, or less, than is claimed by any of them on their own coasts.

"For the jurisdiction of the rivers and bays of the United States, the laws of the several States are understood to have made provision, and they are, moreover, as being landlocked, within the body of the United States.

"Examining, by this rule, the case of the British brig *Fanny*, taken on the 8th of May last, it appears from the evidence that the capture was made four or five miles from the land, and consequently without the line provisionally adopted by the President, as before mentioned.

"I have, etc.,

"TH. JEFFERSON."[1]

The foregoing note was followed by another, in which it was proposed that where a vessel captured by one of the belligerents should be reclaimed as having been taken in violation of the neutrality of the United States, persons should be appointed as representatives of the governments concerned to ascertain the facts and decide what should be done.[2]

Decision of the Supreme Court as to Prize Jurisdiction.

On February 18, 1794, however, the Supreme Court rendered, in the case of the sloop *Betsey*, a decision that dissipated the doubts which had existed as to the jurisdiction of the courts of the United States to intervene in respect of prizes made by cruisers illegally fitted out and armed in the United States.

[1] British Counter Case and Papers, Geneva Arbitration, American reprint, 553.

[2] Mr. Jefferson to Mr. Hammond, November 10, 1793, British Counter Case and Papers, Geneva Arbitration, American reprint, 554. See, also, circular of Mr. Hamilton, Secretary of the Treasury, to collectors of customs, February 10, 1794, id. 568.

The *Betsey* was captured by *Le Citoyen Genet* and brought into Baltimore, where she was libeled for restitution in the district court of the United States for the district of Maryland. The captor pleaded to the jurisdiction, and his plea was sustained. The Supreme Court reversed the decree of the district court and remanded the case for final decision on the merits, holding that the district court, being possessed of all the powers of a court of admiralty, instance as well as prize, was competent to decide whether restitution should be made, and that the admiralty jurisdiction which had been exercised by the French consuls in the United States was unwarranted and "not of right."[1]

Neutrality Act of June 5, 1794.

This decision was followed by the act of June 5, 1794, defining the duties of neutrality and providing for their execution, as follows:

"SEC. 1. *Be it enacted and declared by the Senate and House of Representatives of the United States of America in Congress assembled,* That if any citizen of the United States shall, within the territory or jurisdiction of the same, accept and exercise a commission to serve a foreign prince or state in war by land or sea, the person so offending shall be deemed guilty of a high misdemeanor, and shall be fined not more than two thousand dollars, and shall be imprisoned not exceeding three years.

"SEC. 2. *And be it further enacted and declared,* That if any person shall within the territory or jurisdiction of the United States enlist or enter himself, or hire or retain another person to enlist or enter himself, or to go beyond the limits or jurisdiction of the United States with intent to be enlisted or entered in the service of any foreign prince or state as a soldier, or as a marine or seaman on board of any vessel of war, letter of marque or privateer, every person so offending shall be deemed guilty of a high misdemeanor, and shall be fined not exceeding one thousand dollars, and be imprisoned not exceeding three years: *Provided,* That this shall not be construed to extend to any subject or citizen of a foreign prince or state who shall transiently be within the United States and shall on board of any vessel of war, letter of marque or privateer, which at the time of its arrival within the United States was fitted and equipped as such, enlist or enter himself or hire or retain another subject or citizen of the same foreign prince or state, who is transiently within the United States, to enlist or enter himself to serve such prince or state on board such vessel of war, letter of marque or privateer, if the United States shall then be at peace with such prince or state: *And provided further,* That if any person so enlisted shall within thirty days after such enlistment voluntarily discover, upon oath, to some justice of the peace or other civil magistrate the person or persons by whom he was so enlisted, so as that he or they may be apprehended and convicted of the said offence, such person so discovering the offender or offenders shall be indemnified from the penalty prescribed by this act.

[1] *Glass* v. *The Sloop Betsey,* 3 Dallas, 6.

"SEC. 3. *And be it further enacted and declared,* That if any person shall within any of the ports, harbors, bays, rivers or other waters of the United States, fit out and arm or attempt to fit out and arm or procure to be fitted out and armed, or shall knowingly be concerned in the furnishing, fitting out or arming of any ship or vessel with intent that such ship or vessel shall be employed in the service of any foreign prince or state to cruise or commit hostilities upon the subjects, citizens or property of another foreign prince or state with whom the United States are at peace, or shall issue or deliver a commission within the territory or jurisdiction of the United States for any ship or vessel to the intent that she may be employed as aforesaid, every such person so offending shall upon conviction be adjudged guilty of a high misdemeanor, and shall be fined and imprisoned at the discretion of the court in which the conviction shall be had, so as the fine to be imposed shall in no case be more than five thousand dollars and the term of imprisonment shall not exceed three years, and every such ship or vessel with her tackle, apparel and furniture together with all materials, arms, ammunition and stores which may have been procured for the building and equipment thereof shall be forfeited, one-half to the use of any person who shall give information of the offense and the other half to the use of the United States.

SEC. 4. *And be it further enacted and declared,* That if any person shall within the territory or jurisdiction of the United States increase or augment, or procure to be increased or augmented, or shall be knowingly concerned in increasing or augmenting the force of any ship of war, cruiser or other armed vessel which at the time of her arrival within the United States, was a ship of war, cruiser or armed vessel in the service of a foreign prince or state or belonging to the subjects or citizens of such prince or state the same being at war with another foreign prince or state with whom the United States are at peace, by adding to the number or size of the guns of such vessel prepared for use, or by the addition thereto of any equipment solely applicable to war, every such person so offending shall upon conviction be adjudged guilty of a misdemeanor, and shall be fined and imprisoned at the discretion of the court in which the conviction shall be had, so as that such fine shall not exceed one thousand dollars, nor the term of imprisonment be more than one year.

SEC. 5. *And be it further enacted and declared,* That if any person shall within the territory or jurisdiction of the United States begin or set on foot or provide or prepare the means for any military expedition or enterprise to be carried on from thence against the territory or dominions of any foreign prince or state with whom the United States are at peace, every such person so offending shall upon conviction be adjudged guilty of a high misdemeanor, and shall suffer fine and imprisonment at the discretion of the court in which the conviction shall be had, so as that such fine shall not exceed three thousand dollars nor the term of imprisonment be more than three years.

"SEC. 6. *And be it further enacted and declared,* That the district courts shall take cognizance of complaints by whomsoever instituted, in cases of capture made within the waters of the United States, or within a marine league of the coasts or shores thereof.

"SEC. 7. *And be it further enacted and declared,* That in every case in which

a vessel shall be fitted out and armed, or attempted so to be fitted out and armed, or in which the force of any vessel of war, cruiser or other armed vessel, shall be increased or augmented, or in which any military expedition or enterprise shall be begun or set on foot contrary to the prohibitions and provisions of this act; and in every case of the capture of a ship or vessel within the jurisdiction or protection of the United States as above defined, and in every case in which any process issuing out of any court of the United States, shall be disobeyed or resisted by any person or persons having the custody of any vessel of war, cruiser or other armed vessel of any foreign prince or state, or of the subjects or citizens of such prince or state, in every such case it shall be lawful for the President of the United States, or such other person as he shall have empowered for that purpose, to employ such part of the land or naval forces of the United States or of the militia thereof as shall be judged necessary for the purpose of taking possession of, and detaining any such ship or vessel, with her prize or prizes if any, in order to the execution of the prohibitions and penalties of this act, and to the restoring such prize or prizes, in the cases in which restoration shall have been adjudged, and also for the purpose of preventing the carrying on of any such expedition or enterprise from the territories of the United States against the territories or dominions of a foreign prince or state, with whom the United States are at peace.

"SEC. 8. *And be it further enacted and declared,* That it shall be lawful for the President of the United States, or such other person as he shall have empowered for that purpose, to employ such part of the land or naval forces of the United States or of the militia thereof, as shall be necessary to compel any foreign ship or vessel to depart the United States, in all cases in which, by the laws of nations or the treaties of the United States, they ought not to remain within the United States.

"SEC. 9. *And be it further enacted,* That nothing in the foregoing act shall be construed to prevent the prosecution or punishment of treason, or any piracy defined by a treaty or other law of the United States.

"SEC. 10. *And be it further enacted,* That this act shall continue and be in force for and during the term of two years, and from thence to the end of the next session of Congress, and no longer.

"Approved, June 5, 1794."[1]

Briefly summarized, this act forbade: 1. The acceptance and exercise by a citizen of the United States, within the jurisdiction thereof, of a commission to serve a foreign belligerent. 2. Enlistments in the United States. 3. The fitting out and arming of vessels. 4. The augmenting or increasing the force of armed vessels. 5. The setting on foot of military expeditions. The President was authorized to use the land and naval forces for the execution of these provisions, as well as for the

[1] 1 Stats. at L. 381. This act was continued in force by the act of March 2, 1797, for an additional period of two years and to the end of the next session of Congress thereafter. (Id. 497.) By the act of April 24, 1800, it was continued in force indefinitely. (2 id. 54.)

purpose of compelling any foreign ship or vessel to depart, when by the law of nations or the treaties it ought not to remain.[1] The decision of the Supreme Court and the act of Congress blazed the way for the judicial tribunals, and enabled them to interpose with purpose and effect in cases involving the obligations of neutrality. Where there was no substantial increase,[2] or where there was a mere replacement[3] of force in the United States, or where the cruiser, though first fitted out and armed in the United States, was, after having been reduced there to her original condition, subsequently armed and commissioned in a home port,[4] or where there was no distinctively warlike equipping and arming in the United States,[5] restitution was refused. But, where the cruiser was illegally fitted out and armed in the United States, her prizes were, if brought within the United States, restored.[6] Such was the rule, though it is possible that it may not have been fully or correctly applied in every case.

Obligations of United States under Article VII. of the Jay Treaty.

In proceeding now to examine the cases that came before the commission under Article VII. of the Jay Treaty, the language of which has already been quoted, it is important to bear in mind precisely what were the obligations of the United States under that article.

1. The article *recites* that British subjects have suffered loss and damage by reason of the capture of their vessels and merchandise (*a*) "taken within the limits and jurisdiction of the States and brought into the ports of the same" (*b*) "or taken by vessels originally armed in ports of the said States."

2. The article *provides* that the commission shall exercise jurisdiction "in all such cases where restitution shall not have

[1] *U. S.* v. *Guinet*, Wharton's State Trials, 93.

[2] *Moodie* v. *Ship Brothers*, Bee, 76.

[3] *Moodie* v. *The Ship Phabe Anne*, 3 Dallas, 319.

[4] *Williamson* v. *Brig Betsey*, Bee, 67; *British Consul* v. *Ship Marmaid*, Bee, 69.

[5] *Moodie* v. *The Ship Alfred*, 3 Dallas, 307.

[6] *Talbot* v. *Jansen*, 3 Dallas, 133; *Geyer* v. *Michel*, 3 Dallas, 285; *Moodie* v. *Betty Cathcart*, Bee, 292; 3 Dallas, 288, note. "The principle is now firmly settled that prizes made by vessels which have violated the acts of Congress that have been enacted for the preservation of the neutrality of the United States, if brought within their territory, shall be restored." Marshall, C. J., *The Gran Para*, 7 Wheaton, 471, 486. See *Santissima Trinidad*, 1 Brockenborough, 470.

been made agreeably to the tenor of the letter from Mr. Jefferson to Mr. Hammond, dated at Philadelphia, September 5, 1793."

Thus the obligation of the United States to make compensation in the cases mentioned in the first clause is measured by the tenor of the letter described in the second.

By that letter the United States acknowledged their obligation—

1. To restore vessels captured within their jurisdiction.

2. To restore vessels captured on the high seas and brought into their ports by cruisers armed within them, where such vessels were captured and brought in after June 5, 1793.

3. To make compensation where, as in the cases of the *Lovely Lass*, the *Jane of Dublin*, and the *Prince William Henry*, they had forborne to use all the means in their power to perform obligations 1 and 2.

In this relation it should be observed that obligation 1 does not appear to have been limited to vessels captured and brought in after June 5, 1793. In the cases of the brig *Fanny* and the ship *William*, both of which were captured and brought into port before that date, the United States disclaimed any obligation to make restitution on the ground that the vessels were captured more than a marine league from the coast, which the President had provisionally adopted as the limit of the protection of the United States. It was impliedly admitted that restitution would have been due if the captures had been made within that belt.[1] It has already been pointed out that the reason for this distinction was that it was on the date mentioned that the position of the United States in regard to the privateers fitted out and armed in their ports was taken, while the obligation to extend protection to vessels within their jurisdiction was previously admitted. We have seen that in the case of the ship *Grange*, which was captured in the Delaware Bay and brought into Philadelphia in April 1793, restitution was not only acknowledged to be due, but was actually effected.

Limits of obligation as to restitution or compensation.

When the commission under Article VII. came to deliberate on the claims of British subjects, the first question that arose grew out of the recital as to vessels and merchandise "taken by vessels originally armed in ports of the said [United]

[1] British Counter Case and Papers, Geneva Arbitration, American reprint, 553-554, 582.

States." If this recital could either be substituted for or added to the terms of the letter of Jefferson to Hammond, for the purpose of determining the obligation of the United States in respect of captures made by vessels originally armed in their ports, it might be argued that the mere fact of arming in the United States was sufficient to entitle the claimants to compensation in such cases—and in fact the argument was made. Gore and Pinkney, in a letter to Pickering of December 4, 1797, said:

"Some claimants have contended that it was only necessary to prove the capture to have been made by a French vessel fitted out in the United States in order to entitle them to compensation under that article. This construction is supported by civilians eminent for their talent as well as official rank and station in this government.

"They do not hold themselves bound to prove a capacity in the United States to make restitution by the captured vessel having been within their jurisdiction, or that the United States did or neglected to do some act which proved a forbearance to use means in their power to make restitution.

"It will likewise be contended that a privateer which received any addition to her equipment within the waters of the United States is a vessel 'originally armed in the ports of the United States' within the meaning of those terms, as used in the treaty."

Case of the "Jamaica."

The question whether compensation was due where a vessel, though captured by a cruiser originally armed in the United States, never was brought within their jurisdiction, was decided on May 21, 1798, in the case of the ship *Jamaica*, Martin, master. The question was determined in the negative. The grounds on which it was so determined are set forth in the opinion of Mr. Gore. And in this relation it is proper to point out that Mr. Gore, while adopting the letter of Jefferson to Hammond as the test of the responsibility of the United States, said: "The ground of obligation on the United States to compensate for loss or damage resulting from a capture by vessels originally armed in their ports, was the forbearance on their part to use the means in their power to restore such captured property when brought within their jurisdiction. The counsel for the claimant seemed to suppose that the obligation to compensate arose from the circumstance of the privateer being originally armed in the United States, but as there is not the smallest evidence to induce a belief that, in this or in any other case the government *permitted* or in any degree con-

nived at such arming, or failed to use all the means in their power to prevent such equipment, there is no ground to support a charge on the fact that the armament originated in their ports."

The text of Mr. Gore's opinion is as follows:

Opinion of Mr. Gore. "Claim by William Hutchins on the United States, for compensation for the loss and damage which has accrued to the owners of said vessel and cargo by the capture thereof by the privateer ———, said to have been originally armed in the United States.

"The question of arming in the United States has not been considered by the board, because it appeared from the claimant's own statement that the capture was on the high seas; shortly after which, and before her arrival in any port, the said ship *Jamaica* and her cargo were burnt and totally destroyed; and on this point, viz, that the captured property had never been within any of the ports of the United States, the board, one gentleman only dissenting, were of opinion that the case was not within the stipulation of the article under which the commissioners act.

"At the request of the claimant the cause has been reconsidered and counsel heard, who has endeavored to support the two following positions, viz, that the statement in the article of the complaints of His Britannic Majesty's subjects is conclusive as to the description of cases, and included every quality necessary to entitle the claimant to the compensation promised, without any reference to the letter of Mr. Jefferson to Mr. Hammond, annexed to the treaty, and secondly, that in a case thus circumstanced the law of nations imposes a duty on the United States to make the compensation required.

"The article states that 'certain merchants and others, His Majesty's subjects, complain that they have sustained loss and damage by reason of the capture of their vessels and merchandise, taken within the limits and jurisdiction of the States, and brought into the ports of the same, or taken by vessels originally armed in ports of said States.'

"The above is the complaint, to which follows the agreement of the contracting parties, which contains the promise and stipulation of the United States. It is 'that in all such cases, where restitution shall not have been made, agreeably to the tenor of the letter from Mr. Jefferson to Mr. Hammond, dated at Philadelphia, Sept. 5, 1793, a copy of which is annexed to this treaty, the complaints of the parties shall be, and hereby are, referred to the commissioners to be appointed by virtue of this article, who are hereby authorized and required to proceed in the like manner relative to these as to the other cases committed to them,' etc.

"The description of cases, on which the board is bound to award compensation, is not conclusively defined in the complaints of His Majesty's subjects, for in the agreement afore

recited it appears they must possess another ingredient and be conformable to another rule.

"They must be such cases 'where restitution has not been made agreeably to the tenor of the aforesaid letter.' To avoid the natural and obvious effects of these words, it has been argued that they are introduced merely for the purpose of avoiding an obligation on the United States to compensate for injury sustained by capture, etc., in cases where they had actually effected a restitution of the property captured.

"It can hardly be conceived that the letter should have been introduced and made part of this treaty merely to avoid a charge on the United States, where they had actually restored the thing captured, 1st, because, if the government of said States had caused restitution to be made of property thus taken, it had done everything which the law of nations obliged them to do, and the party could have no just cause of complaint or claim against them for compensation. Secondly, supposing that a different idea of the duty of the United States was entertained, and they were conceived liable not only to restore the thing captured, but also to compensate for any collateral or consequential damage that might have resulted from the capture, and that restitution had been made agreeably to the tenor of that letter, it is not probable that damage had been sustained to any considerable amount, or at least to such a degree as to render it a subject for national negotiation. Neither is it suggested that complaints were made of injury and damage sustained, tho' the property was restored. And further, if any were, the complainants are barred according to this construction from claiming it here, because the board is authorized only to examine those cases where restitution has not been made agreeably to the tenor of that letter, and therefore the parties without burthening the treaty with this letter might have answered every purpose, if this was their object, by saying 'where the property shall not have been restored.'

"The letter, then, must have been introduced, and these words, 'such cases where restitution has not been made agreeably to the tenor of said letter,' to define the circumstances in which the United States were bound to make restitution, and on forbearance whereof they were obliged to make compensation. This construction corresponds with the technical signification of the words 'according to the tenor,' as used in legal instruments, both in Great Britain and America, with the received understanding of the terms in common parlance, and more especially with their use in diplomatic correspondence and in treaties between different nations.

"By the words of this promise no one can doubt that it would be a good reply for the United States to make to a claim for compensation that restitution had been made according to the tenor of said letter. It would have been a satisfactory answer in the United States to a demand on its government for

restitution that according to the tenor, that is, according to the force and obligation of their promise, as contained in Mr. Jefferson's letter, they were not bound to make restitution.

"If such would be a fit answer to a demand for restitution, there can be no reason why it should not be equally just to a claim for compensation, because that, in the same case, they had failed to restore.

"To support the claim for compensation under such circumstances would be saying that compensation was due for not restoring where the party complained against was under no obligation to restore.

"By the promise contained in this letter the United States were bound to use all the means in their power to restore prizes taken by vessels originally armed in their ports, if brought within them. Suppose a vessel to be thus taken, and, after having been despoiled of most of her cargo on the high seas by the captors, to arrive in some port of the United States, and that means are there successfully used to restore the vessel, but from the plunder of her before the arrival not a tenth part of the property captured is obtained for the claimants, yet according to the construction put on this article by the advocate for the claimants no claim for compensation could be supported, for restitution had been made according to the tenor of said letter.

"It would be charging a strange inconsistency in the parties to this agreement to suppose the United States not liable to restore in the case put, beyond what was in their power, and also not liable to make compensation for not restoring, and yet, that in the case before us, where no part was ever in their power, they were liable to make compensation for the whole. The sum might be greater in the former than in the present case, and therefore the loss to the individual greater in that than in this instance. The reason for not restoring the whole in the one case is precisely the same as for not restoring a part in the other, and therefore the demand dependent on the same principle. A construction replete with such contradictions and injustice ought to be resisted unless absolutely imposed by the express meaning of the terms. Here the absurdities, flowing from the construction contended for, only serve to confirm the evident intention of the parties, as derived from the common and natural force of the terms of the stipulation as before shown.

"The letter was written by the Government of the United States to afford satisfaction to the British minister for complaints of His Majesty's subjects on account of loss by them sustained contrary to the law of nations. It has not been suggested that the duties of the United States, as therein defined and applying to a case circumstanced as the one under consideration, were not deemed satisfactory by that minister or his nation. Neither has it ever been contended that they were liable in analogous cases to restore or to compensate for not

making restitution where it was not in their power to restore. It is, therefore, natural to conclude that according to the understanding of both nations this letter fully and truly defined the duties of the United States in cases circumstanced like the present.

"However, the advocate for the complainant supposes that the law of nations obliged the government in such case to make compensation. If this was true it would be incumbent on us to strain the language of the article (of which the letter is as much a part as any sentence) as far as possible, to bring the cause within its meaning. To support the doctrine contended for by the claimant the counsel has introduced the justifying memorial of His Britannic Majesty in answer to the exposition of the court of France, and also the memorial of Sir Joseph Yorke to the States General dated 21st February 1777 and the opinion of Sir Leoline Jenkins in what he considers a like case.

"The memorials referred to were made during the American war, and contain the complaints of Great Britain for the countenance and support which these two powers afforded to the United States in that contest, and especially to their ships of war and their prizes.

"The relation which the United States bore to Great Britain leaves no room to doubt that the duties of France and of the States General were stated as favorably for the complaining power, as the law of nations would justify; and that satisfaction for loss or damage was demanded in every case, where it could be exacted, by virtue of that law, and that complaint for doing or permitting to be done what the law forbade, or omitting to do what their duty imposed, could not fail of being introduced, especially when it is remembered that the justifying memorial against France was written after the commencement of the war between those two crowns. It should also be observed that Great Britain, in those memorials and in all her charges against those powers, founded her complaints, not only on the law of nations, but also on the breach of express stipulations of treaty then subsisting between them and her. She declares that by the spirit as well as the letter of the treaty of 1763 (in which the parties contract 'not to permit any hostilities by land or sea, and to contribute to their mutual glory, without giving any succor or protection, directly or indirectly, to those who would do any prejudice to one or other of the high contracting parties'), France was under obligations to bar her ports against the American vessels, to forbid her subjects to have any commerce with that rebellious people, and not to afford either protection or succor to the domestic enemies of a crown with which she had sworn a sincere and inviolable friendship.

"The memorial complains that France '*permitted* an underhand and dangerous war to issue from her ports,' and this complaint is founded entirely on the ground that all the equipments there made were done with the *knowledge* and *permis-*

sion of the government; that by such permission vessels which the Americans had either built or purchased were armed and fitted out there to cruise on the coast of Great Britain: that such vessels, chiefly armed by Frenchmen, who entered under the eyes of their governors, took many British ships, reentered the ports of France, where they publicly sold their prizes in sight of the royal officers, refitted their privateers, and went out again to make capture of the persons and property of His Majesty's subjects. A particular vessel is named which, after the strongest representation of the British minister against her being suffered to remain in port, was permitted to stay, and the captain allowed to refit his ship, to provide himself with gunpowder, and also with French seamen, and then to go out and cruise on the British, in which cruise the same privateer, with others, took 15 British ships, greater part whereof were carried into the ports of France and sold. No demand was made for compensation for the loss sustained by reason of these captures.

"But on representations being made of the injury received by these equipments and sales of prizes, it was deemed satisfactory by the British crown that the King of France declared his resolution to banish the American corsairs from his ports, and that in future he would take the most rigorous measures to prevent the sale of prizes taken from the subjects of Great Britain.

"Surely then the conclusion to be drawn from this memorial is directly the reverse of what is contended for by the claimant's counsel. The cases stated have a much stronger claim on a government for compensation than those described in Mr. Jefferson's letter; for the privateers, it is declared, were fitted out with the knowledge and permission of the French Government; that the prizes taken by vessels thus fitted out were brought in and publicly sold under the protection of the royal officers, who, in affording this protection, conformed themselves to the French ministry, and yet it was deemed a full satisfaction that the government promised to banish the corsairs and *in future* prohibit the sale of prizes. Not even a demand was made that the prizes should be restored, tho' in the power of France to make the restitution, much less that compensation should be made by the government for the loss sustained from not restoring those which had not been brought into their ports, altho' taken by vessels fitted out against the remonstrances of the British minister and by the permission of the Government of France.

"The memorial of Sir Joseph Yorke states 'that the governor of St. Eustatia connived at the hostile equipment of the Americans and *permitted* the seizure of an English vessel by an American pirate within cannon shot of that island, and did also return from the fortress of his government the salute of a rebel flag.'

"The language used on this occasion by the British envoy

discovered no disposition to abate, in any degree, of the just demands which the law of nations authorized him to make on the States General.

"The satisfaction demanded was a disavowal of the salute by Fort Orange at St. Eustatia and the dismission and recall of the governor. No demand is made for restitution of the English vessel or for compensation for not restoring her, tho', by the allegation, the governor forbore to use the means in his power to defend the said vessel while within the jurisdiction of the island or to restore her after the capture.

"The case stated from Sir Leoline Jenkins is that of a Dutch vessel forcibly taken out of the waters of England, by a French ship of war, and carried to France as prize.

"On a memorial to the King of England on this subject, Sir Leoline gives his opinion in the following words, viz: 'A reparation is justly due to Your Majesty for the indignity offered by taking the Dutch ship out of your protection, and the reparation can not be a full and complete one unless the ship and goods be restored, or else the full equivalent thereof, with the damages. 'Tis true the Dutch are not in a capacity to make a direct demand for such restitution from the French, yet if the wrongdoer do carry away and enjoy the fruits of his violence, and the innocent ally be bound to sit down by his loss, the rights of ports will be thought not asserted to the full, since they consist not only in the reverence due to the government, but in the indemnity of all parties for the punishment of an unjust violence, such as this is, and which undoubtedly belongs to Your Majesty, and to Your Majesty alone, to punish. The affront to authority must in the first place be expiated, but then the loss to the party violated ought to be fully made up. However, the time and manner of demanding this reparation is not (can not be) prescribed by any rule of law that I know of; therefore I shall not presume to speak anything in it, Your Majesty's reasons of state and your royal resentment being the proper measures of demand.'

"What demand the memorial stated does not appear; but there is not the smallest pretense, from the opinion of Sir L. Jenkins on this case, to say that the British King was liable to effect a restitution or make compensation. Evidently, in his judgment, any satisfaction to be made was to come from France. The Dutch, as they were then at peace with the French, might demand it themselves; but as the King's dignity had been injured he was authorized to require a full reparation, though the time and manner of demanding the reparation was to depend solely on His Majesty's reasons of state and royal resentment.

"This case was introduced by the learned advocate to support, on the authority of Sir L. Jenkins, the doctrine that a neutral nation is obliged by the *droit public* to use all the means in her power to restore the property of the subjects of

another nation, taken within her jurisdiction by the enemies of the captured, or by vessels originally armed in her ports, whether brought therein or not; that the means in her power, and which she is obliged to use, are to make war against the capturing nation, and that, if she fail to make use of such extreme means, she is bound to make compensation to the individuals injured. It is impossible to read that opinion and not to form a directly different conclusion as to the means to be used and the obligation on the neutral state in failure of those means.

"According to the principles of justice, on which is founded the law of nations, no government can be liable to compensate for an injury which they did not commit, or for not preventing a loss when out of their power to prevent it, or for not using means in their power to restore property wrongfully taken, when such property never came within the reach of those means. The law of nations is thus laid down by Puffendorf and Grotius:

"'One people may offend another directly, when by order of their sovereign they cause a damage to be done to another in any manner, or indirectly, when a sovereign does not punish the mischiefs done by his subjects to another people, or, if he could hinder them, doth not; as, for example, if he does not use the best means he can and ought to prevent or restrain robberies and piracies; if he affords a reception to those who have wronged and injured the state; in all those cases he is obliged to restitution.' (Puff. 3 B. 1 C. 11 sect. note.)

"'Kings and magistrates are bound to make reparation, if they do not use such means as they may and ought to prevent robbery and piracy. The States had granted letters of marque to many of their subjects to take prizes from their enemy, some of whom robbed their own subjects, and deserting their native country roved about upon the seas, and would not return; it was determined that the States were not bound to make reparation, but to punish and deliver up the delinquents if they could be taken.' (Grotius, 2 B. 17 C. 20 S.)

"'Nor are kings bound to make reparation if their soldiers, either by sea or land, shall do their subjects or allies any damage contrary to their command; which is proved by the testimonies of France and England. But if any one be bound to make reparation for what his ministers or servants do *without his fault*, this cause is not to be determined by the law of nations, but by the civil law; not by that in general, but by certain by-laws made against mariners and some others for particular reasons.' (2 Gro. 17, 20.)

"Bynkershoek, and Lee, who has adopted all his principles and authorities from Bynkershoek, are to the same point:

"'In the case of the husbandmen and servants making iron unlawfully in a farm, it is its being done without the master's knowledge which exempts him from punishment, and, if it had been done with his privity, he would suffer, because it was

his duty, and he had the power to prevent it.' (Bynkershoek, 2 I. P. 1 B. 2 C.; Lee on Captures, p. 187.)

"Conformably to these principles, I find a case, cited from the rolls of Parliament, in an old book entitled 'His Majesty's Propriety and Dominion of the British Seas Asserted,' wherein certain ambassadors from the Emperor of Flanders 'demand that inquiry should be made and justice rendered about a depredation by the subjects of England upon the English seas, taking wines and other property belonging to certain merchants of Flanders toward the ports of Cranden, within the territory and jurisdiction of the King of England, alleging that the said wines, etc., *were brought within the realm and jurisdiction of the King, and that it belonged to him to see justice done in regard to that he is the Lord of the Sea*,' etc.

"The ground of demand here is that the injury was done within the jurisdiction of the King, and that the property, for the loss of which justice is required, was also brought within his realm and jurisdiction.

"Indeed, nothing could be more incongruous with the principles of natural justice, as well as with the law of nations, than to render an individual or government under an obligation to restore that which was never in his power to restore, or under such circumstances to compensate for not restoring it, when the loss arose without the smallest fault imputable to such government or individual.

"The ground of obligation on the United States to compensate for loss or damage resulting from a capture by vessels originally armed in their ports was the forbearance on their part to use the means in their power to restore such captured property when brought within their jurisdiction.

"The counsel for the claimant seemed to suppose that the obligation to compensate arose from the circumstance of the privateer being originally armed in the United States, but as there is not the smallest evidence to induce a belief that, in this or in any other case, the government *permitted* or in any degree connived at such arming, or failed to use all the means in their power to prevent such equipment, there is no ground to support a charge on the fact that the armament originated in their ports.

"The charge against France in the memorial before quoted was founded expressly on the fact that the acts of which His Britannic Majesty complained *were* done with the *knowledge and permission of the government and under the protection of the royal officers.*

"The same memorial states that 'it is well known that the vigilance of the laws can not always prevent artful, illicit traders, who appear under a thousand different forms, and whose avidity for gains makes them brave every danger and elude every precaution.' And in repelling certain accusations of the French court it says: 'In the vast and extended theatre of a naval war the most active vigilance and the most steady

authority *are unable to discover or suppress every disorder*, but every time that the court of Versailles was able to establish the truth of any real injuries that its subjects had sustained, without the knowledge or approbation of His Majesty, the king gave the most speedy and effectual orders to stop an abuse which injured his own dignity as well as the interest of his neighbours,' etc.

"Thus justly did Great Britain define the duties and responsibility of a nation when endeavouring to criminate her enemy and justify herself to the world. Where there is no fault, no omission of duty, there can be nothing whereon to support a charge of responsibility or justify a complaint.

"It is conceded by all that the express stipulation of the article, supposing the letter to be part thereof, excludes this case from our consideration.

"The law of nations, as stated by the most eminent writers, clearly proves that in a case like the one submitted the party has no claim on the neutral government for compensation, and the law, as thus declared, is abundantly exemplified by different writings and diplomatic papers produced by the claimant's counsel.

"My former opinion, therefore, that the claimant is not entitled to compensation under this treaty is confirmed by the fullest conviction that the claim, if considered distinct from the letter of Mr. Jefferson to Mr. Hammond, could not derive the least support from the principles of justice or from the law or practice of nations.

"C. GORE.

"GRAYS INN SQUARE, *21 May 1798*."

Case of the "Fanny."

It has been stated that while, by the letter of Jefferson to Hammond of September 5, 1793, the United States acknowledged an obligation to restore vessels taken by cruisers armed within their jurisdiction only where such vessels were captured and brought in after the 5th of the preceding June, it seems to have been impliedly admitted in the cases of the brig *Fanny* and the ship *William*, which were captured and brought in before that date, that restitution would have been due if the vessels had been taken in territorial waters. The cases of these two vessels came before the commission under Article VII. and the claims were dismissed. In the case of the *William* no opinion was delivered. In the case of the *Fanny* an opinion was read by Mr. Trumbull, in which he seems to have expressed the view that the date in question was intended to apply to all claims, whether the taking occurred inside or outside territorial waters. The question before him was, however, that of a vessel captured

on the high seas by a cruiser originally armed in the United States; and as to that question there is no doubt that his opinion expressed the views of the commission. His opinion was as follows:

Opinion of Mr. Trumbull.

"It appears from the protest and an affidavit of the master (which are the only evidence before us relating to this capture) that this was a British vessel laden with a cargo the property of British subjects, and bound from Jamaica to Baltimore; that she was captured on the 8th day of May 1793 at the distance of about four or five miles from Cape Henry by the French privateer called the *Sans Culottes*, which was originally armed in the port of Charleston in So. Carolina.

"From the affidavit it appears that the *Fanny* was carried into the port of Philadelphia, to which city the captain, Pile, also went, 'and that upon application to the courts of justice he (the captain) obtained an order to attach the vessel, which this deponent did as she lay at the quay.' It is further stated in this affidavit that 'the deponent (Capt. Pile) attended in the court at Philadelphia the trial of the ship *William*, of Glasgow, taken in *nearly* the same circumstances, when the judge observed that he thought the courts of America had no right to take cognizance of or in the least to interfere between the belligerent powers.' It is further stated that a demand being made the same day for the value or restitution of the said vessels and cargoes, the President issued an order the same night to seize the said vessels in the behalf and for the account of the said United States, and which was accordingly done.' The affidavit goes on to say that 'upon this the deponent made direct application to George Hammond, esqr., His Majesty's minister plenipotentiary in Philadelphia, as to what steps he had best pursue, who told him it was now a point between the British and American governments; that it was useless for the deponent to remain longer in America. Thereupon this deponent quitted America in search of other employment.'

"Thus far the testimony goes, but we have no information before us from the complainant what, or whether any, further steps were ever taken by him, or on his behalf, for the recovery of this property, either before the judicial or the executive power of the United States.

"That part of the seventh article of the treaty between Great Britain and the United States by which complaints of this description are referred to the examination and decision of this board is in the following words:

"'And whereas certain merchants and others, His Majesty's subjects, complain that, in the course of the war, they have sustained loss and damage by reason of the capture of their vessels and merchandise, taken within the limits and jurisdiction of the States and brought into the ports of the same,

or taken by vessels originally armed in ports of the said States: It is agreed that in all such cases where restitution shall not have been made agreeably to the tenor of the letter from Mr. Jefferson to Mr. Hammond, dated at Philadelphia, Sept. 5th 1793, a copy of which is annexed to this treaty; the complaints of the parties shall be and hereby are referred to the Commissioners to be appointed by virtue of this article, who are hereby authorized and required to proceed in the like manner relative to these as to the other cases committed to them.'

"Without discussing whether in strict grammatical construction, the letter therein referred to does or not form a part of the article, this at least is manifest, that the article and the letter are inseparably connected, so that in every case which can be brought before the board under the above-recited branch of the article, the preliminary question must necessarily be not whether restitution has already and *absolutely* been made by the United States in the case, but *whether restitution has been made agreeably to the tenor of the letter*. Hence a careful examination and clear understanding of the engagements contained in that letter become necessary, it being manifest that in all those cases where the stipulations of that letter shall appear to the board from this preliminary enquiry to have been fulfilled, we have nothing further to do, and that it is only in cases where we shall find that *restitution according to the tenor of that letter* has not been made that the board are to proceed in like manner as in other cases committed to them.

"The members of the board differ very materially in their understanding of the tenor of this letter. I have heard with attention what has been said on both sides, as well as what was said in a former case by counsel of high reputation, and I have endeavored to form my opinion not only by giving due weight to all that I have so heard, but more especially by a careful examination of the correspondence which passed at the time, and on the subject of the captures complained of between Mr. Jefferson, then the American Secretary of State, and Mr. Hammond and Mr. Genet, then ministers plenipotentiary of the British and French nations. In cases where doubts arise respecting the true intentions of a party expressed in a written act, I know of no method more impartial or more certain of ascertaining such intention than a reference to the cotemporary writings of the party, particularly when, as in the present case, the writings in dispute forms a part of a connected and important series relating to the same subject.

"The President of the United States, in a message dated the 5th Decr. 1793, laid before the Legislature of the Union copies of the correspondence which had passed between the officers of the American Government and the ministers of Great Britain and France respecting captures said to have been illegally made from the subjects of their respective nations. This message and the papers with which it was accompanied were, by order of the House of Representatives, printed at Philadelphia

the same year. What I have to offer to the board as the ground of the opinion which I am to give in the present case will consist principally of extracts from that publication.

"The first paper which I beg leave to quote, as appearing to me essential to a right understanding of the stipulations contained in the letter of the 5th September, is a preceding letter from Mr. Jefferson to Mr. Hammond, dated 5th June 1793. It is as follows:

"'PHILADELPHIA, *June 5th, 1893.*

"'SIR: In the letter which I had the honour of writing you on the 15th May, in answer to your several memorials of the 8th of that month, I mentioned that the President reserved for further consideration a part of the one which related to the equipment of two privateers in the port of Charleston. The part alluded to was that wherein you express your confidence that the Executive Government of the United States would pursue measures for repressing such practices in future, and for restoring to their rightful owners any captures which such privateers might bring into the ports of the United States.

"'The President, after a full investigation of this subject and the most mature consideration, has charged me to communicate to you that the first part of this application is found to be just, and that effectual measures are taken for preventing repetitions of the act therein complained of; but that the latter part, desiring restitution of the prizes, is understood to be inconsistent with the rules which govern such cases, and would therefore be unjustifiable toward the other party.

"'The principal agents in this transaction were French citizens; being within the United States at the moment a war broke out between their own and another country, they determine to go to its defence. They purchase, arm, and equip a vessel with their own money, man it themselves, receive a regular commission from their own nation, depart out of the United States, and then commence hostilities by capturing a vessel. If, under these circumstances, the commission of the captor was valid, the property according to the laws of war was, by the capture, transferred to them, and it would be an aggression on their nation for the United States to rescue it from them, whether on the high seas or on coming into their ports. If the commission was not valid, and consequently the property not transferred by the laws of war to the captors, then the case would have been cognizable in our courts of admiralty, and the owners might have gone thither for redress, so that on neither supposition would the Executive be justifiable in interposing.

"'With respect to the United States, the transaction can in no wise be be imputed to them. It was in the first moment of the war, in one of their most distant ports, before measures could be provided by the government to meet all the cases which such a state of things was to produce, impossible to have been known, and therefore impossible to have been prevented by that government.

"'The moment it was known, the most energetic orders were sent to every State and port in the Union to prevent a repetition of the accident. On a suggestion that citizens of the United States had taken part in the act, one who was designated was instantly committed to prison for prosecution; one or two others have since been named and committed in like manner, and should it appear that there were still others, no measures will be spared to bring them to justice. The President has even gone further, he has required as a reparation of their breach of respect to the United States that the vessels so armed and equipped shall depart from our ports.

"'You will see, sir, in these proceedings of the President, unequivocal proofs of the line of strict right which he means to pursue. The measures now mentioned are taken in justice to the one party; the ulterior measure of seizing and restoring the prizes is declined in justice to the other, and the evil thus early arrested will be of very limited effects, and perhaps indeed soon disappear altogether.'

"A letter was written on the same day to Mr. Genet, the minister of France, on the subject of the vessels fitted out at Charleston, expressive of similar sentiments, and containing an express demand that those vessels should immediately depart from the ports of the United States.

"Both these letters clearly explain that the Government of the United States did not hold itself bound to restore prizes made by the vessels in question on the high seas prior to their date.

"But complaints of this nature continuing to be made, notwithstanding the letter above mentioned to Mr. Genet, it became necessary that the Government of the United States should vindicate its rights in a more energetic manner; and accordingly, on the 7th August, a circular letter was written to the governors, etc., of the respective States, of which the following appears to have been the substance:

"'It having been decided by the President of the United States that no armed vessel which has been or shall be originally fitted out in any port of the United States as a cruiser or privateer by either of the parties at war is to have asylum in any of the ports of the United States; in case any vessel within the foregoing description should arrive in any port or harbor within the limits of your "jurisdiction" you are to cause her to be ordered to depart immediately, and in case of her refusal you are to take effectual measures to oblige her to depart. Force is not to be resorted to until every proper effort has been previously made to procure the early departure without it. If any such vessel or vessels shall have sent or brought, subsequent to the 5th *instant*, or should hereafter send or bring any prize or prizes into any port or harbor within your "jurisdiction," you will cause such prize or prizes to be immediately secured for the purpose of being restored to the former owners.

"'The following are the names of the privateers comprehended within the meaning of this letter that have hitherto come to the knowledge of the Government of the United States: *Citoyen Genet, Sans Culottes, Vainqueur de la Bastille*, fitted out at Charleston, South Carolina; *Petit Democrat*, Philadelphia; *Carmagnole*, Delaware.'

"On the same day the following letters were written by Mr. Jefferson to the British and French ministers:

"'PHILADELPHIA, *7th Augt. 1793.*

"'To Mr. HAMMOND, etc.

"'SIR: A constant expectation of carrying into full effect the declaration of the President against permitting the armament of vessels within the ports of the United States, to cruise on nations with which they are at peace, has hitherto prevented my giving you a final answer on the subject of such vessels and their prizes. Measures to that effect are still taking, and particularly for excluding from all further asylum in our ports the vessels so armed, and for the restoration of the prizes, the *Lovely Lass*, the *Prince William Henry*, and the *Jane of Dublin*, taken by them; and I am authorized in the meantime to assure you that, should the measures for restoration fail in their effect, the President considers it as incumbent on the United States to make compensation for the vessels.

"'I have the honor to be, etc.

"'To the MINISTER PLENIPOTENTIARY OF GREAT BRITAIN.'

"'PHILADELPHIA, *August 7th, 1793.*

"'To the MINISTER PLENIPOTENTIARY OF FRANCE:

"'In a letter of June 5th I had the honor to inform you that the President, after reconsidering at your request the case of vessels armed within

our ports to commit hostilities on nations at peace with the United States, had finally determined that it could not be admitted, and desired that all those which had been so armed should depart from our ports. It being understood afterward that these vessels either still remained in our ports or had only left them to cruise on our coasts and return again with their prizes, and that another vessel, the *Petit Democrat*, had been since armed at Philadelphia, it was desired in my letter of the 12th July that such vessels, with their prizes, should be detained till a determination should be had of what was to be done under these circumstances. In disregard, however, of this desire the *Little Democrat* went out immediately on a cruise.

"'I have it now in charge to inform you that the President considers the United States as bound, pursuant to positive assurances given in conformity to the laws of neutrality, to effectuate the restoration of or to make compensation for prizes which shall have been made of any of the parties at war with France, *subsequent to the 5th day of June last*, by privateers fitted out of our ports.

"'That it is consequently expected that you will cause restitution to be made of all prizes taken and brought into our ports *subsequent to the above-mentioned day* by such privateers, *in defect of which* the President considers it as incumbent upon the United States *to indemnify the owners of those prizes*, the indemnification to be reimbursed by the French nation.

"'That, besides taking efficacious measures to prevent the future fitting out of privateers in the ports of the United States, they will not give asylum therein to any which shall have been at any time so fitted out, and will cause restitution to be made of all such prizes as shall be hereafter brought within their ports by any of the said privateers.

"'It would have been but proper respect to the authority of the country had that been consulted before these armaments were undertaken. It would have been satisfactory, however, if their sense of them, when declared, had been duly acquiesced in. Reparation of the injury to which the United States have been made so involuntarily instrumental is all which now remains, and in this your compliance can not but be expected.'

"In both these letters we see a direct adherence on the part of the Government of the United States to the rule adopted in the letter of the 5th June, as well as the establishment of a new one for all cases which might occur subsequent to the 7th August; that is, to consider the privateers equipped in ports of the United States without the knowledge of the government, and anterior to any prohibition of such acts by it, as legal cruisers until that date, June 5th, and as illegal from the date of the 5th June, when their disapprobation was distinctly communicated to the minister of France. The letter written by Mr. Jefferson to M. Genet on the subject of the three vessels mentioned by name, and dated at Philadelphia, November 22nd, 1793, still goes on the same principle. It is as follows:

"'PHILADELPHIA, *Novr. 22nd, 1793.*

"'SIR: In a letter which I had the honor of writing to you on the 12th July, I informed you that the President expected that the *Jane of Dublin*, the *Lovely Lass* and the *Prince William Henry*, British vessels taken by the armed vessel *Citoyen Genet*, should not depart from our ports until his ultimate determination thereon should be made known. And in a letter of the 7th of August I gave you the further information that the President considered the United States as bound, pursuant to positive assurances given in conformity to the laws of neutrality, to effectuate the restoration of or to make compensation for prizes made subsequent to the 5th day of June by privateers fitted out in our ports; that consequently he expected you to cause restitution to be made of all prizes taken and brought into our ports subsequent to the said 5th of June by such privateers, in defect

of which he considered it as incumbent on the United States to indemnify the owners of such prizes, the indemnification to be reimbursed by the French nation.

"'This determination involved the brig *Jane of Dublin*, taken by the armed vessel *Citoyen Genet* on the 24th July; the brig *Lovely Lass*, taken by the same vessel on the 4th July, and the brig *Prince William Henry*, taken by the same vessel on the 28th June. And I have it in charge to enquire of you, sir, whether these three brigs have been given up, according to the determination of the President, and if they have not, to repeat the requisition, that they be delivered up to their former owners.

I am, etc.'

"They were not given up, and the Government of the United States, 'rather than employ force for their restitution,' became obligated to make compensation agreeably to the opinion of the President expressed in Mr. Jefferson's letter of the 7th August.

"Before I advert to the letter of the 5th September, which is by the treaty made the rule of our judgment in these cases, I shall quote one more letter of the American Secretary of State, which still more clearly explains the sense of that government respecting the rule adopted by that of the 5th June, and at the same time solves a doubt which may sometimes occur to the board on another very important point. It is a letter to the French minister, and in the following words:

"'GERMANTOWN, *November 8th, 1793.*

"'SIR: I have now to acknowledge and answer your letter of September 13th, wherein you desire that we may define the extent of the line of territorial protection on the coasts of the United States, observing that governments and jurisconsults have different views on this subject.

"'It is certain that heretofore they have been much divided in opinion as to the distance from their seacoasts to which they might reasonably claim a right of prohibiting the commitment of hostilities. The greatest distance to which any respectable assent among nations has been any time given has been the extent of the human sight, estimated at upwards of twenty miles; and the smallest distance, I believe, claimed by any nation whatever, is the utmost range of a cannon ball, usually stated at one sea league. Some intermediate distances have also been insisted on, and that of three sea leagues has some authority in its favor. The character of our coast, remarkable in considerable parts of it for admitting no vessel of size to pass near the shores, would entitle us in reason to as broad a margin of protected navigation as any nation whatever. Not proposing, however, at this time, and without a respectful and friendly communication with the powers interested in this navigation, to fix on a distance to which we may ultimately insist on the right of protection, the President gives instructions to the officers acting under his authority to consider those heretofore given them as restrained for the present to the distance of one sea league or three geographical miles from the seashores. This distance can admit of no opposition, as it is recognized by treaties between some of the powers with whom we are connected in commerce and navigation, and is as little or less than is claimed by any of them on their own coasts. Future occasions will be taken to enter into explanations with them as to the ulterior extent to which we may reasonably carry our jurisdiction. For that of the rivers and bays of the United States, the laws of the several States are understood to have made provision, and they are, moreover, as being landlocked, within the body of the United States.

"'Examining by this rule the case of the British brig *Fanny*, taken on the 8th May last it appears from the evidence that the capture was made four or five miles from the land, and consequently without the line provisionally adopted by the President as before mentioned."

"In the last paragraph of this letter, we find a direct application of the principles of the letter of the 5th June to a particular case, I presume the one now under consideration, as I can find no mention in any part of the correspondence of any other captured vessel call the *Fanny* than this commanded by Captain Pile, whose protest (which is printed among the other papers of the correspondence) states the same date of capture and the same distance from the shore, here mentioned. The legality of the privateer is evidently understood here according to the principle of the letter of the 5th June, the capture having taken place prior to that date, and the only question appears to have been whether this happened within the line of jurisdictional protection of the United States; from the master's protest it was seen it did not, and therefore the prize remained to the captors.

"Thus far we can be at no loss for the sentiments of the American Government, the foregoing letters clearly defining the extent to which they held their nation to be responsible for the captures which are of the description of the present complaint. It remains to examine the letter of the 5th September, which is by the treaty made our rule, and to determine whether it contains any expression which can be understood as meant to extend such responsibility. The letter itself having been so long under our eyes I shall only copy here the part which has a direct reference to the present question.

"The first paragraph, after stating that it is an answer to one from Mr. Hammond dated August 30th, goes on to recapitulate the subject of the letter to him, dated August 7th, which contains the first promise of compensation for the three enumerated vessels.

"The second states what were the obligations on this subject, which the United States had by treaty contracted with other nations.

"The third states the determination of the President to extend the same rule to Great Britain, although the United States were not bound by treaty to do so, and even to extend the rule to captures made on the high seas and brought into ports of the United States, if done by vessels which had been originally armed within them.

"The fourth paragraph of the letter is in the following words: 'Having for particular reasons forborne to use all the means in our power for the restitution of the three vessels mentioned in my letter of August 7th, the President thought it incumbent on the United States to make compensation for them; and though nothing was said in that letter of other vessels taken under like circumstances, and brought in after the 5th June, and before the date of that letter, yet, when the same forbearance had taken place, it was and is his opinion that compensation would be equally due.'

"The before-recited letter of the 7th August, in which compensation had been promised for three vessels by name, con-

tained no express stipulation in respect to other cases of a similar description which might have occurred. I have reason to believe that this omission will be found to have occasioned Mr. Hammond's letter of the 30th, in answer to which this paragraph expressly extends the same principle, which had induced the promise of compensation in these three cases to all others of similar character which might have occurred between the 5th June and the 7th August. The promise is limited to cases occurring between those dates, and in this is to be seen an unequivocal maintenance on the part of the United States of the principle adopted and expressed in the letter of the 5th June respecting captures made before that date. The limitation of the engagement to cases occurring after that date leaves no doubt of their having considered those which had occured before as out of the present question, and as having been definitively settled by the distinct determination respecting them, which had been expressed in the letter of that date.

"The fifth paragraph of the letter of the 5th September relates only to cases which might occur after the 7th August.

"The sixth states what instructions had been given to the officers of the United States, etc., on this subject.

"The seventh has no reference to the present question.

"The eighth is only a recapitulation of the preceding parts of the letter.

"The ninth is of no consequence in the present question.

"The tenth respects losses by detention, waste, and spoliation, and, as well as those of the fourth, its provisions are limited to cases which had occurred or might occur of vessels brought in between the 5th June and the 7th August. And from this limitation the same inference is to be made respecting cases which had occurred prior to the 5th June, as have already been made under the fourth paragraph.

"Thus we see that this letter, which was written for the purpose of explaining clearly to the British minister the intentions of the American Government, respecting the captures in question, instead of deviating from the principle already laid down respecting captures made before the 5th June, does, by limiting in two passages the stipulation of compensation to cases occurring after that date, convey as forcibly its sense of not being obligated in cases preceding that date as could have been done by an express clause of exception.

"All the documents above quoted were of the date of 1793, the latest of them November 22nd. They were all public, and in the hands of the negotiators of the present treaty; that treaty which was signed in November 1794 makes the letter of September 1793 the standard of the engagements of the United States in cases of this nature, and directs us in all cases where restitution shall not have been made, agreeably to the tenor of that letter, to proceed as in the other cases committed to us. The tenor of that letter appears to me to respect only cases

occurring after the 5th June, and contains no stipulation either of restitution or compensation in cases anterior to that date. The case of the *Fanny*, Pile, master, now under consideration, is of anterior date, and therefore is, in my opinion, not within the powers or duty of this board further to consider.

"JNO. TRUMBULL.

"GRAYS INN, *October 16th, 1798.*"

Case of the "Elizabeth."

In the case of the *Elizabeth*, Ross, master, it was held that in the case of vessels captured and brought in after August 7, 1793, the United States were not bound to make compensation unless it was shown that the government had been guilty of some forbearance to effect restitution, and that no claim could arise where the complainant's loss was due to his own negligence. In this case Mr. Trumbull, as fifth commissioner, rendered the following opinion:

Opinion of Mr. Trumbull.

"This ship with her cargo being the property of British subjects was taken on the 14th day of May 1794 on the high seas by two vessels, alleged to have been illegally armed in some port or ports of the United States, and commanded by two persons named Ballard and Talbot, and said to have been citizens of the said States. The ship was brought into the river of Savannah, in Georgia, on the 19th day of May, and into the port of Savannah on the 27th of the same month.

"The first step which appears from the testimony before us to have been taken on the behalf of the owners for the recovery of their property, was the entering a protest by the British vice-consul, Mr. Wallace, and the mate of the ship, wherein it is stated 'that John Wallace and John Steward put in their claims as to the right of property of said ship and cargo, before the vice-consul of the Republic of France, residing in the city of Savannah, and filed their plea to the jurisdiction of the said court; that, however, the said ship and cargo was condemned.' Then follow copies of the claim and plea above mentioned, exhibited by John Wallace, esq., and John Steward to the vice-consul of France on the 30th day of May. The next paper of importance is a notarial protest made at the request of the same parties against the sale of the ship and cargo, dated the 6th day of June, on which day the same appear to have been sold under the direction of the house of Hills, May & Woodbridge, and the proceeds of the sale paid to them.

"On the 20th day of September following, a libel was filed by the captain, Ross, on behalf of the owners of the ship and cargo, before the district court of Georgia having by the laws of the United States original jurisdiction in matters of prize, in which, after stating the capture of the ship to have been

illegal, and that the ship and cargo had been sold by Hills, May & Woodbridge, the libellant prays 'that the usual warrants of arrest may issue out of the court to arrest the said ship and cargo, the said Ballard & Talbot (captains of the capturing vessels), Hills, May & Woodbridge, as agents for the captors, and by whose orders the ship and cargo had been sold, and Joseph Miller the purchaser of the ship.' From the subsequent proceedings this appears to have been done as respects the ship and the four persons last named. Ballard & Talbot, it is presumed, had sailed before the date of the libel. This is the first proceeding which appears to have been had on behalf of the owners before any authority of the United States.

"The cause proceeded to trial; various depositions were taken as well in court as before commissioners duly appointed, tending to ascertain that the two capturing vessels had been illegally armed in ports of the United States; that Ballard & Talbot were American citizens, and that Hills, May & Woodbridge, in selling the *Elizabeth* and cargo, had acted as the agents of the captors; and on the 20th day of December of the same year, 1794, a decree was issued by the court declaring the capture of the ship *Elizabeth* and cargo to have been an illegal spoliation, and ordering the ship and a trifling remnant of her cargo still in the hands of Hills, May & Woodbridge, to be restored to the libellant for the use of the owners.

"The libel, as further respected Hills, May & Woodbridge was dismissed, and Ballard & Talbot decreed to make restitution by paying the amount of all damages of what nature soever sustained by the owners in consequence of the capture, such damages to be ascertained by the clerk of the court, assisted by three merchants. This estimate of damage was made on the 6th and 10th of January following.

"From this decree both parties appealed to the circuit court, before whom the cause was reheard; and on the 5th day of May 1795 the decree was confirmed inasmuch as regarded the ship and remnant of cargo, ordered to be restored, and the said Hills, May & Woodbridge were ordered to pay the libellant, for the use of the owners, the full value of the cargo, amounting to $75,000, with costs.

"The cause was next appealed by Hills, May & Woodbridge to the Supreme Court of the United States, and after mature examination judgment was there rendered on the 12th day of August 1796, whereby the former decree was reversed in as far as respected Hills, May & Woodbridge; 'and it was further ordered, adjudged, and decreed that the said Hills, May & Woodbridge should pay to the libellant, for the benefit of the owners, the amount of the sales of the cargo which had been received by them with interest to the date of judgment, being $37,695.70 and costs.'

"Two memorials are filed in this case, which state in general terms that subjects of His Britannic Majesty 'have sustained considerable loss and damage by reason of such capture,' and

that restitution has not been made 'agreeably to the tenor of the letter of Mr. Jefferson to Mr. Hammond, dated at Philadelphia September 5th, 1793, a copy of which is annexed to the above-mentioned treaty;' but both memorials are silent as to the restitution of the ship and the remnant of cargo which was uniformly decreed in all the American courts, and also as to the recovery of all or any part of the sum decreed by the final judgment of the Supreme Court to be paid by the house of Hills, May & Woodbridge.

"Such is the history of this case.

"In order to be capable of rendering a right judgment thereon, a careful examination of the obligations imposed on the Government of America by the letter of Mr. Jefferson, above alluded to, is essential; the preliminary question in this, as in all other complaints of this description, being whether those obligations have already been fulfilled. If they have, this is not a case submitted to the further examination of this board by the treaty; if they have not, then only are we to proceed in the like manner relative to this as to the other cases committed to us.

"The variety of opinions which have been expressed as to the extent of those obligations by men for whose judgment I justly entertain the highest respect, and a due sense of the high responsibility of a situation where even errors of judgment may produce evils which admit of no remedy but one which all good men must deprecate, are reasons sufficient to urge me to give to this question the most mature and impartial examination of which my mind is capable.

"The first paragraph of the letter in question contains no promise, but is a mere recapitulation of the subject of a former one of August 7th.

"The second paragraph is as follows: 'We are bound by our treaties with three of the belligerent nations by all the means in our power to protect and defend their vessels and effects in our ports and waters, or on the seas near our shores, and to recover and restore the same to their right owners when taken from them. If all the means in our power are used and fail in their effect, we are not bound by our treaties with those nations to make compensation.'

"The third paragraph proceeds: 'Though we have no similar treaty with Great Britain, it was the opinion of the President that we should use towards that nation the same rule, and even to extend it to captures made on the high seas and brought into our ports, if done by vessels which had been armed within the same.'

"The fourth paragraph relates only to cases occurring between the 5th June and the 7th August, and in all cases between these dates, where a forbearance to use all the means in their power to procure restitution had taken place, it is announced to be the opinion of the President that the United States ought to make compensation.

"The fifth paragraph is in these words: 'As to prizes under the same circumstances' (that is, within the line of jurisdictional protection, *or even on the high seas*, if brought within the ports of the United States and made by vessels armed within those ports) 'and brought in after the date of that letter' (7th August), 'the President determined that all the means in our power should be used for their *restitution*. If these fail, as we should not be bound by our treaties to make compensation to the other powers in the analogous case, he did not mean to give an opinion that it ought to be done to Great Britain.' It has been suggested these latter words, 'he did not mean, etc.,' bind the United States to make *compensation* in cases where the means used to procure *restitution* should fail of their effect. I confess I know not on what principle of grammar or of logic such a construction can be supported. We must suppose a most uncommon and unaccountable degree of complaisance on the part of the President of the United States, if we believe that he intended by this expression to convey thus gratuitously, and without even the demand of any equivalent, to a nation between whom and the United States there neither existed any treaty, nor even the most cordial good understanding, an important privilege which had not been granted to other nations by treaties formed under circumstances which would have justified liberal compliances on the part of America. He could not intend this; on the contrary, if the expressions 'he did *not* mean, &c.,' do not convey to every mind, as I confess they do to mine, an absolute exclusion of the idea of compensation in these cases, they at least cannot be tortured to convey a *promise* of making it. But if any doubt or uncertainty could be supposed in the unconnected expression, its meaning is rendered unquestionable by the following sentence, which is 'But still, if any cases shall arise subsequent to that date' (7th August), 'the circumstances of which shall place them on similar grounds with those before it, the President would think compensation equally incumbent on the United States.'

"This expression renders it manifest that *compensation* was not meant to be promised *generally* in cases where all the means in the power of the United States having been used should have failed of their effect, but only in cases 'whose circumstances should place them on similar grounds with those before the 7th August.'

"What the circumstances here alluded to were has been asked, and I think is by no means difficult to discover. In the several circumstances of having been made within the line of jurisdictional protection, or even on the high seas, and brought within the ports of the United States by vessels armed within these ports, the captures which had taken place before the 7th August and those which might take place after that date resembled each other; confessedly to these circumstances the first branch of the paragraph applies, and where the means

used to procure restitution in cases of this description, occurring after the 7th August, should fail of their effect, there *compensation* was not intended. The circumstance which had produced the promise of compensation in cases occurring before the 7th August is expressly declared to have been 'a forbearance to use all the means in their power to procure restitution;' and it was doubtless a coincidence in this circumstance which was intended to bring future cases within the same promise of compensation. The President had indeed determined 'that all the means in our power should be used for the restitution of vessels brought in after the 7th August,' and 'if those should fail of their effect he did not mean to promise compensation.' But as situations might again occur in which he might believe it wise to depart from this determination, therefore that case is provided for by this declaration that where that circumstance should again occur of a forbearance, etc., there he would think compensation equally due. This appears to me to be the true construction of the letter, and renders it consistent and clear throughout. The letter of the 7th August had promised compensation for three vessels by name, 'because the United States had forborne to use all the means in their power to effect their restitution.' The fourth paragraph of the letter of September 5th extends this promise of compensation to all cases occurring before the 7th August, where a similar forbearance had taken place; and the fifth now under consideration provides for any possible deviation from the determination therein announced of using *all the means*, etc., for restitution by still further extending the promise of compensation to any future case wherein prudential motives might again dictate a forbearance. The principle of the letter is thus simple and one throughout, and a forbearance to use all the means in their power to procure *restitution* is in all cases the basis of the promise of *compensation.*

"I shall now take the liberty of examining what that forbearance was which produced this obligation in the opinion of the President in the case of the three enumerated vessels, and the state papers so often quoted will give ample information. On the 25th June the following letter had been written by the Secretary of State to the minister of France:

"'PHILADELPHIA, *June 25th, 1793.*

"'SIR: In the absence of the President of the United States I have consulted with the Secretaries of the Treasury and of War on the subject of the ship *William*, and generally of vessels suggested to have been taken within the limits of the protection of the United States by the armed vessels of your nation, concerning which I had the honour of a conversation with you yesterday, and we are so well assured of the President's way of thinking in these cases that we undertake to say that it will be more agreeable to him that such vessels should be detained under the orders of yourself, or of the consuls of France, in the several ports, until the Government of the United States *shall be able to enquire into and decide upon the fact.* If this arrangement should be agreeable to you, and you will be pleased to give the proper orders to the several consuls of your nation, the governors

of the several States will be immediately instructed to desire the consul of the port to detain vessels on whose behalf such suggestions shall be made, until the government shall decide on their case. It may sometimes, perhaps, happen that such vessels are brought into ports where there is no consul of your nation resident nor within a convenient distance; in that case the governors would have to proceed to the act of detention themselves, at least until a consul could be called in.'

"The French minister, in his answer of June 26th, declared that this proposition was perfectly agreeable to him; and in conformity to this arrangement *prizes brought into ports of the United States before the 7th August were not held in the custody of any officer of the United States, civil or military*, but were suffered to remain in the possession of the captors, under the persuasion that they would be given up in all cases where the Government of the United States should determine, after due examination, that they had been illegally taken, and ought to be restored to the original owners. Under this arrangement the brigs *Lovely Lass*, *Prince William Henry*, and *Jane of Dublin*, brought in between the 5th June and 7th August, had remained in possession of the captors. The Government of the United States having made the necessary examination, had demanded from the French minister their restitution; but doubts of the success of this demand (arising from his extraordinary conduct) occasioned the letter of the 7th August to Mr. Hammond. The demand was afterwards formally repeated in the letter to Mr. Genet of November 22d, which I have had occasion to quote in the case of the *Fanny*, Pile; the answer to which was as follows:

"'NEW YORK, *29th Novr., 1793.*

"'To Mr. JEFFERSON, *Secretary of State, etc.*

"'SIR: It is not in my power to order the French vessels which have received letters of marque in the ports of the United States in virtue of our treaties, in virtue of the most precise instructions to me, to restore the prizes which they have been authorized to make on our enemies; but I have long since prescribed to our consuls neither to oppose, nor to allow to be opposed, any resistance to the moral force of the justice of the United States, if it thinks it may interfere in affairs relative to the prizes, or of the government, if it persists in the system against which I have incessantly made the best founded representations.

"'Neither is it in my power to consent that the indemnities, which your government proposes to have paid to the proprietors of the said prizes, should be placed to the account of France. 1st. Because no indemnity is due, but when some damage has been occasioned in the use of a right which was not possessed; whereas, our treaties and my instructions prove to me that we were fully authorized to arm in your ports. 2nd. Because, according to our constitution, as well as yours, the Executive has not the arbitrary appropriation of the funds of the state; and the executive council of France and their delegates could not consent to a reimbursement of the indemnities in question, but when the legislative body shall first have renounced, under its responsibity to the people, the right which I have been expressly instructed to maintain, and afterward have granted the sums demanded by our enemies, and which you have promised them by your President.'

"After this formal refusal of restitution by the minister of France, no means remained by which that restitution could be effected but force. Force, for several prudential reasons, was

not resorted to; and the United States, 'having thus forborne to use all the means in their power for the restitution of the three vessels mentioned in the letter of the 7th August, the President thought it incumbent on the United States to make compensation for them.'

"The sixth and seventh paragraphs speak of the instructions given to the governors of the several States to use all the means in their power for restoring prizes of the foregoing description found within their ports, and of the means to be taken for furnishing them with the necessary information.

"The eighth is in these words: 'Hence you will perceive, sir, that the President contemplates restitution or compensation in the cases before the 7th August, and after that date restitution, if it can be effected by any means in our power, and that it will be important that you should substantiate the fact that such prizes are in our ports or waters.'

"The ninth recognizes as just a list of illicit privateers.

"The tenth proposes a mode of ascertaining the losses by detention, waste, or spoliation sustained by vessels taken as before mentioned, between the dates of June 5th and August 7th.

"From this examination of the letter which is given to us for a rule, it results that it was the opinion of the President, therein expressed, that it was incumbent on the United States to make restitution of, or compensation for, all such vessels and property belonging to British subjects as should have been, 1st, captured between the dates of June 5th and August 7th within the line of jurisdictional protection of the United States, or even on the high seas, if, 2ndly, such captured vessels and property were brought into the ports of the United States, and, 3rdly, provided that, in cases of capture on the high seas, this responsibility should be limited to captures made by vessels armed within their ports; and, 4thly, that the obligation of compensation should extend only to captures made before the 7th August, in which the United States had confessedly forborne to use all the means in their power to procure restitution; and that, with respect to cases of captures made under the 1st, 2nd, and 3rd circumstances above enumerated, but brought in after the 7th August, the President had determined that all the means in the power of the United States should be used for their restitution, and that he thought that compensation would be equally incumbent on the United States in such of these cases (if any such should at any future time occur) where, the United States having decreed restitution, and the captors having opposed or refused to comply with or submit to such decree, the United States should forbear to carry the same into effect by force.

"Such was the promise. In what manner was that promise to be carried into effect? It was not absolutely to restore by the hand of power in all cases where complaint should be made; if it had been such, there would have been no want of complaints; and France herself would have had a better rea-

son for making them than any other party. No; the promise was conditional. We will restore in all those cases of complaint where it shall be established by sufficient testimony that the facts are true which form the basis of our promise—that is, that the property claimed belongs to British subjects; that it was taken either within the line of jurisdictional protection, or, if on the high seas, then by some vessel illegally armed in our ports, and that the property so taken has been brought within our ports. By whom were these facts to be proved? According to every principle of reason, justice, or equity, it belongs to him who claims the benefit of a promise to prove that he is the person in whose favour, or under the circumstances in which the promise was intended to operate; and since it is the party promising redress who must first be convinced by testimony of the truth and justice of the complaint, before the obligation of his promise can apply and bind him to performance of the stipulated relief, he is of course the proper person to decide under what forms and in what manner the examination and proof of these facts is to be conducted. Accordingly, every civilized nation has established laws and judicial forms for doing right, for redressing wrongs, and for restoring to the true owner property which may have been unjustly wrested from him.

"And in no situation could a scrupulous and careful attention in the examination of facts, on which rested the validity of a complaint and the duty of redressing it, be more essentially requisite than in this. The seventeenth article of the treaty with France contained these words: 'It shall be lawful for the ships of war of either party, and privateers, freely to carry whithersoever they please the ships and goods taken from their enemies, without being obliged to pay any duty to the officers of the admiralty or any other judges; nor shall such prizes be arrested or seized when they come to and enter the ports of either party; nor shall the searchers or other officers of those places search the same, *or make examination concerning the lawfulness of such prizes.*' The extravagant conduct of a minister of France had rendered it necessary that examination should be made by the government of America concerning the lawfulness of the capture of certain vessels which he insisted were prizes to French privateers; but respect for the sacred obligations of a treaty, as well as for the interests and opinions of an ally, required that a proceeding which at first sight appeared, and by the minister and his dependents would of course be represented to his government, to be an infraction of that treaty, should be conducted with the most scrupulous delicacy; neither probability nor suspicion, however strong, nor assertion however apparently well founded, could justify the Government of the United States in taking any step in the face of such a stipulation. Moral certainty of the illegal circumstances of the capture, established by testimony upon oath, according to the most solemn forms of judicial proceed-

ing, were indispensably necessary to that end; and France might justly have accused America of favoring her enemies had she proceeded in a less guarded manner.

"The facts, then, on which a complaint of loss by illegal capture was founded, were to be examined according to the forms ordained by the Constitution and laws of the country, and, if established, then the obligation to effect restitution was complete. Here I must again refer to the state papers, so often quoted, for a history of the measures which were actually taken by the American Government.

"The first expression of the sentiments of the government on this subject is the following extract of a letter written by Mr. Jefferson to Mr. Ternant, the French minister, prior to the arrival of Mr. Genet, dated May 15th, 1793, in consequence of certain memorials presented by Mr. Hammond on the 8th: 'Our information is not perfect on the subject-matter of another of these memorials, which states that a vessel had been fitted out at Charleston, manned there, and partly, too, with citizens of the United States, received a commission there to cruise against nations at peace with us, and has taken and sent a British vessel into this port. Without taking all these facts for granted, we have not hesitated to express our highest disapprobation of the conduct of any of our citizens who may personally engage in committing hostilities at sea against any of the nations parties to the present war, to declare that if the case has happened, or that should it happen, *we will exert all the means with which the laws and Constitution have armed us to discover such offenders and bring them to condign punishment; and that the like conduct shall be observed should the like enterprises be attempted against your nation, I am authorized to give you the most unreserved assurance.* Our friendship for all the powers at war, our desire to pursue ourselves the path of peace as the only way leading surely to prosperity, and our wish to preserve the morals of our citizens from being vitiated by courses of lawless plunder and murder are a security that our proceedings in this respect will be with good faith, fervor, and vigilance. The arming of men and vessels within our territory, and without consent or consultation on our part, to wage war on nations with which we are at peace, are acts which we will not gratuitously impute to the public authority of France. They are stated, indeed, with positiveness, in one of the memorials, but our unwillingness to believe that the French nation could be wanting in respect or friendship *to us on any occasion suspends our assent to and conclusions upon these statements till further evidence.*'

"Soon after the date of this letter M. Genet arrived at Philadelphia, and was received as minister of the republic of France, and on the 27th of May he wrote to the American Secretary of State a letter in which he avowed his having granted commissions of his nation to several vessels equipped by his advice at Charleston, and endeavored to vindicate and justify

the measure. This letter was answered on the 5th June as follows:

"'PHILADELPHIA, *June 5th, 1793.*

"'SIR: In my letter of the 15th May to Mr. Ternant, your predecessor, after stating the answers which had been given to the several memorials of the British minister of May 8th, it was observed that a part remained still unanswered of that which respected the fitting out armed vessels in Charleston to cruise against nations with whom we are at peace.

"'In a conversation which I had afterwards the honor of holding with you, I observed that one of these armed vessels, the *Citoyen Genet*, had come into this port with a prize; that the President had thereupon taken the case into further consideration, and after mature consultation and deliberation was of opinion that the arming and equipping vessels in the ports of the United States to cruise against nations with whom they are at peace was incompatible with the territorial sovereignty of the United States; that it made them instrumental to the annoyance of those nations, and thereby tended to compromit their peace, and that he thought it necessary as an evidence of good faith to them, as well as a proper reparation to the sovereignty of the country, that the armed vessels of this description should depart from the ports of the United States.

"'The letter of the 27th, with which you have honored me, has been laid before the President, and that part of it which contains your observations on this subject has been particularly attended to; the respect due to whatever comes from you, friendship to the French nation, and justice to all, have induced him to reexamine the subject, and particularly to give to your representations thereon the consideration they deservedly claim. After fully weighing again, however, all the principles and circumstances of the case, the result appears still to be that it is the *right* of every nation to prohibit acts of sovereignty from being exercised by any other within its limits, and the *duty* of a neutral nation to prohibit such as would injure one of the warring powers; that the granting military commissions within the United States by any other authority than their own is an infringement on their sovereignty, and particularly so when granted to their own citizens to lead them to commit acts contrary to the duties they owe to their own country; that the departure of vessels thus illegally equipped from the ports of the United States will be but an acknowledgment of respect analogous to the breach of it, while it is necessary on their part as an evidence of their faithful neutrality. On these considerations, sir, the President thinks that the United States owe it to themselves and to the nations in their friendship to expect this act of reparation on the part of vessels marked in their very equipment with offence to the laws of the land, of which the law of nations makes an integral part.'

"One of the vessels armed at Charleston having arrived at Philadelphia, and information having been legally made that two of her officers were Americans by birth, they were arrested and committed to prison for trial. The French minister demanded their release as being citizens and officers of the Republic of France; to this demand the following answer was returned:

"'PHILADELPHIA, *June 6th, 1793.*

"'SIR: I have to acknowledge the receipt of your note on the subject of Gideon Henfield, a citizen of the United States, engaged on board an armed vessel in the service of France. It has been laid before the President, and referred to the Attorney-General of the United States for his opinion on the matter of law, and I have now the honor of enclosing you a copy of that opinion. Mr. Henfield appears to be *in the custody of the civil magistrate over whose proceedings the Executive has no control.* The act with which he is charged will be examined by a jury of his countrymen in the presence of judges of learning and integrity, and, if it is not contrary to the laws of the land, no doubt need be entertained that his case

will issue accordingly. The forms of the law involve certain necessary delays, of which, however, he will experience none but what are necessary.

"'P. S.—After writing the above I was honoured with your note on the subject of Singletary, on which it is in my power to say nothing more than in that of Henfield.

"'The Attorney-General of the United States has the honor of submitting to the Secretary of State the following opinion on the case of Gideon Henfield, as represented by the minister of France:

"'1st. It may well be doubted how far the minister of France has a right to interfere. Henfield is a citizen of the United States, and it is unusual at least that a foreign power should interfere in a question whether as a citizen a man has been guilty of a crime. Nor can an authority be derived from Henfield being under the protection of the French Republic, because, being still a citizen he is amenable to the laws which operate on citizens, and the very act by which he is said to have been taken under such protection is a violation of the sovereignty of the United States. If he be innocent he will be safe in the hands of his countrymen; if guilty, the respect due by one nation to the decrees of another demands that they be acquiesced in.

"'2nd. But Henfield is punishable because treaties are the supreme law of the land, and by treaties with three of the powers at war with France it is stipulated that there shall be peace between their subjects and the citizens of the United States.

"'3rd. He is indictable at the common law because his conduct comes within the description of disturbing the peace of the United States.

"'MAY 30TH, 1793. E. RANDOLPH.'

"In answer to new remonstrances of the minister of France, a letter was written on the 17th June, of which the following is an extract:

"'The testimony of these and other writers on the law and usage of nations, with your own just reflections on them, will satisfy you that the United States, in prohibiting all the belligerent powers from equipping, arming, and manning vessels of war in our ports, have exercised a right and a duty with justice and with great moderation. By our treaties with several of the belligerent powers, which are a part of the laws of our land, we have established a state of peace with them, but, without appealing to treaties, we are at peace with them all by the laws of nature, for by nature's law man is at peace with man till some aggression is committed which by the same law authorizes one to destroy another as his enemy. For our citizens, then, to commit murders and depredations on the members of nations at peace with us, or to combine to do it, appeared to the Executive, and to those whom they consulted, as much against the law of the land as to murder or rob, or combine to murder or rob, its own citizens, and as much to require punishment, if done within their limits where they have territorial jurisdiction, or on the high seas where they have a personal jurisdiction—that is to say, one which reaches their own citizens only, this being an appropriate part of each nation on an element where all have a common jurisdiction. So say our laws, as we understand them ourselves. To them the appeal is made, and whether we have construed them well or ill, the constitutional judges will decide. Till that decision shall be obtained the Government of the United States must pursue what they think right with firmness, as is their duty.

"'On the first attempt that was made, the President was desirous of involving in the censures of the law as few as might be; such of the individuals only therefore as were citizens of the United States were singled out for prosecution. But this second attempt, being after full knowledge of what had been done in the first, and indicating a disposition to go on *in opposition to the laws, they are to take their course against all persons concerned, whether citizens or aliens*, the latter while within our jurisdiction, and enjoying the protection of the laws, being bound to obedience to them, and to avoid disturbance of our peace within, or acts which would commit it without, equally as our citizens are.'

"On the 23d June the following letter was written to M. Genet:

"'SIR: I have the honor to inform you that in consequence of the general orders given by the President, a privateer fitted out by English subjects within the State of Georgia to cruise against the citizens of France *has been seized by the governor of Georgia, and such legal prosecutions are ordered as the case will justify.* I beg you to be assured that the government will use the utmost vigilance to see that the laws which forbid these enterprises are carried into execution.'

"On the 25th June the letter already quoted was written, proposing that vessels *suggested* to have been taken by privateers whose illegality had been declared on the 5th June, should remain in the custody of the minister or consuls of France until the *American Government should have decided on the fact.* In the meantime several vessels had been brought in as prizes, and proceedings had been instituted against the captors in the district court of Pennsylvania, having original jurisdiction in matters of prize. This court, considering the obligation of the treaty with France before stated as paramount, decided that it had no jurisdiction in the case, in consequence of which the following letter was written to M. Genet on the 29th June:

"'SIR: The persons who reclaimed the ship *William* as taken within the limits of the protection of the United States, having thought proper to carry their claims first *into the courts of admiralty, there was no power in this country which could take the vessel out of the custody of that court till it should decide itself whether it had jurisdiction or not* of the cause. Having now decided that it had not jurisdiction, the same complaint is lodged with the Executive.

"'I have the honor to inclose you the testimony whereon the complaint is founded. Should this satisfy you that it is just, you will be so good as to give orders to the consul of France at this port to take the vessel into his custody and deliver her to the owners; should it be overweighed in your judgment by any contradictory evidence which you have or may acquire, *I will ask a communication of that evidence.* and that the consul retain the vessel in his custody *until the Executive of the United States shall consider and decide finally on the subject.*'

"After this decision of the inferior court, the question of fact rested for examination with the Executive. The foregoing letter shews the mode of proceeding for the purpose of acquiring the necessary information which they adopted, and this will be further explained by a letter of November 16th, which will be seen below; for, lest the delay of sending on complaints and testimony from distant parts of the United States to the seat of government should sometimes become prejudicial and vexatious, the mode pointed out in the following letter was adopted:

"'GERMANTOWN, *Novr. 16th, 1793.*

"'To M. GENET, *etc.*

"'SIR: As in cases where vessels are reclaimed by the subjects or citizens of belligerent powers, as having been taken within the line of jurisdiction of the United States, *it becomes necessary to ascertain that fact by testimony taken according to the laws of the United States,* the governors of the several States, to whom the application will be made in the first instance, are desired immediately to notify thereof the attorneys of their respective districts. The attorney is instructed thereupon to give notice to the prin-

cipal agent of both parties, who may have come in with the prize, and also to the consuls of the nations interested, and to recommend to them to appoint, by mutual consent, arbiters to decide whether the captures were made within the jurisdiction of the United States, as stated to you in my letter of the 8th instant (that is within three miles from the shore), according to whose award the governor may proceed to deliver the vessel to the one or the other party. But, in case the consul or the parties shall not agree to name arbiters, then the attorney, or some person substituted by him, is to notify them of time and place, when and where he will be, *in order to take the depositions of such witnesses as they may cause to come before him, which depositions he is to transmit for the information and decision of the President.*

"'It has been thought best to put this business into such a train as that the examination of the facts may take place immediately, and before the witnesses may have again departed from the United States, which would too frequently happen, and especially in the distant States, if it should be deferred until information is sent to the executive and a special order awaited to take the depositions.

"'I take the liberty of requesting that you will be pleased to give such instructions to the consuls of your nation as may facilitate the object of this regulation. I urge it with the more earnestness because as the attorneys of the districts are for the most part engaged in much business of their own they will rarely be able to attend more than one appointment, *and consequently the party who should fail, from negligence or other motives, to produce his witnesses at the time and place appointed,* might lose the benefit of their testimony altogether. This prompt procedure is the more to be insisted on, as it will enable the President, by an immediate delivery of the vessel and cargo to the party having title, to prevent the injuries consequent on long delay.'

"The following extract of a letter written on the 9th September to Mr. Genet is very clearly expressive of the opinion of the executive branch of the American Government as to the powers of the judicial department:

"'The intention of the letter of June 25th having been to permit such vessels to remain in the custody of the consuls, instead of that of a military guard (which in the case of the ship *William* appeared to have been disagreeable to you), the indulgence was of course to be understood as going only to cases where the executive might take or keep possession with a military guard, and not to interfere with the authority of the courts of justice in any case wherein they should undertake to act. My letter of June 29th, accordingly, in the same case of the ship *William*, informed you that no power in this country would take a vessel out of the custody of the courts, and that it was only because they decided not to take cognizance of that case that it resulted to the executive to interfere in it.

"'Consequently this alone put it in their power to leave the vessel in the hands of the consul. *The courts of justice exercise the sovereignty of this country in judiciary matters, are supreme in these, and liable neither to control nor opposition from any other branch of the government.*'

"In the meantime the conduct of this minister of France having become so extravagant and his language so offensive as to be no longer tolerable, the American Government determined to demand his recall, and a letter was written on the 16th of August by the Secretary of State to the American minister in France, detailing the reasons of this demand, and directing him to lay the same before the Executive Council of France. The following is an extract of that letter:

"'It is an essential attribute of the jurisdiction of every country to preserve peace, to punish acts in breach of it, and to restore property taken by force within its limits. Accordingly, this right of protection

within its waters, and to a reasonable distance on its coasts, has been acknowledged by every nation, and denied to none, and if the property seized be yet within their power, it is their right and duty to redress the wrong themselves. How and by what organ of the government, whether judiciary or executive, it shall be redressed, is not yet perfectly settled with us. One of the subordinate courts of admiralty has been of opinion, in the first instance, in the case of the ship *William*, that it does not belong to the judiciary. Another, perhaps, may be of a contrary opinion. The question is still *sub judice*, and an appeal to the court of last resort will decide it finally. If finally the judiciary shall declare that it does not belong to the *civil* authority, it then results to the executive, charged with the direction of the *military* force of the Union and the conduct of its affairs with foreign nations. But this is a mere question of internal arrangement between the different departments of the government, depending on the particular diction of the Constitution and laws; and it can in no wise concern a foreign nation to which department these have delegated it.'

"Various branches of the judiciary department entertained various opinions on this question. In Boston the district court took cognizance so early as August 1793, and the French consul at that port, having had the audacity to oppose the marshal in the execution of their precept by removing the vessel which he had orders to seize under the guns of a frigate, and placing a guard of troops of his nation on board her, the court was supported in its authority, its proceedings were continued and carried to full effect, and the exequatur of the consul was withdrawn.

"These various letters sufficiently explain the sentiments and conduct of the Government from the commencement of these complaints, and while it appears pretty clearly that they regarded the question as of a nature within the cognizance of the judiciary, yet we see no want of activity, energy, or good faith to remedy by their own exertion the evils which might arise from the opposite opinion being in some instances held by the courts.

"All uncertainty on this subject was, however, removed by the decision of the Supreme Court of the United States at their session in Philadelphia on the 18th of February 1794, which was as follows:

"'In the Supreme Court of the United States.

"'UNITED STATES, *ss:*

"'ALEXANDER S. GLASS AND OTHERS, appellants,
vs.
"'THE SLOOP BETSEY AND CARGO, ETC., and Pierre Arcade Johannene, appellee.

"'Appeal from the circuit court for the Maryland district.

"'At a Supreme Court of the United States held at Philadelphia, the same being the present seat of the National Government, on Saturday the 8th day of February, in the year of

our Lord 1794, before the Honorable John Jay, Chief Justice, and the Honorable William Cushing, James Wilson, John Blair, and Wm. Patterson, esquires, Associate Justices of the said court, came the parties, as well appellants as appellee, in the above appeal by their respective advocates, and after full hearing of all and singular the matters and things set forth and contained in the record and minutes of the proceedings in the said appeal, as well of the circuit court for the Maryland district, as of the district court for the said district, and solemn argument being had thereon by the said advocates, the said Supreme Court, sitting and adjourning from day to day until the 12th day of February, instant, took the same into consideration and held the same under advisement until the 18th day of February aforesaid.

"'At which day the said Supreme Court of the United States, being met, and the advocates aforesaid attending the court, proceeded to the publication of their final sentence or decree, which, being read and filed, is in the words following, to wit:

"'This court being decidedly of opinion that every district court in the United States possesses all the powers of a court of admiralty, whether considered as an instance or as a prize court, and that the plea of the aforesaid appellee, Pierre Arcade Johannene, to the jurisdiction of the district court of Maryland is insufficient; therefore, it is considered by the Supreme Court aforesaid, and now finally decreed and adjudged by the same, that the said plea be, and the same is hereby, overruled and dismissed, and that the decree of the said district court of Maryland founded thereon be, and the same is hereby revoked, reversed, and annulled.

"'And the Supreme Court being further clearly of opinion that the district court of Maryland has jurisdiction competent to enquire and to decide whether in the present case restitution ought to be made to the claimants, or either of them, in whole or in part, that is whether such restitution can be made consistently with the law of nations, and the treaties and the laws of the United States: Therefore it is ordered and adjudged that the district court of Maryland do proceed to determine upon the libel of the said Alexander S. Glass and others agreeably to law and right, the said plea to the jurisdiction of the said court notwithstanding.

"'And the said Supreme Court being further of opinion that no foreign power can of right institute or erect any court of judicature of any kind within the jurisdiction of the United States, but such only as may be warranted by and be in pursuance of treaties, it is therefore decreed and adjudged that the admiralty jurisdiction which has been exercised in the United States by the consuls of France, not being warranted, is not of right.

"'It is further ordered by the said Supreme Court that this cause be, and it is hereby, remanded to the district court for

the Maryland district for a final decision, and that the several parties to the same do each pay their own costs.'

"After this decree of the Supreme Court, it does not appear that any difficulty occurred in any of the inferior courts on the question of jurisdiction, but that justice was speedily and impartially administered is to be presumed, since it appears from the following case that, even in Charleston (of which place we have heard such a strange account from a gentleman who, altho' he resided in the town, appears to have been very incorrectly informed), the administration of justice in cases of this nature was not interrupted. This case is extracted from a letter of Mr. Fauchet, the French minister, successor to Mr. Genet, to the Secretary of State, dated Philadelphia, 13th September 1794:

"'The French privateer *L'Ami de la Pointe à Petre*, Captain William Talbot, commissioned at Guadaloupe, seized near the Island of Cuba a Dutch brigantine, called *De Frouw Christiana Magdalena*. This vessel had been originally captured by a French armed vessel called *L'Amour de la Liberté*, but having been met with and visited by *L'Ami de la Pointe à Petre*, and the prize master who had been put on board by the first captor not being able to produce any commission, the latter manned her and brought her to Charleston. Having arrived at that port, Captain Talbot was arrested at the suit of the Dutch captain as a pirate, *and security to the amount of fourteen thousand dollars was demanded from him for his liberty*. Proceedings were immediately instituted against the captors in the court of admiralty, and, notwithstanding the representations of the French consul, notwithstanding documents furnished in favor of Talbot and which, as you will soon see, were not of a nature to be refused, *the prize was adjudged illegal and restored to the claimants*. I could have wished, sir, to have it in my power to send you a formal copy of the decree pronounced by the court; but, if the enclosed extract from the Gazette, of Charleston, may be deemed sufficient information, it appears that the sentence was grounded on the illegal equipment of the capturing vessels, on Captain Talbot's being a citizen of the United States, and his vessel armed at Charleston.

"'CHARLESTON, *Saturday, August 9th, 1794*.

"'Wednesday, in the court of admiralty for this district, the judge pronounced his decree in the *long-contested cause* of the Dutch brigantine the *Vrouw Christiana Magdalena*, captured and brought into this port by the Captains Ballard and Talbot.

"'The libel was on behalf of the captain and owners of the said brigantine, claiming restitution under the 15th and 19th articles of the treaty with the United Netherlands. A plea was entered to the jurisdiction of the court, under the 17th article of the treaty with France and the 6th section of the act of Congress of the 5th June last, entitled "an additional act to the act for the punishment of crimes and offenses against the United States." A claim was interposed on behalf of Captain William Talbot, as a French citizen, acting under a commission from the governor of Guadaloupe, and as having taken this vessel out of the possession of Captain Ballard, the original captor, his prize master producing no commission.

"'The judge, on considering the arguments in support of the plea to the jurisdiction, overruled the same as irrelevant.

"'1st. Because the 17th article of the treaty with France contemplates only French vessels of war or privateers legally appointed.

"'2nd. Because the 6th section of the act of Congress of the 5th June last does not lessen the jurisdiction of the district courts in any case of which they had previous cognizance; and the decree of the Supreme Court of the United States, in the case of Glass and others, against the sloop *Betsey*, etc., having declared that every district court of the United States possesses all the power of an admiralty court, whether considered

as an instance or a prize court, this cause was therefore cognizable therein by the law of nations and the constitution of the court.

"'The judge being of opinion that Captain Ballard had acted without any commission authorizing him to cruise or arm for war, and had not even the pretense of being a French citizen; that Captain Talbot, having armed his vessel (then an American bottom) in an American port, proceeded thence to Guadaloupe for the express purpose, as appeared in evidence, of changing the property, applying for a French commission, obtaining the same within two days after the sale of the vessel, and under color of such commission having captured the said brigantine *Vrouw Christiana Magdalena*, which acts were decreed contrary to the 19th article of the treaty with the United Netherlands, and in no way derogatory to the 17th article of the treaty with France, as not being within the purview or intention thereof; restitution of the vessel and cargo was therefore decreed.'

"The introduction of so many quotations has drawn this examination to a length which I wished to avoid; but, as the question is important, I was unwilling to omit any passage which appeared useful to a clear and perfect understanding of it.

"There is no doubt that the *Elizabeth* and her cargo were the property of British subjects; that she was captured by privateers 'illegally armed in ports of the United States;' nor that she was brought into a port of the same. She is therefore clearly within the purview of the letter of the 5th September; but, having been captured after the 7th of August 1793, she can only claim the benefit stipulated in favor of such cases.

"It appears from the first part of this enquiry that in promising to use all the means in their power for the *restitution* of vessels captured after that date the United States did not undertake to make *compensation in case those means should fail of their effect.*

"It appears that by the expression 'all the means in their power,' they meant, first, those means which the Constitution and laws had provided for the redress of wrong and force, whenever it should be rendered necessary by any act of opposition to the ordinary course of justice. That although doubts, entertained by a part of the judicial establishment of its jurisdiction in these cases, had placed them for a time under the immediate eye of the executive power, yet to the complainant this produced no important change, since the same examination and proof of facts was required to establish the justice of his complaint and to guide the decision of the President, as would have been required before the judges. That after the 18th February 1794, the decision of the Supreme Court had removed those doubts which had for a time influenced the conduct of some of the inferior courts. And it does not appear that after that decision there was any delay on the part of the inferior courts in rendering, nor any opposition on the part of the captors to the execution of, their process or decrees, insomuch that there existed no occasion thereafter to fulfill the ultimatum of the promise by exerting force to compel restitution.

"It appears from the case of the *Vrouw Christiana Magdalena*, decided at Charleston on the 6th August 1794, and which is spoken of as a long-contested case, that the means thus provided by the constitution and the laws were effectual to procure relief in cases of this description, when properly pursued.

"Although the *Elizabeth* was brought within the jurisdiction of the United States so early as the 19th May 1794, at which time the decision of the Supreme Court, dated February 18th of the same year, and the course proper thereupon to be pursued in these cases must have been long known in Georgia, yet it does not appear that any measures were taken for pursuing that course until the date of the libel filed by the captain, Ross, on the 20th September following. It does not appear that after the filing of the libel on the 20th September there was any greater delay than usually attends the proceedings of European courts of admiralty, the first decree having been rendered on the 20th December 1794, the first appeal having been heard and judgment rendered on the 5th May 1795, and the final decision before the Supreme Court having taken place on the 12th August 1796.

"It appears that all these decrees ordered not only *restitution* of all that part of the property which actually came, or indeed could have come, within the custody of the court (and of this alone as courts of admiralty, acting according to the European practice *in rem*, they might strictly be held to have cognizance, and the restitution of this, without much violence of construction, might be considered as fulfilling the promise contained in the letter of the 5th September), but all these decrees went much further, and ordered either the captors or their agents to make compensation either in the full value of the property captured, or in the amount of sales which had come into their hands.

"And it further appears from the case of the *Vrouw Christiana Magdalena* that it was in the practice of the courts to require bail from the captor in cases of this kind, thereby giving to the party complainant all the certainty of the ultimate satisfaction of his demand, when established, that is, I believe, customary among nations the most famed for the correct administration of justice.

"Under these circumstances I confess I do not see how the memorialists can have suffered loss in this case, unless by that negligence and delay which, according to the treaty, precludes them from any remedy before this board.

"There was manifest negligence and delay in not applying to the authority of the United States before the 20th September, which gave time from the 19th May preceding for the captors to dispose of the property, and thus evade the powers of a court whose right it was to act *in rem*, and also to withdraw themselves from the reach of the court.

"There must have been negligence if bail was not demanded from the agents of the captors.

"And there must have been negligence if the final decision of the Supreme Court has not been carried into effect in the restitution of the ship and a part of the cargo.

"The United States, in using the means they did for the restitution of the property in question, appear to me to have done in this case all that they would or could have done if the complainant had been one of their own citizens; all that the law or practice of nations require to be done in favor of a foreigner; all that they were bound to do in behalf of the subjects of allied nations; and all that by the letter of 5th September 1793 they had engaged to do in favor of British subjects. They are not bound by the tenor of that letter to make compensation in cases of this nature, where those means should fail of their effect. And, therefore, I am clearly of opinion that the two memorials which have been filed in this case ought to be dismissed.

"JNO. TRUMBULL.

"LONDON, *November 5th, 1798.*"

Awards in favor of British Claimants.

While the foregoing opinions on claims that were rejected disclose certain cardinal rules of decision, further light may be thrown on the subject by an examination of the claims that were allowed. As to these claims the American commissioners made no report, beyond the bare communication to their government from time to time, in the course of a letter, of the fact that a certain award, or certain awards, had been made.

Prior to the suspension of the proceedings of the board in July 1799 five awards were made in favor of British claimants. These awards were made in the cases of the *Prince William Henry*, the *Jane of Dublin*, and the *Lovely Lass*, the vessels in respect of which liability was expressly acknowledged, on the ground that though they were captured and brought in after June 5, 1793, by privateers originally armed in the United States, the government had forborne to use all the means in its power to restore them. The awards in question were as follows:

Prince William Henry	$1,843.91
Jane of Dublin	3,280.00
	3,549.00
	3,036.93
Lovely Lass	21,884.80
Total	33,594.64

After the reassembling of the board in February 1802 seven awards were made in favor of British claimants. The first of

these was reported by Messrs. Gore and Pinkney to Mr. Madison in a letter of July 15, 1803, to which they said that they subjoined an abstract of the only award made against the United States since February 1802. Unfortunately, this abstract has disappeared. Abstracts of the other awards were communicated from time to time, and the list may be stated as follows:

Unknown	$12,474.93
Grenada Packet, Wemyss, master	18,498.09
Rochampton, Aitkin, master	14,965.33
Friendship, Strannock, master	41,595.56 13,778.70
Pilgrim, Walstrum, master	1,448.88
Providence, Robertson, master	7,072.01
Total	109,833.50

The "Grenada Packet."

The ship *Grenada Packet*, of London, was captured on the high seas on April 16, 1794, and brought into Savannah, by the French privateer *L'Ami de la Pointe à Pitre*, which was fitted out and armed in the United States. Soon after her arrival at Savannah, the *Grenada Packet* was burned, it seems accidentally.[1]

The "Rochampton."

The ship *Rochampton*, of London, was captured on the high seas in September 1793, and brought into Baltimore by the French privateer *Industry*. It appears that on September 6, 1793, Mr. Hammond wrote to Mr. Jefferson that he had received information that a privateer, "named the *Industry*, has, within the last five or six weeks, been armed, manned, and equipped in the port of Baltimore." On the 7th of November Hammond wrote again, in relation to the capture of the *Rochampton*. He stated that the *Industry* was one of two vessels which, in consequence of a positive requisition from the Secretary of War, a member of the executive council of Maryland, named Kelty, was in the preceding August appointed to examine, in order to ascertain whether they had been arming for hostile purposes. Though the information obtained by Kelty on his arrival in Baltimore was deemed sufficient to warrant the immediate seizure and dismantling of the *Industry*, he was on the following day induced to restore her, and to

[1] British Counter Case and Papers, Geneva Arbitration, American reprint 614, 615.

allow her to be refitted, and to proceed to sea, with a complete privateering equipment. When, not long afterward, the *Roehampton* was sent in as a prize, the British consul at Baltimore, having obtained unquestionable evidence that the *Industry* had undergone a material alteration in form and received additions to her force in that port, demanded of the governor of Maryland that the ship be released. The governor refused to interfere, on the ground that the evidence should have been produced when the owner of the *Industry* was present to controvert it; that it was illegally taken, and that, even if it were admitted, it did not authorize him to interpose. An appeal of the owners of the *Roehampton* to the district court of the United States was equally unsuccessful, the judge holding that the case was not within his jurisdiction. The *Roehampton*, after a second refusal of the governor to interfere, was then sold by an agent of the captor, and was purchased by a citizen of the United States. By the depositions obtained by the British consul, it appeared that when the *Industry* first entered the port of Baltimore she carried from four to six guns, that during her stay her decks were altered and strengthened, new port holes cut, and new gun carriages made, and that when she departed she had four 6-pounders, eight 4-pounders, and two howitzers, completely mounted, besides a lage quantity of newly purchased ammunition.

Jefferson, replying to Hammond on the 14th of November 1793, said that "restitution of prizes" had "been made by the Executive of the United States only in the two cases: first, of capture within their jurisdiction by armed vessels originally constituted such without the limits of the United States; or second, of capture, either within or without their jurisdiction, by armed vessels originally constituted such within the limits of the United States, which last have been called proscribed vessels." As to "military equipments" made in the ports of the United States, they "were ordered to be suppressed when detected, and the vessel reduced to her original condition," even though she was a vessel of war on her arrival; but if the vessel escaped detection altogether, departed, and made prizes, "the Executive," declared Jefferson, "has not undertaken to restore the prizes." In connection with this declaration, he observed that with due care, especially since the issuance of regulations by the Secretary of the Treasury in the preceding August, it could scarcely happen that military equipments of

any magnitude should escape discovery. Vessels that were small might, perhaps, sometimes escape, but to decide that the "smallest circumstance" of military equipment in the ports of the United States should invalidate a vessel's prizes "through all times" would be "a measure of incalculable consequence."

Having thus argued that no demand for restitution would lie on the ground of "a mere military alteration or an augmentation of force," Jefferson said that he would consider Hammond's letter "only as a complaint that the orders of the President prohibiting these have not had their effect in the case of the *Industry*, and inquire whether, if this be so, it has happened either from neglect or connivance in those charged with the execution of these orders."

Proceeding, then, to review the evidence, Jefferson said that when, in the preceding August, an investigation was made at the request of the Secretary of War, neither Captain Kilty (*sic*) nor the British consul were able to find any vessels answering the description of those that were the objects of their inquiry. At length, however, Captain Kilty, observing a schooner which appeared to have been making some equipments for a cruise, to have added to her guns and made some alteration in her waist, thought these circumstances merited examination, though the regulations issued by the Secretary of the Treasury had not then appeared. He therefore had the vessel seized. On examination "he found that she was the schooner *Industry*, Captain Carven, from St. Domingo, and that she had been an armed vessel for three years before coming here, and as late as April last had mounted 16 guns; that she now mounted only 12; and he could not learn that she had procured any of these or done anything else essential to her as a privateer at Baltimore. He therefore discharged her." After the arrival of the *Rochampton*, new witnesses had come forward to prove that the *Industry* had made some military equipments at Baltimore before her cruise. Had this testimony been obtained before her departure it would have had the effect of causing her to be detained till she should have reduced herself to the condition in which she was at the time of her arrival. Nevertheless, said Jefferson, "the governor's refusal to restore the prize, was perfectly proper; for, as has been before observed, restitution has never been made by the Executive, nor can be made, on a mere clandestine alteration or augmentation

of military equipments, which was all that the new testimony tended to prove." The President had, however, ordered a new inquiry to be made; and if the result should be that the *Industry* really did make any military equipments in the United States, instructions would be given to reduce her to her original condition, should she come again within the jurisdiction. In conclusion, Jefferson said:

"On the whole, sir, I hope you will perceive that, on the first intimation, through their own channels, and without waiting for information on your part that a vessel was making military equipments at Baltimore, the Executive took the best measures for inquiring into the fact, in order to prevent or suppress such equipments; that an officer of high respectability was charged with the inquiry; that he made it with great diligence himself, and engaged similar inquiries on the part of your vice-consul; that neither of them could find that this privateer had made such equipments, or, of course, that there was any ground for reducing or detaining her; that at the date of your letter of September 6 (the first intimation received from you), the privateer was departed, had taken her prize, and that prize was arriving in port; that the new evidence taken after the arrival can produce no other effect than the institution of new inquiry, and a reduction of the force of the privateer, should she appear to have made any military alterations or augmentation, on her return into our ports; and that in no part of this procedure is there the smallest ground for imputing either negligence or connivance to any of the officers who have acted in it."

On the 22d of November 1793 Hammond, acknowledging the receipt of Jefferson's letter, said that, as it announced the "fixed determination" of the government "not to restore" the *Roehampton*, he deemed it unnecessary to enter into a minute examination of the reasoning or the facts by which that determination was justified. Mr. Hammond added:

"I can not, however, avoid remarking that, although your position may be well founded, 'that it would be a measure of incalculable consequence to decide that the smallest circumstance of military equipment to a vessel in your ports should invalidate her prizes through all time,' it may also be a measure of incalculable mischief to the general commerce of friendly powers (excepting that of France) trading with the United States, if the largest circumstances of military equipment superadded to French privateers in your ports, provided they elude the vigilance of the officers appointed to watch over proceedings of this nature, shall not be considered by this government as sufficient to invalidate prizes brought into its ports by vessels under this predicament. In the present case the

facts are that the schooner *Industry*, according to the deposition of Benjamin Baker, of Baltimore, at whose wharf and shipyard she lay during her additional equipment, had no more than four or six cannon mounted when she was brought to his wharf; that when she left it she had four 6-pounders, eight 4-pounders, and two howitzers completely mounted; and that from Mr. Kelty's report it appears that he himself was convinced that she had added to the number of her guns, and had made alterations of a warlike nature, but as he could not learn whence these additional cannon had been procured, he did not deem himself justified in refusing his assent to the authenticity of the documents produced by the captain of the vessel, or in detaining her any longer.

"The privateer *Industry* was therefore allowed to depart from Baltimore under an augmentation of force more than double to that of her original appearance in that port, and to which augmentation I have reason to believe her subsequent capture of the ship *Roehampton* is in a great measure, if not entirely, to be imputed."[1]

Though Jefferson in his letter of the 14th of November refers to the clandestine manner in which the additional fitting out and arming of the *Industry* were effected, it is obvious that he did so merely for the purpose of showing that the authorities of the United States were not guilty of any connivance or neglect, and not for the purpose of maintaining that a privateer that had illegally augmented her force might, merely by getting to sea before her misconduct was discovered, secure the privilege of bringing (or sending) in and disposing of her prizes. The ground he assumed was that the "mere military alteration or an augmentation of force," as distinguished from an original or entire fitting out and arming, did not afford a basis for restitution.

Before the case of the *Roehampton* came before the commission under Article VII. several vessels captured by French cruisers whose force, like that of the *Industry*, was only augmented in the United States, were restored by the courts, after the passage of the act of June 5, 1794.[2]

The "Friendship."

The ship *Friendship*, Strannock, master, of London, while on a voyage from Jamaica to Quebec, was captured on June 26, 1794, and brought into Charleston by the French privateer *Montagne*.

[1] *British Counter Case and Papers*, Geneva Arbitration, American reprint, 544, 548, 555, 559.

[2] *Geyer* v. *Michel*, 3 Dallas, 285; *Moodie* v. *Betty Cathcart*, Bee, 292, 3 Dallas, 288, note; *British Consul* v. *Schooner Nancy*, Bee, 73.

This privateer was originally an American schooner, called the *Robert*, which was condemned as French property at Nassau, New Providence, July 26, 1793. Subsequently she returned to Charleston, where, as a French vessel, she was permitted to fit out. She left Charleston armed and manned March 4, 1794, and, sailing to the French West Indies, received a commission, which was registered at Point-à-Pitre on the 25th of March. On the 26th of April she returned to Charleston as a French privateer, and sailing thence captured the *Friendship*. The *Friendship*, when brought in, was libelled for restitution. The court sustained a plea to the jurisdiction, and on August 18, 1794, dismissed the libel with costs, holding that, as the commission was granted in a French port, Article XVII. of the treaty of amity and commerce with France of 1778 might be invoked against the claim of restitution.[2] On appeal, the circuit court of the United States reversed this judgment and remanded the cause to the district court for trial on the merits, Judge Wilson, who heard and determined the appeal, holding that the jurisdiction of the court below was ample, and that the claimant ought to have answered and pleaded the treaty in bar to the action, leaving it to the court to decide how far the treaty was available for that purpose. Restitution, however, was not obtained. It appears that, besides the fact that the *Montagne* obtained her commission in the French West Indies, it was also urged in behalf of the captor that her arming at Charleston did not exceed what was requisite or proper for the protection of a vessel engaged in commerce, and that such arming was not, before the enactment of the neutrality statute of June 5, 1794, unlawful.

The "Pilgrim."

The brig *Pilgrim*, of Bristol, England, was captured October 6, 1793, while on a voyage from Nanticoke, Maryland, to Barbados, by the privateer *Sans Culottes*, one of the so-called proscribed vessels. Moreover, the capture was made at the distance of two and one-half miles from the shore, and consequently within the jurisdiction of the United States. The brig was sent into Baltimore, where she was condemned by the French consul and sold to an American citizen within a month of the date of her capture. Five months later, on the 5th of April 1794, the British minister was informed that the

[2] *Stannick* v. *Ship Friendship*, Bee, 40.

President had instructed the Secretary of War to cause the brig to be restored. These instructions appear to have been given without attention to the circumstance of the sale, and a judicial proceeding was subsequently instituted by the government with a view to effect restitution by that means. June 21, 1794, Edmund Randolph, who was then Secretary of State, informed the British minister that, if the prosecution should not succeed, the government would "consider the *Pilgrim* as standing upon an equal title to compensation with any of the vessels illegally captured." It appears that the brig was subsequently restored, but in a bad condition.[1] The commission's award of $1,448.88, in favor of the owners of the vessel and cargo, seems to have been for damages, which probably were awarded in accordance with the following principle, stated in a letter of Jefferson to Hammond of December 26, 1793:

"I observed to you, in the letter of September 5th, that we were bound by treaties with three of the belligerent powers to protect their vessels on our coasts and waters by all means in our power; that if these means were sincerely used in any case, and should fail in their effect, we should not be bound to make compensation to those nations. Though these means be effectual and restitution of the vessel be made, yet if any unnecessary delay or other default in using them should have been the cause of a considerable degree of waste or spoliation, we should probably think we ought to make it good; but whether the claim be for compensation of a vessel not restored, or for spoliation before her restitution, it must be founded on some default in the government."[2]

In accordance with this letter an arrangement, which had been proposed for ascertaining damages in the special cases described in Jefferson's letter of September 5, 1793, was made general, so that a provisional valuation might be obtained in any case by the officers of the customs, whenever applied to by a British consul, without prejudice to the question whether in the particular case any compensation was due. The precise character of the arrangement is stated in the following circular of Hamilton to the collectors of customs:

"TREASURY DEPARTMENT, *February 10, 1794.*

"SIR: A provisory arrangement has been agreed upon with the ambassador of Great Britain, contained in a letter from

[1] British Counter Case and Papers, Geneva Arbitration, American reprint, 552, 580, 582, 612–613.

[2] British Counter Case and Papers, Geneva Arbitration, American reprint, 561.

the Secretary of State to him, dated 26th December last, to ascertain the losses by detention, waste, or spoliation sustained by such vessels, the property of the subjects of Great Britain, as have been or shall be captured by French privateers, armed and equipped in the ports of the United States.

"In order that these measures may be taken with as little delay as circumstances will permit, I have to request that you will, whenever applied to by any of the consuls of Great Britain, in concert with the consul, appoint persons to establish the value of such vessels and cargoes at the times of their capture, and of their arrival in the port into which they are brought, according to their value in such port, transmitting to me the documents of the proceedings in each case.

"I am, etc.,

"A. HAMILTON."

The "Providence."

The facts in the case of the *Providence*, Robertson, master, are not disclosed beyond the circumstances that she was captured by the *Embuscade* and sent to the United States.

2. CASES UNDER THE TREATY BETWEEN THE UNITED STATES AND MEXICO OF JULY 4, 1868.

Ortega's Case.

Claimant was on the staff of Gen. Jesus Gonzales Ortega, who at the time of claimant's arrest wanted to be President of the Mexican Republic. This claim he based upon the letter of the Mexican constitution of 1857, which, as he alleged, was set aside by President Juarez in his own favor by a decree prolonging his own term of office. General Ortega, with claimant, was on his way to Mexico to assume the office of President and levy war against the Juarez government, which the United States had recognized, when, having already been warned by General Sheridan at New Orleans that he would not be allowed to proceed through his lines on his errand, he and claimant were arrested on the bank of the Rio Grande in Texas. It was for this arrest that the claim was made. The commissioners differing, the umpire made the following decision:

"In the case of *Fernando M. Ortega* v. *The United States*, No. 560, the claim arises out of the arrest of the claimant by United States military authorities on November 3, 1866, at Brazos de Santiago, Texas, and of his imprisonment till the 10th of December. The arrest and imprisonment are not denied by the defense, and there is no doubt that the arrest was due to information furnished by the Mexican Government through its accredited minister at Washington, which informa-

tion, as coming from a friendly sovereign recognized by the United States, the government of the latter was bound to believe. The Mexican Government denounced the claimant as a deserter, a traitor, engaged in a dangerous conspiracy to subvert the Mexican Government.

"If the military authorities in Texas, then under martial law, committed a violation of the laws of the United States, it was in the power of the claimant as transient through that State to appeal to the courts of justice and obtain redress. But when the Republic of Mexico has concluded a treaty with the United States for the settlement of claims of her citizens arising from injuries by the authorities of the United States, it seems to the umpire very questionable whether a person who was denounced as a traitor by the Mexican Government, and was arrested and imprisoned on account of that denunciation, can now present himself to the commission as a Mexican citizen and claim on account of that arrest and imprisonment.

"But apart from this question the umpire is of opinion that as a matter of comity towards a friendly government the Government of the United States was not only justified under the circumstances in ordering the arrest and imprisonment of the claimant, but that it was its duty by taking that course to prevent the success of a conspiracy against the Mexican Government, which there was sufficient evidence to prove that the claimant and his companions were endeavoring to carry out under shelter of the neutral territory of the United States. It is also to be observed that the measure of arrest and imprisonment was forced upon the United States military by the refusal of the claimant and his companions to retire to a point in the United States where their object could not so easily have been carried out, and where there would have been less danger of a breach of neutrality. The umpire is of opinion that the Government of the United States can not be called upon to make compensation for the acts of their officers above referred to."

Thornton, umpire, July 11, 1876, *Fernando M. Ortega* v. *The United States*, No. 560, convention of July 4, 1868, MS. Op. VI. 258.

Walker Expedition Cases.

A group of claims against the United States, growing out of the invasion of Lower California in 1853 by William Walker at the head of a band of adventurers collected in the United States, was presented to the mixed commission under the convention between the United States and Mexico of July 4, 1868. The total amount claimed was $5,680,110—$2,071,300 for the destruction of property, and $3,608,810 as damages and interest. The titles of the claims were as follows; *Thomas Warner*, No. 890; *Guadalupe Melendez*, No. 891; *Pedro Gastelum*, No. 892; *Santiago D. Arce*, No. 893; *Loreto Amador*, No. 894;

Santos Cesena and Santana Saez, No. 895; *Francisco del Castillo Megrete*, No. 905; *Juan N. Guerra*, No. 906.

These claims formed the subject of elaborate and able briefs, one of the briefs of Mr. Ashton, the agent of the United States, before the umpire, filling 123 printed pages and presenting a thorough discussion both of the law and the facts.

The cases were, however, with a single exception, dismissed by the umpire, Sir Edward Thornton, for want of proof of the Mexican citizenship of the claimants. The exception was the case of *Juan N. Guerra*, No. 906, which was also dismissed, but on the ground of want of evidence to support the claimant's statements.

A claim against Mexico, based on the circulation of "calumnious reports" touching claimant's connection with Walker's expedition, was dismissed by the commissioners on the ground that the facts alleged did not constitute an injury by Mexican authorities in the sense of the convention.[1]

Bagdad Claims.

A large number of claims were filed before the commission under the convention between the United States and Mexico of July 4, 1868, for the loss and destruction of goods and merchandise by the capture and pillage of Bagdad, a Mexican town situated at the mouth and on the bank of the Rio Grande, on the morning of January 5, 1865. These claims were presented both by citizens of the United States and by citizens of Mexico, residents of the town at the time of its capture. The most of them were, however, presented by citizens of Mexico.

In the Mexican memorials it was alleged, as the ground of liability on the part of the United States, that the capture and pillage were perpetrated "by an armed force of colored soldiers, belonging to the army of the United States, under the command of officers of the said army." At the time of its capture, Bagdad had for some time been in the possession of the Imperialist forces, under the immediate command of one Colonel Rico. By its capture it was restored to the possession of the authorities of the Mexican Republic.

The history of the transaction began with the appointment by President Jaurez November 12, 1864, of General J. M. J. Carvajal as an agent of Mexico, with authority to facilitate the coming of foreigners into the country, to augment the

[1] *Juan N. Robinson* v. *Mexico*, No. 25, MS. Op. II. 537.

military forces of the republic, to purchase arms and munitions of war, to raise a loan, and to do various other things in aid of the Republican cause. In pursuance of this commission General Carvajal came to the United States and among other things concluded an arrangement with General Lew Wallace, whereby the latter was to enter the service of the Republic of Mexico with the rank of major-general.

In the summer or autumn of 1865 General Wallace brought General Carvajal and Gen. R. Clay Crawford together in New York City, as the result of which General Crawford also agreed to enter the Mexican service. To this end he proceeded to the Rio Grande, under instructions from General Wallace, "cautiously to canvass the military district of Texas, adjacent to the Rio Grande, with a view to ascertain the number of veteran discharged soldiers willing to enter the Mexican service," and to try to enlist them, both officers and men, into his organization. He was specially charged to ascertain, through Colonel Treviño, "the whereabouts of Col. John S. Ford, late of the rebel service," and to endeavor to employ him to raise "a regiment of Texas cavalry." General Crawford himself was to complete, if possible, a brigade of infantry of three regiments, and for this purpose he was to be "at liberty to accept discharged Federal soldiers *without arms*, sending them into rendezvous for organization." The rendezvous was to be on the American side of the Rio Grande. Unless an arrangement was made with Colonel Ford no cavalry were to be enlisted or brought into the rendezvous, as they were difficult to subsist and would straggle and subject the plan to exposure. Arms, uniforms, and ammunition were not to be purchased. After placing the men in camp, General Crawford was not to cross the Rio Grande into Mexico, nor to permit any of his officers or men to do so, until General Carvajal should arrive, unless he should be otherwise instructed either by General Carvajal or by General Wallace. On General Carvajal's arrival on the Rio Grande, General Crawford was instructed that "he was of course to be governed by his orders."

General Crawford, bearing these instructions and a commission from Carvajal as a general of division, arrived at Brownsville, Texas, about November 1, 1865, and there met Francisco De Leon, who was then acting governor of the State of Tamaulipas, Colonel Treviño, Gen. Guadalupe Garcia, Colonel Hinojosa, and other military officers of the Mexican Republic. Ac-

companied by General Garcia, Governor De Leon, Colonel Garza, aid-de-camp on the staff of General Escobedo, and other officers, he went to Reynosa, where General Escobedo then had his headquarters. He was presented by General Escobedo to the troops as an officer of the republic, and subsequently to the officers as a general of division in the Mexican army. General Escobedo was then commander of the Republican forces in the north. He returned General Crawford's visit at Brownsville, accompanied by a number of Mexican officers, and the subject of capturing Bagdad was then discussed. In subsequent communications General Escobedo addressed General Crawford as an officer in the Mexican service. In a letter of December 27, 1865, he urged him to "act as speedily as possible." Crawford had no commission from President Juarez.

Early in the morning of January 4, 1866, a consultation was held at the house of Thomas D. Sears, at Clarksville, Texas, just across the river from Bagdad, in regard to an attack on the latter place. Sears was said to have a commission from Governor De Leon, appointing him an officer in the Mexican Liberal navy. Among those present were persons named Read, Lamberton, Shaw, McDonald, Littlefield, and Earl. Read was a "staff officer" of Crawford's; Lamberton was said to have a commission from De Leon as a captain in the Liberal army; Shaw, McDonald, Littlefield, and Earl were all represented as officers in the Mexican army or navy. They all claimed to be acting under the immediate authority of De Leon and Crawford. Neither of those persons, however, was present. Some of the party proposed to send for them, and to delay the attack until they should arrive and assume command of the movement; but Read, "as a staff officer" of Crawford's, assumed the responsibility of an immediate attack, though he consented to send an express for De Leon and Crawford, who were then at Brownsville. A messenger was accordingly dispatched, but about 4 o'clock in the morning of January 5, 1866, "the above-named party, with the addition of others, mostly negroes and some Mexicans, in all about one hundred, all under the command of Read, crossed the river into Bagdad." The crossing was effected by means of an English vessel lying in the river. The town was captured with but little trouble. Governor De Leon arrived in Clarksville within three hours after the attack, crossed the river into Bagdad, assumed command

of the attacking party, and paroled the prisoners. General Crawford arrived at Clarksville late in the afternoon of the 5th. General Escobedo arrived there in the evening of the same day and crossed into Bagdad on the 6th and assumed command.

January 25, 1866, a military commission was assembled at Brazos Santiago, Texas, in pursuance of the orders of General Sheridan, with instructions to report on the capture of Bagdad. Among the witnesses before the commission was Col. J. D. Davis, the commander of the United States forces at Clarksville. He produced a letter from Governor de Leon, of January 5, 1866, addressed to him, saying: "This place [Bagdad] was captured last night by a force of Republican soldiers of Mexico, acting under the orders of Gen. R. Clay Crawford." A letter was also laid before the commission from General Escobedo to Major-General Weitzel, commanding the district of the Rio Grande, of January 5, 1866, written from Brownsville, and saying: "I have the honor to inform you that the forces under my command have taken the post of Bagdad. Mr. Crawford, without my orders, has started, it is said, to take command of said post. As he has no instructions from me, I beg that you detain him on his march in order to avoid complications of the gravest nature. I start immediately to place myself at the head of my troops in Bagdad, from which point I shall write to you whatever may be of interest." Among the persons engaged in the attack was Col. Adolfo Garza, who had, as it appears, been designated by General Escobedo to command the expedition. After the capture General Escobedo placed Col. Enrique Mejia in command of the forces at Bagdad, Colonel Garza remaining second in command under him.

By all the testimony before the military commission it appeared that Bagdad was captured by Read, Sears, Garza, Lamberton, McDonald, and others, aided by a small force of Mexicans and negroes, suddenly collected together, some of whom were deserters and discharged soldiers from the Army of the United States, and others of whom still belonged to it. None of the persons named was an officer of that army.

A number of witnesses for the Mexican claimants before the mixed commission testified that the town was captured and pillaged by colored soldiers belonging to the Army of the United States, under white officers who wore the uniform of officers of the United States Army. Some of the leaders prob-

ably did wear that uniform. Read, Earle, and Sears had only recently been discharged from the service. But no witness identified by name, rank, or otherwise any actual officer of the United States Army as being present at the capture. January 7, 1866, General Escobedo, who had then arrived at Bagdad and investigated the affair, and who had in the meantime quarreled with General Crawford at Brownsville, again wrote to General Weitzel, saying, "at daylight on the morning of the 5th a band of adventurers, without any official character, attacked this village [Bagdad] and committed all kinds of depredations." January 9 Colonel Mejia made a report to the same effect, refusing, as General Escobedo had done, to recognize the military character of Crawford and his associates. On January 19 Mejia made another report to General Escobedo, in which, referring to the depositions of certain witnesses, he declared that the expedition was commanded by Colonel Davis, of the One hundred and eighteenth regiment of the United States Army. None of the witnesses, however, to whom the report referred proved the presence of Colonel Davis; and the latter testified before the military commission that he was at the time in bed at his camp, in Clarksville, and that no officer of his command was, so far as he knew, concerned in the attack.

After the capture of the town, Sears and some of his associates claimed, as persons acting under the authority of the Mexican Republic, the right to take the goods of their enemies as prize or booty of war, and immediately began to seize the goods of the inhabitants of the town and transfer them across the river to Clarksville. Under the circumstances, and especially as General Escobedo had disowned the military character of the captors, the customs authorities of the United States, in order to arrest irregular importations, stopped the ferries across the river for a short time. A military guard was furnished to the deputy collector by General Weitzel to enable him to protect the property arriving, and exact the payment of duties. At this time great excitement and confusion existed at Clarksville, where men, women, and children were seeking refuge from Bagdad. The military guard seized the goods brought from Bagdad to Clarksville, and the officer in command retained them in his possession, except where proof of ownership was furnished and the revenue laws were complied with. In some cases the claimants, having proved their title, took their

goods back to Bagdad without paying duty. Where conflicting claims were made, the parties were left to refer their dispute to the judicial authorities.

The military authorities of the United States acted in the same spirit. After investigating the capture, and declaring those concerned in it to have acted without authority, General Escobedo requested of General Weitzel a loan of two hundred troops to assist in the restoration of order and the protection of private property from pillage, besides asking him, as has been seen, not to recognize R. Clay Crawford in any capacity whatever. General Weitzel complied with both these requests. With the aid of the United States troops, General Escobedo took military possession of the town, expelled Crawford and his followers, and ultimately reestablished order.

It was alleged by some of the witnesses for the claimants before the mixed commission that the troops of the United States sent by General Weitzel at General Escobedo's request remained in Bagdad, and that they participated, both officers and men, in the pillage and robbery of the inhabitants. To this accusation the agent of the United States, Mr. Ashton, replied (1) that if it had been true, the United States ought not to be held responsible, since the troops, though under the command of United States officers, were to be considered for the time being as in the service of the Mexican Republic, they having been sent to Bagdad and kept there at the special instance and request of General Escobedo; (2) that the accusation was not true in fact, but (3) that, if the goods of any of the inhabitants were taken after the United States troops occupied the town, such taking was not to be considered as pillage or robbery in the common acceptation of those terms, but as the seizure, made by direction of Colonel Mejia and his associates, acting under the authority of General Escobedo, of the goods of their enemies, the Imperialists, for the purpose of confiscating them. That such seizures were made appeared from the evidence,[1] but the Mexican witnesses evidently drew no distinction between seizures made by persons under a claim of right, and common pillage.

Argument of Mr. Ashton.

On all the facts the agent of the United States contended that the Mexican claimants and the Mexican Government had no legal or moral ground of complaint against the United States on ac-

[1] Dip. Cor. 1866, part 3, pp. 133–138, 158.

count of the transactions at Bagdad. As to the legal aspects of the case, he maintained—

1. That the claimants, being permanent inhabitants either of Matamoras or of Bagdad, which were at the time in the possession of the Imperialist authorities, military and civil, could not be considered as "citizens of the Mexican Republic" in the sense of the convention.[1] It was true, said Mr. Ashton, that these decisions did not directly determine the effect of a hostile occupation of a portion of the territory of a state upon the political relations and status of its citizens residing in the conquered country, but he submitted whether they did not "tend to show that in contemplation of the law of nations the *state connections* of such citizens were *suspended* during the presence of the paramount force, so far as regards foreign states and their citizens."[2]

2. That, whether they were so far citizens of Mexico as to be entitled to present their claims before the commission or not, they were unquestionably within the legal designation of enemies of the Mexican Republic. The territory they occupied was enemy's territory, and their having been attacked could not be asserted by Mexico as an injury to its citizens.[3]

3. That the consideration of these questions was in fact rendered superfluous by the circumstance that the expedition against Bagdad was organized and conducted by officers of the army of the Mexican Republic; that all the parties engaged therein were acting under the authority or color of the authority of the Mexican Government; and that no officer of the United States Army or Government participated in the pillage which ensued upon the capture of the town.

4. That if the movement against Mexico had not been so organized and conducted, but had been carried on by private individuals operating from the territory of the United States, the Government of the United States would not under the

[1] *United States* v. *Rice*, 4 Wheaton, 246; *Fleming* v. *Page*, 9 Howard, 614; *Thorington* v. *Smith*, 8 Wallace, 9; opinion of Attorney-General Black, 9 Op. 42.

[2] Pufendorf, Bk. VIII. Ch. XI. sec. 8; The Foltina, 1 Dodson, 451; *Ruding* v. *Smith*, 2 Hagg. Consist. 382; *Elphinstone* v. *Bedreechund*, Knapp, 388; *Fabrigas* v. *Moslyn*, Cowper, 165.

[3] The Prize Cases, 2 Black. 635; The *Bella Guidita*, 1 Rob. 207; 4 Wheaton 254; 2 Gallison, 501; 9 Howard, 615; 1 Dodson, 151.

circumstances have been liable, since no negligence on the part of the American authorities was shown.[1]

Claims against Mexico: Opinion of Mr. Wadsworth.

Nearly all the claims against Mexico growing out of the transaction in question were dismissed by the commissioners. In the case of *John Friery* v. *Mexico*, No. 541, MS. Op. V. 18, Mr. Wadsworth delivered the following opinion:

"A body of armed men of all nations and colors, acting under the orders of leaders deriving their authority from the Mexican Government, through General Carvajal, instigated by General Escobedo, and assisted by Governor De Leon, assaulted and captured Bagdad on the morning of the 5th January 1866. The town at the time was within the lines of the French and the Imperialists, and garrisoned and held by a body of their troops, which were taken prisoners by the assailants.

"As war was raging at the time between the Government of Mexico and the French, and all persons residing in the town of Bagdad were enemies of the Mexican Government, without distinction, they can not complain of injuries received from the assailing party while the assault was in progress. It is true that after the capture of the place by the Mexican forces, it was the duty of the officers commanding to restrain pillage and protect life and property so far as in their power.

"I am too familiar with the facts attending the scandalous affair not to know that in the earlier hours of the attack it was out of the power of Read and Governor De Leon (who commanded) to restrain the disorders and that this could not be done until Escobedo borrowed from the United States commander, on the opposite bank, a portion of his troops for the purpose.

"In the mean time pillaging went on, all parties taking a hand in it—the assailants, the garrison, and the mob. The disorders were disgraceful enough, but just such as are incident to the assault upon a town held by troops, and made in the darkness and crowned with success. I can not deny the right of the Government of Mexico to assail and capture a town held by its enemies, and do not see how the government is to be made responsible for the disorders which accompany a successful assault upon such a town, committed upon persons or against the property of persons who are at the time enemies, when I am sure it was impossible for the parties in command to restrain these disorders.

"These were the hazards of war, and claimant, residing in the town where the contest rages, must share the fortunes of the rest of the inhabitants. His small effects were plundered

[1] Grotius, De Jure Belli, Bk. II. ch. XXI.; Vattel, Bk. II. chap. VI. sec. 72; I Phillimore, chap. X. sec. 218.

in the earlier moments of the capture of the place, and before the authorities possessed the means or had the time to restore order and preserve discipline. We can not tell who did the mischief; it certainly was not ordered by the officers or countenanced by them, so far as the proof speaks. It would not be just to hold a belligerent responsible for such unauthorized acts committed in an armed town just taken by assault. Claimant's own fellow-townsmen, or his Imperialist defenders may have committed them for aught we know. But even if some of the assailing party made a spoil of his goods it would be going a great way to affirm responsibility on the part of the government.

"I think the case must be dismissed, and so it is ordered accordingly."

Opinion of Mr. Zamacona.

Mr. Zamacona, in another claim against Mexico, delivered the following opinion:

"In case No. 139, of the Mexican docket, relating to the claim of Francisco Garcia Muguerza, the undersigned has given his opinion on what may be termed the historical part of this case. He then maintained and now repeats that the Mexican Government can not be charged with responsibility for the disorders that occurred in Bagdad in January 1866, but the authorities and officers of the United States. This implies that the claim can not be made against the Mexican Government, and should therefore be dismissed."

Claims against the United States: Opinion of Sir Edward Thornton.

In the case of *Bernardino and Francisco Garcia Muguerza* v. *The United States*, No. 139, MS. Op. VI. 262, in which the commissioners were unable to agree, Sir Edward Thornton, as umpire, rendered the following decision:

"After a careful examination and study of the voluminous evidence submitted on both sides in the case of *Bernardino and Francisco Garcia Muguerza* v. *The United States*, No. 139, the umpire is fully satisfied and convinced that the party who on the morning of the 5th of January 1866 attacked and captured the town of Bagdad in Mexico, did so at the instigation primarily of General Escobedo, commander in chief of the Mexican army of the north, and secondarily of R. Clay Crawford, and that in the attack upon the town the party was under the immediate command and leadership of Read, McDonald, Lambertson, and others. It is evident that General Escobedo had on the part of the Government of Mexico authorized Crawford to enlist men in the United States for the service of Mexico, and to organize the attack upon Bagdad with men so enlisted; and that Crawford entrusted Read with the preparation and carrying out of the attack.

"General Escobedo, in his letter of the same day to General Weitzel, accepted and assumed the responsibility of the act, and stated that 'the forces under my [his] command have taken the post of Bagdad.' Indeed, it is far from probable that the same general on the same day would have applied to Colonel Moon for a United States force to preserve order in Bagdad if he had supposed that he was entitled to complain that a portion of the same force had attacked and plundered Bagdad.

"It is evident that none of the leaders above mentioned were officers of the United States Army; they appear to have been dressed in United States uniforms, but that was an act for which the United States Government was in no way responsible. The leaders were in the service and under the orders of the Mexican Government. The umpire can not discover that any United States officer was present or gave any order during the attack and capture of Bagdad.

"There is no doubt that there were some colored soldiers in United States uniforms, and belonging to a United States regiment stationed at Clarksville, who took part in the attack; but it is pretty clear that they did so without the knowledge or consent of their own officers, and that as soon as the latter became acquainted with the fact they ordered the arrest of those soldiers. The umpire does not even consider that it is shown that there was a want of due diligence on the part of the United States officers in not preventing these men from joining the expedition. General Escobedo had authorized a violation of the United States laws in encouraging the enlistment of men in the United States to fight against the French, and preparing the attack upon Bagdad from the United States. If there was a want of due diligence on the part of the United States authorities in not discovering that such violations of the law were being committed and in not preventing them, it is possible that the commanders of the French forces might have been justified in remonstrating against it; but certainly the Mexican Government, in whose interest, and by the authority of the commander in chief of whose army of the north, Americans were engaged as Mexican officers, men were enlisted, and the attack on Bagdad was organized in the United States territory, and United States soldiers were seduced from their duty, was not in a position to protest against the consequences of the infractions committed by its own officers of the laws of the United States.

"It does not appear that much plundering, except perhaps of spirituous liquors, was done by the United States armed soldiers. The greater and more valuable part of the goods were undoubtedly carried off by the leaders of the expedition. But whether these acts were committed by the one or the other, the umpire considers that the Mexican Government alone is responsible for the acts of its own officers, and that General Escobedo both knew and assumed the responsibility, and for

that very reason asked for the assistance of the United States troops to prevent the pillage which was being committed by persons who must have formed part of 'the forces under his command,' which, in the language of his letter of January 5th, 1866, had 'taken the post of Bagdad.'

"The umpire is therefore forced into the conclusion that the Government of the United States can in no way be held responsible for the above-mentioned claim, and he accordingly awards that it be dismissed."

Cooper's case

In another of the Bagdad cases, *Joseph Cooper & Co.* v. *Mexico*, No. 565, being a claim of a citizen of the United States against Mexico, Sir Edward Thornton said:

"In the case of *Joseph Cooper & Co.* v. *Mexico*, No. 565, the claim arises out of alleged losses and destruction of property suffered by the claimant at the hands of Mexican troops during an attack upon Bagdad in Mexico, where the claimants resided and were engaged in business. It appears that Bagdad was occupied by French, or Imperialists, troops when on the 5th of January 1866 it was attacked by a Mexican force, or at least by a force which was acknowledged by the Mexican military chiefs to be acting under their orders. During the disorder and confusion which is almost always consequent upon an attack of this nature, a quantity of property belonging to the claimant was robbed and carried off by some of the attacking force, or at least by armed men.

"According to the strict rules of war, a belligerent can not be held responsible for the value of property belonging to residents, whether natives or foreigners, which has been seized or destroyed in a place previously occupied by and captured from the enemy; and though it is more in accordance with the rules of modern and more civilized warfare to respect the property of private persons, whether natives or neutral foreigners, it is doubtful whether an international claim can be sustained on account of the violation of these rules. In the present instance the umpire is of opinion that the principal portion of the claim arises from the inevitable cause of war. The pillage and destruction were general and seem to have been directed against natives as well as foreigners. Neither is the umpire of opinion that there is any proof of the charge that the commanders and officers of the force countenanced or participated in the plundering of the claimants' property. On the contrary, it would appear that there was no discipline whatever and that the plunderers were under no control. One of the claimants, Joseph Cooper himself, declares that he went to his office in the morning of the attack and 'on entering the yard he saw a crowd of soldiers and civilians, all armed.' At that time no officer seems even to have been present. He subsequently returned to his house and found it in

possession of a number of soldiers under the command of Captain St. Clair, 'who claimed to be an officer of the army of the Republic of Mexico.' But there is no proof that this officer countenanced or encouraged the work of destruction. The plundering, however, and destruction of claimants' property seems all to have been done during a few hours immediately succeeding the capture of the town. It is also to be observed that the greater part of the plundered property was carried across in vessels belonging to the claimants to the Texas side of the river, and that, though a force of United States troops was stationed there, they did not interfere to save the property from the plunderers nor prevent it from being carted away from the store, so that it would seem to be partly owing to their nonintervention that the property was lost.

"The umpire is of opinion that, however deplorable it may be for the sufferers, and however much to be regretted that such proceedings should not be prevented, the Mexican Government can not under the circumstances be made responsible for the losses to which the claimants were subjected. With regard to the seizure some time after the capture of Bagdad of 42 bales of hay and 98 bales of India bagging belonging to the claimants, which it was said were to be used for purposes of defense, the facts are not sufficiently proved to justify the umpire in making an award for their value. There is only the evidence of one of the claimants to show that they were taken for that purpose by the order of the Mexican officer in command.

"One of the claimants, Joseph Cooper, swears that he was born in New Orleans, but he has not complied with the rule of the commission by stating the date of his birth, nor does he bring any other proof that he is a citizen of the United States.

"For the above-mentioned reasons the umpire considers that the Mexican Government can not be held responsible for the losses suffered by the claimants, and he therefore awards that the claim be dismissed."

MS. Op. V. 210, VII. 592. A similar decision was rendered in the case of *Joseph L. Ximenes* v. *Mexico*, No. 836, MS. Op. VII. 51, in which a claim was made on account of the breaking open and plundering of a store on the entrance of the captors into the town.

Claim of the town of Reynosa.

A claim was made by the corporation of the town of Reynosa, Mexico, against the United States, before the commission under the convention of July 4, 1868, on account (1) of a raid by one A. N. Norton on the town on March 26, 1853, and (2) of the entry into the town on April 5, 1860, of a military force of the United States of seventy or eighty men, under the command of Col. John S. Ford. With regard to the first claim, the umpire,

Sir Edward Thornton, said that it was not proved that the expedition under Norton was prepared in the United States, or, if it was so prepared, that it "was countenanced by or even previously known to the United States authorities," or "that the latter could have prevented it or did not use due diligence to that end," or that Norton was "a justice of the peace of Starr County or a United States authority." "On the contrary," said Sir Edward Thornton, "it appears that they [the United States authorities] were completely ignorant of it; but that after the occurrence, when the guilty persons returned into Texas, the authorities arrested the leaders of the expedition, who were tried, but finally acquitted. The Government of the United States can not, therefore, be held responsible for the injuries inflicted by that expedition."

With regard to the entrance of United States troops into Reynosa on April 5, 1860, Sir Edward Thornton said:

"The umpire is satisfied that there was an understanding between the commander of the Mexican forces in that district and Colonel Ford, that the United States forces should be allowed to follow into Mexican territory the leader Cortina and his comrades, who had committed so many depredations in Texas, if the latter should take refuge on the right bank of the Rio Bravo. He is also convinced from the evidence that the force under Colonel Ford did no damage to either the *ayuntamiento* or the inhabitants of Reynosa. If the Mexican Government considered that its territory had been violated, it had a right to demand satisfaction for the violation; but as no injury was done to the persons or property of the claimants, their claim is unfounded. If the *ayuntamiento* chose to maintain a force, the United States Government can not be held responsible for the expense incurred by that step. The United States Government was itself incurring considerable expense at the time in maintaining a force to resist the depredations of Cortina, who with his followers had taken refuge within Mexican territory, whence they were actually threatening acts of hostility against the United States forces and a United States steamer, and where they seem to have been very little molested by the Mexican authorities. The umpire does not consider that the United States Government can be made responsible for the above-mentioned claims."

Thornton, umpire, February 28, 1876, *The Corporation of Reynosa* v. *The United States*, No. 831, MS. Op. VI. 323. The claim of *Francisco Garcia Muguerza* v. *The United States*, No. 636, growing out of the Norton expedition, was likewise dismissed. (MS. Op. VI. 317.) In the case of *Juan N. Trerino* v. *The United States*, No. 533, MS. Op. VI. 314, growing out of the entrance of Colonel Ford into Reynosa, it was asserted that a force was raised in the town for the purpose of resisting Colonel Ford's entry (though

in fact it was not resisted), and that this force was furnished by claimant with arms and supplies. Sir Edward Thornton, referring again to the movements of "Cortina and his banditti," said that Mexico, acting upon the complaints of the United States, had instructed its officers to endeavor to capture Cortina and his band, and to cooperate for that purpose with the United States forces on the left bank of the Rio Bravo. Continuing, Sir Edward Thornton said: "In accordance with these instructions it appears from the declaration of Guadalupe Carvajal, commander in chief of the Mexican forces in the State of Tamaulipas, that permission had been given to the United States forces to cross into Mexican territory in pursuit of Cortina and his followers. It was in consequence of this permission that Colonel Ford entered Reynosa, with the force under his command; he acquainted the municipality with the object of his visit; and being assured that none of Cortina's followers were in that town, he remained but an hour and recrossed into Texas, whence he again communicated with the authorities and stated his intention of not returning to Reynosa. It appears also that on the 6th of April 1860, the day after Colonel Ford's visit to Reynosa, General Garcia, commander in chief of the line of the Brazos, addressed a letter to Col. R. E. Lee, commanding the United States forces, complaining of Colonel Ford's entering with his force into Reynosa. Colonel Lee answered on the 12th April that Colonel Ford supposed that he was acting in accordance with General Garcia's sanction; and the latter, in his answer of the 14th of that month, expressed himself satisfied with Colonel Lee's explanation. There does not seem therefore to have been any cause arising out of the action of the United States authorities for the raising and maintaining of a Mexican force at Reynosa, nor for the claimant's having temporarily abandoned the care and management of his business, and the umpire consequently feels himself obliged to award that the above-mentioned claim be dismissed."

3. CASES UNDER ARTICLE XII. OF THE TREATY OF WASHINGTON OF MAY 8, 1871.

The Saint Albans raid.

"The First National Bank of Saint Albans *v.* Great Britain, No. 1.

"Collins H. Huntington *v.* Same, No. 2.

"William and Erasmus D. Fuller *v.* Same, No. 3.

"Bradley Barlow, receiver of the Saint Albans Bank *v.* Same, No. 4.

"Mariette Field, administratrix, etc., *v.* Same, No. 5.

"Seth W. Langdon *v.* Same, No. 6.

"Joseph S. Weeks *v.* Same, No. 7.

"Breck & Wetherbee *v.* Same, No. 8.

"Aldis O. Brainerd *v.* Same, No. 9.

"Charles F. Everest *v.* Same, No. 10.

"Oscar A. Burton, receiver of the Franklin County Bank *v.* Same, No. 13.

"Lucien B. Clough, administrator, etc., *v.* Same, No. 14.

"These claims all arose out of the same transaction, and were considered and decided together. All, except No. 14, were claims for property taken and appropriated or destroyed at Saint Albans, Vermont, by an incursion of rebels, known as the Saint Albans raid, in October 1864. No. 14 was a claim brought by the administrator of Elinas J. Morrison, deceased, to recover damages for the wrongful killing of said deceased by the rebels engaged in the same raid.

"The entire amount claimed in all the cases was $313,490, besides interest.

Allegations in the memorials.

"The allegations in all the memorials were substantially the same, and as follows:

"That, shortly before the 19th of October 1864 a large number of persons, then domiciled or commorant within Her Britannic Majesty's province of Canada, combined together within those provinces for the purpose of committing acts of depredation, rapine, and war from said provinces as a base of operations, and as a shelter for immediate retreat, against the persons and property of citizens of the United States residing within those States. That some twenty or more of those persons, shortly before that day, pursuant to the combinations so made, proceeded from Her Majesty's province of Canada East into the territory of the United States, and assembled at the village of Saint Albans, in the State of Vermont, distant about twelve miles from the border of said province. That, being so assembled, they took forcible and armed possession of a part of said village; there seized and imprisoned several citizens of the United States; fired shots at sundry citizens; by such shooting killed the decedent named in No. 14; set fire to several buildings in the village; entered three of the banks therein, seizing and imprisoning the officers of such banks, and seized and appropriated the securities and moneys from the safes of said banks, together with horses and other property named in the several memorials. That all these acts were committed under arms and with military uniform, equipage, and organization to a greater or less extent. That after the perpetration of these acts the perpetrators retreated in a body toward the province of Canada, and entered that province, carrying with them the plundered property, and closely pursued by the citizens of Saint Albans and vicinity, who organized for that purpose, and would doubtless have captured the fugitive marauders but for the asylum afforded them by Her Majesty's province. That shortly after the arrival of the re-

treating marauders within the province of Canada, several of them were arrested by local magistrates in that province, and a part of the plunder carried off by them was seized by such magistrates and retained in their custody. That immediately thereafter requisition was made by the Government of the United States upon Her Britannic Majesty's government for the surrender of said persons on the charges respectively of murder, assault with intent to commit murder, and robbery, committed within the jurisdiction of the United States, such requisition being based on and conformable to the terms of article 10 of the treaty of 9th August 1842 between the United States and Great Britain. That the requisition was supported by full evidence on the part of the United States of the commission by the persons so charged of the acts of violence above named. That before the hearing before such local magistrates of the charges preferred against such arrested persons, Her Majesty's government for said province caused the jurisdiction of such local magistrates and the proceedings before them to be superseded by one Charles J. Coursol, a judicial officer of the province, who took jurisdiction of the matters charged, issued warrants for the arrest of the persons so charged, and caused such persons to be removed from the jail at St. Johns, Canada, where they were confined under process issued by the local magistrates, to the city of Montreal; and also caused the property seized to be transferred from the custody of the local magistrates to the custody of Her Majesty's officers in Montreal. That a partial hearing was had before Judge Coursol, on which hearing full evidence was made of the commission of such acts of violence by the persons so charged; and that the hearing was, on the application of the persons charged, unreasonably, and against the protest of the counsel for the United States, postponed from time to time to the 13th December 1864, for the purpose of enabling the respondents to make proof of their being commissioned and authorized by the Confederate States of America, so called, to commit the acts of violence named. That on the 13th December Judge Coursol, without hearing any further proofs or arguments, in a hasty, unjudicial, and indecent manner discharged from custody the persons against whom such hearing had chiefly proceeded, and all other persons arrested and held on the same charge, and immediately and with indecent haste ordered the money and property of the claimants found upon

the persons so charged to be delivered up to them, and permitted them to make their escape therewith, such money and property amounting to $80,000 and upwards, and having been fully proved and identified as the money and property of the claimants, and as having been plundered and carried off by the persons so charged and arrested and discharged. That subsequently further warrants were issued by Judge Smith, one of Her Majesty's justices of the superior court for the said province, on which warrants, after much delay and hindrance, arising from the friendliness of the constabulary of the province to the Confederate raiders and their pretended government, and the unfriendliness of the same to the United States Government and its people, in consequence whereof most of the offenders were allowed to escape, and all the money and property was allowed to be secreted or removed, five of the persons so charged were again arrested and brought before Justice Smith upon an application of the United States for their extradition. That after much delay Justice Smith decided that the persons were not the subject of extradition under the treaty, but were belligerents against the United States in committing the acts complained of, and in making their retreat to Canada and enjoying its asylum, and discharged the prisoners. That by these acts of the judicial officers of Canada, Her Majesty's government, in effect, refused to surrender the persons who committed these acts of violence within the United States, and refused to restore to the United States and to its citizens the property and money so taken and carried by the plunderers into the province of Canada. That in the commission of these acts, as well as in their organization and preparation for the same, these raiders claimed to act under the authority and in aid of the so-called Confederate States of America—the enemies of the United States—and that their confederation and organization for the purpose of committing these acts were well known to many of the government officials, local officers, and citizens of the province of Canada before the occurrence of the acts named at Saint Albans. That in consequence of the culpable negligence or connivance of the authorities of the province, no steps were taken to prevent the expedition, or to give any information to the United States Government, or any of its officers, so as to enable them to protect themselves against such acts. That both before and after the acts in question warm sympathy and hospitality

were extended to the offenders by a large number of the leading and influential citizens of the province of Canada, and the acts themselves were vindicated and approved by some of the official government newspaper organs in the province; and that such sentiments prevailed there that magistrates and peace officers in many instances refused search-warrants and the necessary assistance to enforce the same; in consequence of which many of the offenders were allowed to escape without arrest and carry with them the plundered property. The memorials charged Her Majesty's government and official authorities in Canada to have been culpably negligent in permitting the raid in question from their borders, and in permitting the returning band, under fresh pursuit, to escape into Canada and obtain asylum therein, and in refusing to surrender them, with their booty, to the United States, and in neglecting and refusing, upon full notice and demand, to restore to the United States or to the claimants the money and property of the claimants so carried off by the raiders.

Claimants' proofs.

"Proofs taken on the part of the claimants fully established the facts of the depredations committed at Saint Albans, as alleged in the several memorials, and that those depredations were committed by a body of men who came separately or in small detachments from Canada in the guise of ordinary travelers and without any open or apparent organization or military array. That their first apparent action in an organized body or in unison commenced at Saint Albans, on the 19th October 1864, and continued less than an hour. That immediately after the committing of the depredations charged in the complaint they retreated in a body toward Canada; were closely pursued by the citizens of Saint Albans and vicinity, who rallied for that purpose; and that the pursuit was only abandoned upon the retreating party entering the province of Canada. The party acted under the command of one Bennett H. Young, a lieutenant in the army of the Confederate States, and all its members were claimed to have been connected with the regular military service of the Confederates.

"The arrest, examination, detention, discharge, rearrest, and final discharge of some of the party, substantially as alleged in the memorial, were also established by proofs on the part of the claimants. Testimony was taken on both sides bearing upon the question of the knowledge by the authorities

of Canada of the intentions of the Confederates to organize a raid from Canada upon Saint Albans or other frontier towns of the United States, and as to the conduct of those authorities in regard to taking any measures to prevent or suppress such intended raid.

"Among the witnesses examined on the part of the claimants to show such knowledge by the Canadian authorities, and their failure to take proper steps to prevent or suppress the raid, were Guillaume Lamothe, chief of police of the city of Montreal, at the time of the raid, and Jacob Rynders, a detective in the employ of the United States at Montreal at the same time. The evidence of these and other witnesses tended to establish the fact that the raid upon Saint Albans was arranged and organized in Canada; that the fact that that raid or similar raids were in contemplation was known to high officers of the Canadian Government, among others to Sir George E. Cartier and Sir Etienne Taché, then members of the Canadian ministry; to Col. William Ermatinger, a stipendiary magistrate, having the entire control of the police force and militia for the district of Montreal, embracing all the frontier towns in Lower Canada bordering upon the United States; to Lamothe himself, chief of police of the city of Montreal; and to Judge Coursol, government superintendent of police for the city and district of Montreal.

"The claimants also put in evidence the report of Frederick William Torrance, esq., who was commissioned in January 1865 by the Canadian Government to investigate and report upon the proceedings connected with the arrest, examination, commitment, and discharge of the raiders, the seizure of the moneys found upon them, and the circumstances connected with the giving up of such moneys; also, whether there was any refusal to execute any warrant for the rearrest of the accused; if so, by whom and for what reason; and generally to obtain authentic information of all matters and things connected with such arrest, discharge, and rearrest of the prisoners, and the seizure, detention, and giving up of the moneys. In this report, made to the Canadian Government and dated 18th May 1865, Mr. Torrance went fully over the whole ground committed to his investigation, Messrs. Coursol and Lamothe appearing before him and being permitted to cross-examine witnesses. The report recited the facts found by him, including

the transactions at Saint Albans substantially as alleged in the memorials; the flight of the raiders into Canada, closely pursued by the citizens of Vermont; the arrest in Canada of several of the raiders by the local authorities in the district bordering upon Vermont; the seizure upon the persons of those arrested and in deposits where secreted by them of about $87,000 plundered from the banks; the subsequent taking of jurisdiction of the cases of the persons arrested by Judge Coursol, and the transfer of those persons to Montreal; the examination of the prisoners, or some of them, before Judge Coursol, the Government of Canada, the United States, and the prisoners all being represented upon such examination, and the same having been continued from the 7th November to the 13th December, including an adjournment of several weeks during that time to enable the defendants to make proof of their relations to the government of the Confederate States, and to show that their acts were those of lawful belligerents and not of private robbers. That on the 13th December an objection was raised by the counsel for the prisoners to the jurisdiction of Judge Coursol, which objection had some days previously been made the subject of a private interview between Judge Coursol and the counsel for the prisoners; and that thereupon the prisoners were immediately discharged, and the money found upon them, to the amount of about $87,000, was surrendered to them by the chief of police, under the private advice of Judge Coursol, though without any judicial order to that effect. The report of Mr. Torrance acquitted both Judge Coursol and Mr. Lamothe of the imputation of being influenced by corrupt motives. It showed that after the discharge of the prisoners by Judge Coursol, new complaints were made on behalf of the claimants or their government before Mr. Justice Smith, on which warrants issued for the rearrest, and that the execution of these warrants was refused by Mr. Lamothe and one of his deputies. Under the instructions of Sir George E. Cartier, and under the stimulus of a reward offered by the Government of Canada for the rearrest of the prisoners, five of them were shortly afterward rearrested upon the warrants issued by Justice Smith, and on examination were discharged by him, on the ground that their acts at Saint Albans were belligerent acts and not crimes subjecting them to extradition under the treaty between the United States and Great Britain.

"Mr. Torrance stated his conclusions upon the whole case to the following effect:

"That Mr. Lamothe, as chief of police, committed an improper act in the surrender of the money to the prisoners without official directions from Judge Coursol, as whose agent he held the money, so to deliver it. That the oral and unofficial instruction of Judge Coursol to Mr. Lamothe to the effect that the prisoners, if liberated, would be entitled to the possession of the money, was not a sufficient justification to Lamothe for its delivery, but was an improper instruction on the part of Judge Coursol, and might have misled Lamothe.

"That Judge Coursol, if his decision that he had no jurisdiction of the case was a correct one, was in fault for having omitted to communicate with the government before announcing such decision and discharging the prisoners, and had laid himself open to the imputation of a grave dereliction of duty in a matter of national importance. And, on the other hand, if his decision that he had no jurisdiction was erroneous, he was liable to a criminal prosecution by indictment for malfeasance in his office by reason of the discharge of the prisoners.

"And, finally, that the Government of Canada was responsible to the Government of the United States for the acts of Judge Coursol and Mr. Lamothe, and was under obligation to restore the booty brought into the province by the belligerents.

"Under this report the Government of Canada subsequently refunded to the claimants, to whom the same belonged, the sum of about $58,000, the gold value of the $87,000 seized from the arrested raiders and subsequently returned to them. This payment did not include anything on account of the still larger sums plundered and carried off by the raiders, and which never came to the hands of the Canadian authorities.

Proofs for the Defense.

"On the part of the defense various prominent officials of Canada were examined, among them Viscount Monck, governor-general of Canada at the time of the raid; Sir John A. Macdonald, K. C. B., and Sir George E. Cartier, Bart., members of the Canadian ministry at the same time, whose evidence tended to show the absence of any such knowledge or information on their part, in regard to any intended invasion of the United States from Canada, as to call upon them for any precautionary acts beyond those actually taken by the government, and to sustain the claim on the part of Her Majesty's govern-

ment, that the provincial government of Canada were chargeable with no lack of due diligence in failing to prevent the perpetration of the wrongs alleged by raiders proceeding from Canada in the manner above detailed.

Argument for the Claimants.

"In argument it was maintained on the part of the claimants that the evidence showed the raid to have been plotted and organized in Canada, under the advice and direction of Messrs. C. C. Clay, jr., and Jacob Thompson, Confederate agents commorant in Canada. That the sympathies of the Canadian people and the subordinate officials of the government were largely favorable to the Confederate cause and hostile to the Government of the United States. That there was no neutrality law in force in Canada at the time of the raid. That in the absence of such neutrality law and by reason of the sympathies of the Canadian people and officials with the Confederates, the Confederates were enabled to use Canada as a base of operations—the scene of their plans and arrangements for warlike acts against the United States, as their point of departure upon those raids, and their asylum on their return from them. That supposing it conceded that Lord Monck and all his ministry were without fault on their part personally, the officers immediately charged with the maintaining of neutrality upon the frontier—Coursol, Ermatinger, and Lamothe—were shown to have been fully advised of the contemplated invasions, and to have failed of their duty in reporting their knowledge to the government, if they did fail so to report it, and in taking measures to prevent such invasions.

"That the positions of Judge Coursol, as superintendent of police for the city and district of Montreal, and of Colonel Ermatinger, the magistrate charged with the entire control of the police force and the militia for the same district, were such as to make notice to them, in fact notice to the government, and that their failure in any respect to perform their official duty was the failure of the government, and charged Great Britain with the consequences of such neglect.

"That the Government of Canada was under obligation to constantly watch the movements of these enemies of the United States thus plotting the invasion of a friendly nation from the Canadian soil; should have arrested the persons engaged in such plots, or should have expelled them from Canada; and, if the law was found insufficient, should have called on parlia-

ment to make it sufficient. That it was the duty of the Canadian parliament to have provided by law the means of preventing such invasions; and that the absence of such municipal law could not be pleaded in bar of the international liability of the government to perform its duty in preserving neutrality toward the United States, a friendly nation. That in fact the Government of Canada actually did nothing to prevent these violations of neutrality from their soil, though with abundant reason, irrespective of proof of actual notice or knowledge, to apprehend such invasions by the Confederates commorant in Canada; and that the actual notice of such intentions, brought home to Coursol, Ermatinger, and Lamothe, was a notice to the government itself, which was chargeable with the nonfeasance or malfeasance of those officers. That the Government of Canada was held to 'due diligence' to prevent military operations by the enemies of the United States from the soil of Canada as a base of operations against the United States. That the measure of this diligence was to be determined by the nature of the danger to be apprehended from the neutral soil, the magnitude of the danger and the results of negligence, the means of the United States to resist or prevent it, the sympathy and aid which the enemies of the United States might receive in Canada, and the unfriendliness of the people of Canada to the United States, the fact of plans for former raids known to the Government of Canada, and the hostile speeches and avowed intentions of the enemies of the United States, found in large numbers in that province. That all these considerations combined to require strict diligence on the part of the Canadian Government to prevent hostile incursions into the United States across the long and unprotected frontier between those States and Canada.

"The counsel for the claimants insisted that the Canadian Government had entirely failed in the performance of these international duties, and that by reason of such failure Great Britain was liable to the United States for the injuries inflicted by the raiders; that the United States had done all in their power, and all which they were required by international law to do, to protect themselves against such dangers from Canada, and that the government of those States had in their diplomatic correspondence preferred such claims against the Government of Her Britannic Majesty and had fully provided by the treaty for the submission of them to the decision of the commission.

ment, that the provincial government of Canada were chargeable with no lack of due diligence in failing to prevent the perpetration of the wrongs alleged by raiders proceeding from Canada in the manner above detailed.

Argument for the Claimants.

"In argument it was maintained on the part of the claimants that the evidence showed the raid to have been plotted and organized in Canada, under the advice and direction of Messrs. C. C. Clay, jr., and Jacob Thompson, Confederate agents commorant in Canada. That the sympathies of the Canadian people and the subordinate officials of the government were largely favorable to the Confederate cause and hostile to the Government of the United States. That there was no neutrality law in force in Canada at the time of the raid. That in the absence of such neutrality law and by reason of the sympathies of the Canadian people and officials with the Confederates, the Confederates were enabled to use Canada as a base of operations—the scene of their plans and arrangements for warlike acts against the United States, as their point of departure upon those raids, and their asylum on their return from them. That supposing it conceded that Lord Monck and all his ministry were without fault on their part personally, the officers immediately charged with the maintaining of neutrality upon the frontier—Coursol, Ermatinger, and Lamothe—were shown to have been fully advised of the contemplated invasions, and to have failed of their duty in reporting their knowledge to the government, if they did fail so to report it, and in taking measures to prevent such invasions.

"That the positions of Judge Coursol, as superintendent of police for the city and district of Montreal, and of Colonel Ermatinger, the magistrate charged with the entire control of the police force and the militia for the same district, were such as to make notice to them, in fact notice to the government, and that their failure in any respect to perform their official duty was the failure of the government, and charged Great Britain with the consequences of such neglect.

"That the Government of Canada was under obligation to constantly watch the movements of these enemies of the United States thus plotting the invasion of a friendly nation from the Canadian soil; should have arrested the persons engaged in such plots, or should have expelled them from Canada; and, if the law was found insufficient, should have called on parlia-

ment to make it sufficient. That it was the duty of the Canadian parliament to have provided by law the means of preventing such invasions; and that the absence of such municipal law could not be pleaded in bar of the international liability of the government to perform its duty in preserving neutrality toward the United States, a friendly nation. That in fact the Government of Canada actually did nothing to prevent these violations of neutrality from their soil, though with abundant reason, irrespective of proof of actual notice or knowledge, to apprehend such invasions by the Confederates commorant in Canada; and that the actual notice of such intentions, brought home to Coursol, Ermatinger, and Lamothe, was a notice to the government itself, which was chargeable with the nonfeasance or malfeasance of those officers. That the Government of Canada was held to 'due diligence' to prevent military operations by the enemies of the United States from the soil of Canada as a base of operations against the United States. That the measure of this diligence was to be determined by the nature of the danger to be apprehended from the neutral soil, the magnitude of the danger and the results of negligence, the means of the United States to resist or prevent it, the sympathy and aid which the enemies of the United States might receive in Canada, and the unfriendliness of the people of Canada to the United States, the fact of plans for former raids known to the Government of Canada, and the hostile speeches and avowed intentions of the enemies of the United States, found in large numbers in that province. That all these considerations combined to require strict diligence on the part of the Canadian Government to prevent hostile incursions into the United States across the long and unprotected frontier between those States and Canada.

"The counsel for the claimants insisted that the Canadian Government had entirely failed in the performance of these international duties, and that by reason of such failure Great Britain was liable to the United States for the injuries inflicted by the raiders; that the United States had done all in their power, and all which they were required by international law to do, to protect themselves against such dangers from Canada, and that the government of those States had in their diplomatic correspondence preferred such claims against the Government of Her Britannic Majesty and had fully provided by the treaty for the submission of them to the decision of the commission.

"The counsel for the claimants cited the opinion of Count Sclopis upon the question of due diligence in the tribunal at Geneva; also, on the same subject, 1 Phill. 21, 230 to 232; 3 id. 201 to 237; Halleck, 318, 524. They also cited various passages from the diplomatic correspondence between the governments of the United States and Great Britain during the war, and from the papers before the Geneva tribunal, as well as from the protocols to the treaty of 8th of May 1871, to show that the Government of the United States had always claimed the British Government responsible for the injuries to their citizens by the Saint Albans raid, and that these injuries occupied a prominent place among the claims of citizens of the United States against Great Britain for acts committed during the war, for the purpose of passing upon which this commission was instituted.

Argument for the Defense.

"On the part of the defense it was maintained by Her Majesty's counsel that the proofs in the case showed no state of facts importing any lack of care or diligence on the part of the authorities of Canada in the maintenance of their international obligations; that the persons who committed the acts complained of at Saint Albans did not enter the States from Canada in a body, nor with any military array or equipment; that they passed over the lines from Canada individually or in small parties, with the appearance and in the manner of ordinary travelers; that the authorities of Canada had no reason to suppose them engaged in a hostile expedition against the United States, and that no grounds existed for their arrest or detention by those authorities; that there was nothing in their appearance or movements to excite suspicion; that the Government of the United States had, in 1862, voluntarily annulled its own passport regulations which had previous to that time required all persons coming from Canada into the United States to be provided with passports countersigned by the United States consul-general at Montreal; and that from that time until after the Saint Albans raid there was no regulation interfering with the free and ordinary passage of travelers across the line; that the degree of diligence contended for by the counsel for the claimants would have required of the Canadian authorities a careful examination of every person traveling from Canada to the States as to his character and objects, and

would, in effect, have abolished the free intercourse between the provinces and the States which had existed under the full assent and approval of both governments; that from the diplomatic correspondence between the two governments it appeared that the United States had never preferred a claim of pecuniary liability against Great Britain on account of this raid, but, on the contrary, the American Secretary of State, Mr. Seward, had on different occasions expressed his satisfaction with the action of the Canadian authorities, and had particularly expressed through the British legation his thanks to Lord Monck, the governor-general, for the assistance rendered by the Canadian authorities toward the detection and arrest of the offenders; that in the protocols of the treaty, in the four preliminary notes between Mr. Secretary Fish and Sir Edward Thornton, on the subject of the formation of the Joint High Commission which framed the treaty, and by the confidential memorandum or brief sent by Secretary Fish to General Schenck of that commission for the information and guidance of himself and colleagues, there was no allusion to the Saint Albans raid, much less to any claims on the part of the United States growing out of the acts committed or omitted by the British Government in relation thereto; that the only explanation that could be given of this omission was that the Government of the United States did not consider itself entitled to make any international demands in the premises; that in fact the proofs failed to show that the raid was organized in Canada, that the raiders procured arms or ammunition there, or did any other act within Her Majesty's dominions in violation of her just neutrality, which was known to, or with due diligence might have been known to, the Canadian authorities; that, on the contrary, the evidence strongly tended to show that the raid was in fact organized within the United States, and that no act compromising British neutrality was committed by the raiders; that no liability was shown by the evidence, and none was claimed by the claimants' counsel to exist against Great Britain by reason of the omission alleged in the memorials of the Canadian authorities to surrender the raiders under the extradition treaty; that the acts of the raiders were belligerent acts, and as such afforded no ground for extradition.

"Her Majesty's counsel cited the opinion of Count Sclopis in the tribunal at Geneva; also, 1 Phillimore, 230 to 232.

Disallowance of the claims.

"The commission unanimously disallowed all the claims.

"Mr. Commissioner Frazer read an opinion, in which I am advised that the majority of the commission concurred, as follows:

"'I may not be prepared to say that Great Britain used that diligence to prevent hostile expeditions from Canada against the United States which should be exercised by a neutral and friendly neighbor; but in the view which I take of these claims this question is not important, and need not therefore be decided.

"'The raid upon Saint Albans was by a small body of men, who entered that place from Canada without anything to indicate a hostile purpose. They came not in an organized form, so as to attract attention, but apparently as peaceable individuals traveling by railroad and not in company, and stopped at the village hotels. That there was a preconcerted hostile purpose is unquestionable, but this was so quietly formed, as it could easily be, that even at this day the evidence does not disclose the place, the time, nor the manner. The Government of the United States was at the time diligent, by means of its detectives, to know what mischievous expedition might be organized by rebels in Canada, but it failed to discover this one until after it had done its work. Such was the secrecy with which this particular affair was planned that I can not say it escaped the knowledge of Her Majesty's officers in Canada because of any want of diligence on their part which may possibly have existed. I think rather it was because no care which one nation may reasonably require of another in such cases would have been sufficient to discover it. At least the evidence does not satisfy me otherwise.'"

American and British Claims Commission, treaty of May 8, 1871, Article XII. Hale's Report, 21. See also Howard's Report, 157, 600, 650, 674, 698, 702, 706, 713.

"Walter Oliver Ashley *v.* Great Britain, No. 19.

The Lake Erie Raid.

"This case was, in general character and in most of the circumstances accompanying it, analogous to the cases growing out of the Saint Albans raid above reported. The evidence on each side in the Saint Albans raid cases was invoked into this case, and the case was argued, submitted, and decided in connection with those cases.

"The memorial alleged that some months prior to September 1864 Confederate refugees, domiciled or commorant in the provinces of Canada, there planned and organized a warlike enterprise of forcibly appropriating steamers of the United States on Lake Erie and using them for the capture of the

United States war steamer *Michigan*, then stationed on Lake Erie; that by such capture the plan contemplated the release of some 3,000 Confederate prisoners confined on Johnsons Island, in Lake Erie, near the American shore, and also to obtain control of the lakes and power to destroy and pillage the cities of the United States bordering thereon; that the existence of the plan for such expedition was known to the Canadian authorities for many months before September 1864, and that such knowledge was communicated by the governor-general of Canada in November 1863 to Her Majesty's minister at Washington, who communicated it to the War Department of the United States, but that no steps were taken by Her Majesty's government for said provinces to prevent the execution of the plan.

"That on the 19th of September 1864 about thirty Confederate soldiers came on board the steamer *Philo Parsons*, a private freight and passenger vessel of the United States, at certain Canadian ports, with concealed weapons shipped as freight, the vessel being then on her regular trip from Canadian ports to Sandusky, Ohio; that immediately after the vessel had crossed the boundary line between the Canadian provinces and the States this party rose with arms upon the crew, took forcible and armed possession of the vessel, making prisoners the officers and crew, threw overboard and destroyed a large quantity of the cargo; siezed the money of the claimant, an officer and part owner of the vessel; shaped the course of the vessel for the war steamer *Michigan*, and on their way overhauled, seized, and sunk in American waters another private steamer of the United States, the *Island Queen*, but, failing to receive expected signals, abandoned their project of capturing the *Michigan*, raised the Confederate flag upon the *Philo Parsons*, changed her course, and proceeded toward Sandwich in Canada; that on arriving at Sandwich on the 20th of September they plundered the *Philo Parsons* while lying in British waters, landed their booty in the province of Canada, sunk or partially sunk the steamer, and retreated in a body within the province of Canada with the plundered property taken from the vessel.

"The memorial contained allegations similar to those contained in the memorials in the Saint Albans cases as to the asylum afforded by Canada to the retreating raiders; as to the negligence of the Canadian authorities in failing to pre-

vent the expedition, and also in failing to take proper steps in apprehending the raiders and surrendering them under the extradition treaty, and in restoring the property captured and carried off by them.

"The claimant claimed for himself and as the assignee of all the other owners and claimed damages in the premises, $16,093.

"The evidence in the case sustained the allegations in the memorial as to the circumstances of the capture and destruction of the vessels and the seizure of the property alleged, and as to the assignment of the claims of other owners to the claimant.

"Upon the question of due diligence by the Canadian authorities, the claim was rested on both sides substantially on the evidence taken in the Saint Albans cases, and the arguments of the respective counsel upon this question were substantially those urged in the Saint Albans cases, with the additional point, urged on behalf of the defense, that the Canadian Government had promptly given notice to the Government of the United States of the information received by them as to the contemplated raid, thereby putting the United States Government fully upon its guard.

"The claim was unanimously disallowed."

American and British Claims Commission, treaty of May 8, 1871, Article XII. Hale's Report, 30. See also Howard's Report, 158, 717, 728, 733.

CHAPTER LXVIII.

NEUTRALITY: THE GENEVA ARBITRATION.

The stipulations of the Treaty of Washington of May 8, 1871, in relation to the Geneva arbitration may be found in the first volume of this work (pp. 547–553). In accordance with those stipulations, each government filed in due order a printed Case, a printed Counter Case, and a printed Argument, and later, by request of the arbitrators, counsel on each side presented Supplemental Arguments, either in writing or orally, in further elucidation of certain points. We give below a summary of the cases and counter cases, and also a digest of the facts and arguments touching each vessel inculpated, or sought to be inculpated, and of the opinions and decisions of the arbitrators.

The first question to be considered is that of "due diligence."

1. DUE DILIGENCE.

Case of the United States.

In the Case of the United States, the position of that government on the question of due diligence was defined as follows:

"The United States understand that the diligence which is called for by the rules of the treaty of Washington is a *due* diligence; that is, a diligence proportioned to the magnitude of the subject and to the dignity and strength of the power which is to exercise it—a diligence which shall, by the use of active vigilance, and of all the other means in the power of the neutral, through all stages of the transaction, prevent its soil from being violated—a diligence that shall in like manner deter designing men from committing acts of war upon the soil of the neutral against its will, and thus possibly dragging it into a war which it would avoid—a diligence which prompts the neutral to the most energetic measures to discover any purpose of doing the acts forbidden by its good faith as a neutral, and imposes upon it the obligation, when it receives the knowledge of an intention to commit such acts, to use all the means in its power to prevent it.

"No diligence short of this would be 'due;' that is, *commensurate with the emergency, or with the magnitude of the results of negligence.* Understanding the words in this sense, the United States finds them identical with the measure of duty which Great Britain had previously admitted."[1]

Case of Great Britain.

In the Case of Great Britain, the question of due diligence was treated as follows:[2]

"9. Due diligence on the part of a sovereign government signifies that measure of care which the government is under an international obligation to use for a given purpose. This measure, where it has not been defined by international usage or agreement, is to be deduced from the nature of the obligation itself, and from those considerations of justice, equity, and general expediency on which the law of nations is founded.

"10. The measure of care which a government is bound to use in order to prevent within its jurisdiction certain classes of acts, from which harm might accrue to foreign states or their citizens, must always (unless specifically determined by usage or agreement) be dependent, more or less, on the surrounding circumstances, and can not be defined with precision in the form of a general rule. It would commonly, however, be unreasonable and impracticable to require that it should exceed that which the governments of civilized states are accustomed to employ in matters concerning their own security or that of their own citizens. That even this measure of obligation has not been recognized in practice might be clearly shown by reference to the laws in force in the principal countries of Europe and America. It would be enough, indeed, to refer to the history of some of these countries during recent periods for proof that great and enlightened states have not deemed themselves bound to exert the same vigilance and employ the same means of repression, when enterprises prepared within their own territories endangered the safety of neighboring states, as they would probably have exerted and employed had their own security been similarly imperiled.

[1] The case of the United States cited the following authorities: Vinnius, Comment. ad Inst. lib. 3. tit. 15; Ayliffe, Pandects, B. 2, tit. 13, pp. 108–110; Wood's Institutes, p. 106; Hallifax's Civil Law, p. 78; Bell's Comm. § 232 *et seq.;* Browne's Civil and Admiralty Law, vol. 1, p. 354; Erskine's Institutes, Bk. 3, tit. 1; Bowyer's Civ. Law, p. 174; Mackenzie's Roman Law, p. 186; Domat's Civ. Law, by Strahan, vol. 1, p. 317; Heineccius, Elementa Juris Civilis, lib. 3, tit. 14, Opera, tom. V; Story on Bailments, § 14; Steamboat *New World* v. *King,* 17 How. 475; Hay on Liabilities, ch. 8; Speech of Lord Granville, London *Times,* June 13, 1871; Speech of Sir Roundell Palmer, August 4, 1871. See Papers relating to the Treaty of Washington, I. 67.

[2] Papers relating to the Treaty of Washington, I. 237, 412.

"11. In every country where the executive is subject to the laws, foreign states have a right to expect—

"(*a*) That the laws be such as in the exercise of ordinary foresight might reasonably be deemed adequate for the repression of all acts which the government is under an international obligation to repress;

"(*b*) That, so far as may be necessary for this purpose, the laws be enforced and the legal powers of the government exercised.

"But foreign states have not a right to require, where such laws exist, that the executive should overstep them in a particular case, in order to prevent harm to foreign states or their citizens; nor that, in order to prevent harm to foreign states or their citizens, the executive should act against the persons or property of individuals, unless upon evidence which would justify it in so acting if the interests to be protected were its own or those of its own citizens. Nor are the laws or the mode of judicial or administrative procedure which exist in one country to be applied as constituting a rule or standard of comparison for any other country. Thus, the rules which exist in Great Britain as to the admission and probative force of various kinds of testimony, the evidence necessary to be produced in certain cases, the questions proper to be tried by a jury, the functions of the executive in regard to the prevention and prosecution of offenses, may differ, as the organization of the magistrature and the distribution of authority among central and local officers also differ from those which exist in France, Germany, or Italy. Each of these countries has a right, as well in matters which concern foreign states or their citizens, as in other matters, to administer and enforce its own laws in its own forum, and according to its own rules and modes of procedure; and foreign states can not justly complain of this, unless it can be clearly shown that these rules and modes of procedure conflict in any particular with natural justice, or, in other words, with principles commonly acknowledged by civilized nations to be of universal obligation.

* * * * * * *

"A charge of injurious negligence on the part of a sovereign government, in the exercise of any of the powers of sovereignty, needs to be sustained on strong and solid grounds. Every sovereign government claims the right to be independent of external scrutiny or interference in its exercise of these powers; and the general assumption that they are exercised with good faith and reasonable care, and that laws are fairly and properly administered (an assumption without which peace and friendly intercourse could not exist among nations), ought to subsist until it has been displaced by proof to the contrary. It is not enough to suggest or prove that a government, in the exercise of a reasonable judgment on some question of fact or

law, and using the means of information at its command, has formed and acted on an opinion from which another government dissents or can induce an arbitrator to dissent. Still less is it sufficient to show that a judgment pronounced by a court of competent jurisdiction and acted upon by the executive was tainted with error. An administrative act founded on error or an erroneous judgment of a court may, indeed, under some circumstances found a claim to compensation on behalf of a person or government injured by the act or judgment. But a charge of negligence brought against a government can not be supported on such grounds. Nor is it enough to suggest or prove some defect of judgment or penetration, or somewhat less than the utmost possible promptitude and celerity of action on the part of an officer of the government in the execution of his official duties. To found on this alone a claim to compensation, as for a breach of international duty, would be to exact in international affairs a perfection of administration which few governments or none attain in fact or could reasonably hope to attain in their domestic concerns. It would set up an impracticable and therefore an unjust and fallacious standard, would give occasion to incessant and unreasonable complaints, and render the situation of neutrals intolerable. Nor, again, is a nation to be held responsible for a delay or omission occasioned by mere accident and not by the want of reasonable foresight or care. Lastly, it is not sufficient to show that an act has been done which it was the duty of the government to endeavor to prevent. It is necessary to allege and to prove that there has been a failure to use for the prevention of an act which the government was bound to endeavor to prevent such care as governments ordinarily employ in their domestic concerns and may reasonably be expected to exert in matters of international interest and obligation. These considerations apply with especial force to nations which are in the enjoyment of free institutions, and in which the government is bound to obey and can not dispense with the laws."

British Counter Case.

The British Counter Case treated the subject thus:[1]

"It may readily be conceded that the care exerted by a government to prevent violations of its neutrality should bear some proportion to the probable consequences of such offenses. It may be conceded also that the responsibility incurred by failing to prevent an offense must materially depend on the power which the government possessed of preventing it. So far as this, the British Government concurs with the Government of the United States. But Her Majesty's government can not admit that the measure of diligence due from neutral powers ought to be proportioned in any way to their relative degrees of dignity; it knows of no distinction between more dignified and less dignified powers; it regards all sovereign

[1] Papers relating to the Treaty of Washington, II. 229.

states as enjoying equal rights and equally subject to all ordinary international obligations; and it is firmly persuaded that there is no state in Europe or America which would be willing to claim or accept any immunity in this respect on the ground of its inferiority to others in extent, military force, or population. In truth, the arbitrators will have clearly perceived, from this statement already presented to them on the part of Great Britain, that in a country which, with free institutions, possesses a large commercial marine and a very extensive ship-building trade, the difficulty of preventing enterprises of this nature is, instead of being less, far greater than in countries which are not so populous and where these conditions are not united; and just allowance ought to be made for this difficulty. The assertion that due diligence means a diligence which shall prevent the acts in question, and shall deter men from committing them, if taken literally, can only signify that no government can be held to have done its duty which has not been completely successful. * * * It has been shown, by ample evidence, in the case presented on the part of Great Britain, that the measures adopted by the British Government did prevent and deter men from enterprises which would have violated or imperiled her neutrality; all that the United States have to complain of is that these measures proved ineffectual to prevent or deter, in a very small number of cases, in which the agents contrived to escape observation, or the difficulty of obtaining evidence was great. That due diligence requires a government to use all the means in its power is a proposition true in one sense, false in another: true, if it means that the government is bound to exert honestly and with reasonable care and activity the means at its disposal; false, impracticable, and absurd, if it means that a liability arises whenever it is possible to show that an hour has been lost which might have been gained, or an accidental delay incurred which might, by the utmost foresight, have been prevented; that an expedient which might have succeeded has not been tried; that means of obtaining information which are deemed unworthy or improper have not been resorted to; or that the exertions of an officer or servant of government have not been taxed to the utmost limit of his physical capacity.

United States Argument.

In the Argument of the United States the subject of due diligence was fully discussed in the following passages:[1]

"*Due diligence as required by the three rules of the treaty and the principles of international law not inconsistent therewith.*

"I. The subject of 'due diligence,' both in its nature and its measure, as an obligatory duty of Great Britain under the three rules of the treaty is much considered upon principle

[1] Papers relating to the Treaty of Washington, III. pp. 154–158.

and authorities in the Case of the United States and is commented upon with some fullness in the British Case and Counter Case. Neither a very technical nor a merely philosophical criticism of this definite and practical phrase, adopted by the high contracting parties and readily estimable by the tribunal, can be of much service in this Argument. Some propositions and illustrations may aid the arbitrators in applying the obligation thus described to the facts and circumstances under which its fulfillment or failure therein is to be decided by their award.

"II. The foundation of the obligation of Great Britain to use 'due diligence to *prevent*' certain acts and occurrences within its jurisdiction, as mentioned in the three rules, is that those acts and occurrences within its jurisdiction are offenses against international law, and, being injurious to the United States, furnish just occasion for resentment on their part and for reparation and indemnity by Great Britain, *unless* these offensive acts and occurrences shall be affirmatively shown to have proceeded from conduct and causes for which the Government of Great Britain is not responsible. But by the law of nations the state is responsible for *all* offenses against international law arising within its jurisdiction by which a foreign state suffers injury, unless the former can clear itself of responsibility by demonstrating its freedom from fault in the premises.

"The high contracting parties, mindful as well of this principal proposition of responsibility of a state as of this just limitation upon it, have assigned as the true criterion by which this responsibility is to be judged in any case arising between nations the exhibition or omission on its part of 'due diligence to prevent' the offenses which of themselves import such responsibility. The offenses and the injuries remain, but the responsibility of the one nation and the resentment of the other therefor are averted by exculpation of the state at whose charge the offenses lie upon adequate proofs to maintain its defense.

"The nature of the presumptive relation which the state bears to the offenses and injuries imputed and proved necessarily throws upon it the burden of the exculpatory proof demanded—that is to say, the proof of due diligence on its part to prevent the offenses which, in fact and in spite of its efforts, have been committed within its jurisdiction and have wrought the injuries complained of.

"III. It is incumbent, then, upon Great Britain to satisfy the tribunal that it used 'due diligence to prevent' what actually took place, and for which, in the absence of such 'due diligence to prevent,' the tribunal will adjudge it responsible. The nature of 'diligence' and the measure of it exacted by the qualifying epithet 'due' may now be considered.

"(*a*) The English word *diligence* in common usage and in the text of the treaty alike adheres very closely to the Latin origi-

nal, *diligentia.* It imports, as its derivation from *diligo* (to love, or to choose earnestly) requires, enlistment of zealous purpose toward the object in view, and activity, energy, and even vehemence in its attainment. It has been adopted both in the civil law and in the common law of England from common speech, and for this virtue in its vulgar meaning, which can give practical force and value to the legal duty it is used to animate and inspire. So far, then, from the word bearing a technical or learned sense in its legal application either to private or national obligations, the converse is strictly true. A definition from approved authorities of the English language common to the high contracting parties is the best resort for ascertaining the sense intended in the text of the treaty. Webster defines 'diligence' as follows: 'Steady application in business of any kind; constant effort to accomplish what is undertaken; exertion of body or mind without unnecessary delay or sloth; due attention; industry; assiduity.' He gives also this illustrative definition: '*Diligence* is the philosopher's stone that turns everything to gold;' and cites as the example of its use this verse from the English Scriptures: 'Brethren, give *diligence* to make your calling and election sure.'

"We confidently submit that no appreciation of the sense of this cardinal phrase of the treaty is at all competent or adequate which does not give full weight to the ideas of enlisted zeal, steady application, constant effort, exertion of all the appropriate faculties, and without weariness or delay, attention, industry, and assiduity.

"(*b*) The qualifying epithet 'due' is both highly significant and eminently practical. It requires the 'diligence,' in nature and measure, that is *seasonable, appropriate, and adequate* to the exigencies which call for its exercise. It is to be, in method, in duration, and in force, the diligence that is suitable to, or demandable by, the end to be accomplished, the antecedent obligations, the interests to be secured, the dangers to be avoided, the disasters to be averted, the rights that call for its exercise.[1] '*Præstat exactam diligentiam*,' a phrase of the civil law, is a just description of the undertaking 'to use due diligence.' Those who incur this obligation to prevent an injury are excused from responsibility if they fail only by deficiency of power. 'Ceux qui, pouvant empêcher un dommage que quelque devoir les engageait de prévenir, y auront manqué, pourront en être tenus suivant les circonstances.'[2]

"(*c*) The British Case and Counter Case attempt to measure 'due diligence' in the performance of this international duty to the United States in the premises of this arbitration by the degree of diligence which a nation is in the habit of employing in the conduct of its own affairs. It is objection enough to this test that it resorts to a standard which is in itself uncertain and fluctuating, and which, after all, must find its measure in

[1] See Webster's Dictionary *in verbo* Due.

[2] Domat, Lois civiles, Liv. II. tit. 8, § 4, No. 8.

the same judgment which is to pass upon the original inquiry, and to which it may better be at once and directly applied. It is quite obvious, too, that this resort can furnish no standard, unless the domestic 'affairs' referred to be of the same nature, magnitude, and urgency as the foreign obligations with which they are thus to be compared. Probably the United States might be well satisfied with the vigilance and activity and scope and energy of means that Great Britain would have exhibited to prevent the outfit and escape from port of the *Alabama* and her consorts had *her own commerce* been threatened by the hostilities they were about to perpetrate and her own ships been destined to destruction by the fires they were to light; but this is not the standard which the arbitrators are invited to assume by this reasoning of the British Case and Counter Case. They are expected to measure the due diligence which Great Britain was to use, under the requirements of the treaty, to prevent the destruction of the commerce and maritime property of the United States by the ordinary system of detection of frauds upon the customs. Even this comparison would not exculpate, but would absolutely condemn the conduct of Great Britain in the premises; but the standard is a fallacious application of the proposed measure of diligence, and the measure itself, as we have seen, is wholly valueless.

"III. The maxims and authorities of the law of 'due diligence' in the determination of private rights and redress of private injuries may not very often present sufficiently near analogies, in the circumstances to which they are applied, to the matter here under judgment to greatly aid the deliberations of the tribunal. There is, however, one head of the law of private injuries familiar to the jurisprudence of these two great maritime powers which may furnish valuable practical illustrations of judicial reason which they both respect, and whose pertinency to certain considerations proper to be entertained by the arbitrators can not be disputed. We refer to the law of responsibility and redress for *collisions at sea.*

"In the first place, this subject of marine collisions is regarded by scientific writers on the law of diligence as falling within the rules which govern liability for *ordinary negligence*, the position in which the contentions of the British Case and Counter Case seek to place international responsibility of Great Britain to the United States.

"In the second place, the controversy between the parties in these cases is admitted to exclude the notion of intent or willful purpose in the injury, an element so strongly insisted upon in defending Great Britain here against the faults laid to her charge by the United States.

"In the third place, the circumstances of difficulty, danger, obscurity, uncontrollable and undiscoverable influences, and all possible opportunities of innocent error or ignorance, form the staple elements of the litigation of marine collisions, as they are urged, with ingenuity and persistency, in defense

before this tribunal against the responsibility of Great Britain for the disasters caused to the United States by the means and agencies here under review.

"And, lastly, the eminent judges who have laid down the law for these great maritime nations, in almost complete concurrence, in this department of jurisprudence, have not failed to distinguish between *fault* and *accident*, in a comprehensive and circumspect survey of the whole scene and scope of the occurrences, from the moment that the duty arose until the catastrophe, and through all the stages of forecast, precaution, provision, and preparation, which should precede, and of zeal, activity, promptitude, and competency, which should attend, the immediate danger. We cite a few cases, not dependent upon a knowledge of their special facts for the value of the practical wisdom they inculcate, and taken, with a single exception, from British decisions:

"'In law, inevitable accident is that which a party charged with an offense could not possibly prevent by the exercise of ordinary care, caution, and maritime skill. It is not enough to show that the accident could not be prevented by the party at the very moment it occurred, but the question is, could previous measures have been adopted to render the occurrence of it less probable? (The *Virgil*, 7 Jur. 1174; 2 W. Rob. 205; Notes of Cases, 499; The *Juliet Erskine*, 6 Notes of Cases, 633; The *Mellona*, 3 W. Rob. 13; 11 Jur. 783; 5 Notes of Cases, 450; The *Dura*, 5 (Irish) Jur. (N. S.,) 384.)'[1]

"'In order to establish a case of inevitable accident, he who alleges it must prove that what occurred was entirely the result of some *vis major*, and that he had neither contributed to it by any previous act or omission, nor, when exposed to the influence of the force, had been wanting in any effort to counteract it. (The *Despatch*, 3 L. J. (N. S.) 220.)'[2]

"'It is not a *vis major* which excuses a master, that his vessel had caused damages to another in a tempest of wind, when he had warning and sufficient opportunity to protect her from that hazard. (The *Lotty*, Olcott, Adm. 329.)'[3]

"'It is no excuse to urge that from the intensity of the darkness no vigilance, however great, could have enabled the vessel doing the damage to have descried the other vessel in time to avoid the collision. In proportion to the greatness of the necessity, the greater ought to have been the care and vigilance employed. (The *Mellona*, 11 Jur. 783; 3 W. Rob. 13; 5 Notes of Cases, 450.)'[4]

"'It is necessary that the measures taken to avoid a collision should not only be right, but that they should be taken in time. (The *Trident*, 1 Spink's Eccl. and Adm. Rep. 222.)'[5]

"'If circumstances arise evidently and clearly requiring prudential measures, and those measures are not taken, and

[1] Pritchard's Adm. Dig. 2d ed. vol. i. p. 133.
[2] Id. 134.
[3] Id. 134, note.
[4] Id. 135.
[5] Id. 140.

the natural result of such omission is accident, the court would be inclined to hold the party liable, even if such result were only possible. (The *Itinerant*, 2 W. Rob. 240; 8 Jur. 131; 3 Notes of Cases, 5.)'[1]

"'The want of an adequate look-out at the time on board a vessel at sea is a culpable neglect on her part, which will, *prima facie*, render her responsible for injuries received from her. (The *Emily*, Olcott, Adm. 132; 1 Blatch. Ct. Ct. 236; The *Indiana*, 1 Abb. Adm. 330.)'[2]

"'To constitute a good look-out there must be a sufficient number of persons stationed for the purpose, who must know and be able to discharge that duty. (The *George*, 9 Jur. 670; 4 Notes of Cases, 161.)'[3]

"IV. In assigning a just force to the 'due diligence,' upon the presence of which, in the failure of Great Britain actually to prevent the injuries complained of, its exculpation by the tribunal is to turn, we have had no occasion to insist upon any severity or weight of obligation too burdensome for the relation of neutrality to endure. On the contrary, both the sentiments and the interests of the United States, their history and their future, have made, and will make, them the principal advocates and defenders of the *rights* of neutrals before all the world. In pleading before this tribunal for indemnity at the hands of Great Britain for the vast injuries which its non-fulfillment of neutral *duties* has caused, the United States desire no rule or measure of such duties to be assumed or applied by this tribunal that its enlightened and deliberate judgment would not assign as suitable to govern the conduct of each one of the equal and independent powers which are represented in this arbitration. The United States do not themselves undertake to become to other nations *guarantors* of the action of all persons within their jurisdiction, and they assert no such measure of responsibility against Great Britain. They lay no claim to *perfection* or *infallibility* of administration, or security against *imposition*, *misadventure*, *miscarriage*, or *misfortune*, nor would they seek to charge Great Britain, or any other nation, upon any such requirement or accountability. But the United States do maintain that the disposition and action comporting with 'due diligence,' as reasonably interpreted, are adequate to prevent, and will prevent, but for extraordinary obstacles or accidents, violations, by a powerful state, of its duties to other nations; that when such prevention fails, the proof of this disposition and action toward prevention, and of the obstacles and accidents that thwarted the purpose and the effort, are demandable by the aggrieved nation, and that upon that proof the judgment of exculpation or inculpation is to proceed.

"V. In conclusion, we conceive that the arbitrators are unquestionably the rightful judges of what constitutes 'due

[1] Pritchard's Adm. Dig. 2d ed. vol. i. p. 141.
[2] Id. 134, note.
[3] Id. 143.

diligence,' in the sense of the treaty, and that this secures not only to the contending parties, but to the rights, duties, and interests cared for by the laws of nations, a reasonable, a practical, and a permanent rule and measure of obligation, just in its judgment of the past, and wise and beneficent in its influence on the future. We concur in the final considerations of the British Counter Case on this subject of due diligence, in leaving 'the arbitrators to judge of the facts presented to them by the light of reason and justice, aided by that knowledge of the general powers and duties of administration which they possess as persons long conversant with public affairs.'"[1]

British Argument.

From the discussion of the subject of due diligence in the British Argument, the following passages are extracted.[2]

"28. Due diligence on the part of a government signifies that measure of care which the government is under an obligation to use for a given purpose. This measure, where it has not been defined by international usage or agreement, must be deduced from the nature of the obligation itself, and from those considerations of justice, equity, and general expediency on which the law of nations is founded.[3]

"29. Where the substance of the obligation consists in the prevention of certain acts within the territory of a neutral power, from the consequences of which loss might arise to foreign states or their citizens, it would not be reasonable to exact, as of right, from the government, a measure of care exceeding that which governments are accustomed to exert in matters affecting their own security or that of their own citizens. No duty which nation owes to nation can possibly be higher or more imperative than that which every state owes to its own members, for whose welfare it exists, and to whom the government, however constituted, is morally and primarily responsible for the right exercise of its powers.[4] An extract from the able Danish jurist, Tetens, bearing on manifestly just and reasonable principle, has been given in a note at page 23 of the British Counter Case.

"30. An observation to the same effect as the foregoing in the Case of Great Britain has been excepted to in the Counter Case of the United States on the ground that 'it sets up as the measure of care a standard which fluctuates with each succeeding government in the circuit of the globe.'[5] This is an error. Where individuals are in question, the only general standards of due care which it has been found possible to frame

[1] British Counter Case, 125.
[2] Papers relating to the treaty of Washington, III. 268; see, also, 389, 443, 476, 480.
[3] British Case, 24, proposition 9.
[4] British Case, 167. Counter Case of the United States, sec. ii. par. 3.
[5] British Case, 24 proposition 10. British Counter Case, 21, 22.

are framed with reference either to the care which the particular individual against whom negligence is alleged is accustomed to exert in his own concerns, or to the care which men in general, or particular classes of men, are accustomed to exert in their own concerns. To standards of this kind, with various modifications and under different forms of expression, jurists and judicial tribunals in all countries have commonly had recourse to assist them to a decision in cases of alleged negligence. Where the acts or omissions of a government are in question, it is certainly not unreasonable that the general standard of care, so far as any general standard is possible, should be drawn from the ordinary conduct of governments in matters affecting those interests which they are primarily bound to protect. The objection suggested by the United States that the standard is a fluctuating one is therefore not only erroneous in itself, but might with equal reason be urged against the principles of decision commonly applied to analogous cases in the administration of private law. Its tendency, if admitted, would be to introduce a universal hypothesis of absolute and arbitrary powers as the rule of judgment for all such international controversies.

"31. Great Britain has, however, submitted to the arbitrators that the question, what measure of care is in a given case sufficient to constitute due diligence, can not be defined with precision in the form of a general rule, but must be determined on a careful consideration of all the circumstances of the given case.[1] In the British Counter Case the history and experience of the United States themselves, during the war between Great Britain and France at the close of the last century, during the wars between Spain and Portugal and their revolted colonies, and still more recently in the cases of expeditions and hostile movements organized within the United States against Mexico, Cuba, and Great Britain, has been largely referred to for the purpose of showing what has heretofore been deemed sufficient by the Government of the United States to satisfy the obligations incumbent upon them in this respect toward other nations, and how imperfect a measure of success has attended their efforts to restrain their citizens from lawless acts inconsistent with those obligations.[2] The statements in the British Counter Case on this subject will be found to be corroborated by the papers appended to the Counter Case of the United States. Those papers show the various instructions and proclamations issued with the object of preventing violations of the American law. The British Counter Case shows how, for a long series of years, and also very recently, those instructions and proclamations have been successfully evaded. Mr. Seward, in his dispatch to Mr. Adams, dated the 2d March 1863, thought it sufficient to express the desire and expectation of the President that Her Majesty's government would 'take the necessary

[1] British Counter Case, 22. [2] Id. 25–47.

measures to enforce the execution of the law as faithfully as his own government had executed the corresponding statutes of the United States."[1] This is a test of due diligence, by which Her Majesty's government might safely be content to have its conduct tried. It does not believe that upon any candid mind the comparison would leave an impression to the disadvantage of Great Britain.

"32. It is absolutely necessary, in considering charges such as are made against Great Britain by the United States, to take into account, for some purposes, the laws and institutions of the nation charged, the powers with which its government is invested, and its ordinary modes of administrative and judicial procedure. These are among the circumstances which bear on the question of negligence, and they have a most material bearing on it. In all civilized countries the government possesses such powers only as are conferred on it expressly or tacitly by law. The modes of ascertaining disputed facts are regulated by law. Through these powers the executive acts, and to these methods of inquiry it is bound to have regard. To exclude these from consideration in questions relating to the peformance of international duties would at once render such duties intolerable and their performance impossible.

"33. These considerations in no way affect the principle that the duties of neutrality are in themselves independent of municipal law. Those duties are not created by municipal law; they can not be abolished or altered by it. But since, in the discharge of international duties, every nation acts through its government, and each government is confined within the sphere of its legal powers, the local law and local institutions can not be disregarded when the question arises, whether in a given case a government had sufficient grounds of belief to proceed upon, and whether it acted with proper diligence."

Opinion of Count Sclopis.

Count Sclopis, in his opinion, said:[2]

"The words *due diligence* necessarily imply the idea of a relation between the duty and its object. It is impossible to define *a priori* and abstractly an absolute duty of diligence. The thing to which the diligence relates determines its degree. Taking the scale of degrees of default according to the Roman law, descending from the *dolus* by the *culpa lata* and *culpa levis* to the *culpa levissima*, we find that their applicability changes according to the objects to which they refer. I pass over the responsibility of the guardian, of the trustee, and several other cases specified in the law, and will only cite as examples cases in which responsibility is incurred by the *culpa levis* and even *levissima*. Such is that, for instance, which attaches to persons charged with the care of explosive substances, or with looking after the

[1] Appendix to Case of the United States, vol. i. p. 669.
[2] Papers relating to the Treaty of Washington, IV. 58.

safety of dams in time of inundation, or in whose charge are deposited papers of exceptional importance. All these persons, from the fact alone of their having accepted these functions, are bound to exercise an amount of diligence determined by the special object of these same functions.

"In treating of political questions the greatest extent which could be given to the duties of diligence incumbent on a neutral would be to require that he should act with regard to the belligerent as he would act in similar circumstances in his own interest.

"It is undoubtedly right to take into account the requirements of a belligerent with regard to a neutral, but these must not be pushed to such a point as to embarrass the neutral in the normal exercise of his rights or in the organization of his administrative functions.

"I willingly admit, on the other hand, that the duties of the neutral power can not be determined by the laws which that power may have made in its own interest. This would be an easy means of eluding positive responsibilities which are recognized by equity and imposed by the law of nations. There exists between nations a general law, or, if it is preferred, a common tie, formed by equity and sanctioned by respect for reciprocal interests. This general law receives especial development in its application to acts which take place at sea, where no frontiers are marked out, and where there is the greatest necessity that liberty should be secured by a common law, without which it would be impossible to defend one's self by positive guaranties from the most flagrant acts of injustice. This is what prompted the saying of one who had been brought up in habits of servility to say, 'The Emperor is master of the earth, but the law is the mistress of the sea.' I grant, then, the right of the belligerent to require that the neutral should not shelter his responsibility under rules made by himself in his own interest, and I enter fully into the views of Article VI. of the treaty of Washington, which simply gives the preference to rules of general equity over the provisions of any particular system of legislation, whatever it may be.

"It does not, however, seem to me admissible that a belligerent should be able to require of a neutral that, in order to fulfill his neutral duties, he should increase his military establishments or his ordinary system of defense. This would be an encroachment on the independence of a state, which is not bound to abdicate a portion of its material sovereignty because it finds itself involuntarily in a special position with regard to the belligerent. The neutral may be asked to put the powers of his government into full activity in order to maintain his neutrality; he can not reasonably be expected to modify the organization of his administrative machinery to serve the interests of another power.

"We must beware of rendering the condition of neutrals too difficult and almost impossible. The importance of circum-

scribing war is a matter of continual remark, and if neutrals are to be overwhelmed with a burden of precautions and a weight of responsibility which is in excess of the interest they have to remain neutral, they will be forced to take an active part in the war; instead of a proper inaction we should have an increase of hostilities. There will no longer be any *medii* between combatants; the disasters of war will be multiplied, and the part of mediators, which neutrals have often undertaken and brought to a successful conclusion, will forever disappear.

"Let us, then, take a view which will induce neutrals and belligerents mutually to respect one another. Let us take as a basis the two conditions of neutrality laid down by Dr. L. Gessner.

"These are:

"1. To take absolutely no part in the war, and to abstain from all that might give an advantage to one of the belligerent parties.

"2. Not to permit on the neutral territory any proximate hostile act of one party against the other.

"As to the measure of activity in the performance of the duties of a neutral, I think the following rule should be laid down:

"That it should be in a direct ratio to the actual danger to which the belligerent will be exposed through the laxity of the neutral, and in an inverse ratio to the direct means which the belligerent can control for arresting the danger.

"This rule leads us to a solution of the question, so often discussed in the documents presented, as to the initiative to be taken by the neutral in order to preserve his neutrality to the profit of the belligerent.

"Where the ordinary conditions of the country, or particular circumstances which have occurred on the territory of the neutral, constitute a special danger for the belligerent, who has no direct means of protecting himself from them, the neutral is bound himself to take the initiative in order that the state of neutrality may be maintained with regard to the two belligerents.

"This initiative may be taken either on account of a flagrant case of some enterprise of one of the belligerents against the other, or on the application of the belligerent denouncing a fact or a series of facts which would constitute a violation of neutrality in regard to him—*i. e.*, which would improve the position of one belligerent to the detriment of the other.

"It does not appear that the neutral could in such case release himself from responsibility by requiring the belligerent to furnish him with evidence sufficient to institute regular proceedings before the courts. This would be to reduce the belligerent to the condition of a mere subject of the government of the country. The law of nations is not contented with these narrow measures of precaution; it requires a larger measure of assistance. This is demanded not only by the comitas inter

gentes, but also by the real necessity which nations are under to lend reciprocal aid and protection in order to maintain their independence and guarantee their security.

"The greater, then, the actual danger to the belligerent on the territory of the neutral, the more is the latter bound to watch over his neutrality and to prevent its being violated to the profit of either of the belligerents.

"The matter appears under a somewhat different light when the belligerent can, of himself, by the employment of his forces, hold his enemy in check, even on the neutral territory. This case presents itself in particular when the geographical position of a state is sufficient of itself to secure the means of promptly repressing any enterprise prepared on the neutral territory. Under such circumstances the neutral would no longer be bound to assume an initiative which would have no object. He could not, however, from considerations of self-respect, allow his neutrality to be violated, and he would be bound to comply with any just demand which might be addressed to him, in order to avoid any kind of connivance with one or other of the belligerents.

"If from abstract principles we pass to the consideration of the particular facts for which the United States hold that Great Britain is responsible, we must commence by discussing the construction of ships and the circumstances under which such construction took place. Indeed, the fact of the construction of the vessels, of their armament, and equipment, and of the export of arms, assumes a different aspect according to the circumstances of the time, the persons, and the localities in which it occurred. If the government on whose territory the acts take place is aware of a permanent state of affairs, leading to a decided probability that such construction, armaments, and exports will be affected with the object of assisting the designs of a belligerent, the duty of vigilance on the part of the government becomes more pressing, and exists to a greater extent."

Mr. Staempfli's Opinion.

Mr. Staempfli, in his opinion, said:

"The 'due diligence' to be exercised implicitly comprises vigilance and initiative *on the part of the neutral itself*, with the object of discovering and preventing any violation of its own neutrality. A belligerent state is neither bound, nor has it the right, to exercise surveillance or to perform police duties in a neutral state in lieu of the local authorities."

Mr. Adams's Opinion.

Mr. Adams, in his opinion, said:[1]

"These words (due diligence), which are found in the first and third of the rules prescribed by the Treaty of Washington for the government of the arbitrators in making up their judgment, have given rise

[1] Papers relating to the Treaty of Washington, IV. 141.

to much discussion in the preparatory arguments of the opposing parties.

"On the side of Great Britain, an explanation of them is given in the 9th, 10th, and 11th propositions, laid down on the 24th and 25th pages of The Case.

"The subject is again considered in pages 21 and 22 of the volume called the Counter Case.

"It is again referred to in the 8th and 9th pages of the volume called the Argument or Summary.

"Lastly, it is treated in a more general way in the argument presented by Sir Roundell Palmer, counsel on behalf of Her Britannic Majesty, on the 25th July last.

"On the side of the United States, an explanation is presented in pages 150 to 158 of the volume called The Case.

"It is again referred to in the 6th page of the Counter Case.

"The subject is again treated in pages 316 to 322 of the Argument or Summary.

"Lastly, it is discussed in a more general way in the argument submitted by the counsel on behalf of the United States on the 5th and 6th of August.

"The objection which I am constrained to admit as existing in my mind to the British discussion is that it appears to address itself for the most part to the establishment of limitations to the meaning of the words rather than to the explanation of the obligations which they imply.

"The objection which I am constrained to find to the American definition is that I do not find the word 'due' used in the sense attributed to it in any dictionary of established authority.

"Yet it does not appear to me so difficult to find a suitable meaning for these words. Perhaps it may have been overlooked from the very fact of its simplicity.

"I understand the word diligence to signify not merely work, but, to use a familiar phrase, work with a will.

"The force of the qualifying epithet 'due' can be best obtained by tracing it to its origin. All lexicographers derive it from the Latin verb 'debere,' which itself is a compound of two words 'de' and 'habere,' which means 'quasi de alio habere'—that is, in English, *to have of or from another.*

"Assuming this to be the primary meaning, I now come to the second step. The first having implied something received by one person from another, the second implies equally an obligation incurred thereby. 'Debere,' in Latin means to owe. In French it becomes 'devoir,' which is equivalent to debt, to duty, or to obligation. In English it is thus defined by two eminent authorities:

"Richardson: 'That which is owed; which anyone ought to have, has a right to demand, claim, or possess.'

"Webster: 'Owed; that ought to be paid or done to another; that is due from one to another, which contract, justice, or propriety requires one to pay, and which he may justly claim as his right.'

"I have searched a great variety of other authorities, but do not cite them, as they only repeat the same idea.

"Hence, it may be inferred that the sense of the words 'due diligence' is that of 'earnest labor owed to some other party,' which that party may claim as its right.

"But, if this definition be conceded, it must naturally follow that the nature and extent of this obligation can not be measured exclusively by the judgment or pleasure of the party subject to it. If it could, in the ordinary transactions between individuals, there would be little security for the faithful performance of obligations. If it were not that the party to whom the obligation has been given retains a right to claim it in the sense that he understands it, his prospect of obtaining justice in a contested case would be but slight.

"If this view of the meaning of the words be the correct one, it follows that when a neutral government is bound, as in the first and third rules laid down in the treaty for our guidance, to use 'due diligence' in regard to certain things, it incurs an obligation to some external party, the nature and extent of which it is not competent to it to measure exclusively by its own will and pleasure.

"Yet the assumption that it is competent appears to me to underlie the whole extent of the British position in this controversy.

"It may, indeed, be affirmed that no sovereign power in the last resort is accountable to any other for the results of the exercise of its own judgment, arrived at in good faith.

"This proposition may be admitted to be true in point of fact; but it is obvious that proceedings under it gain no sanction under any law but that of superiority in physical force.

"To escape this alternative, resort has been had to an attempt at definition of a system of rights and obligations, to which the assent of civilized nations imparts authority in the regulation of their reciprocal duties.

"Under that system all the nations recognizing it are placed on a perfectly equal footing, no matter what the nature of their relative force. To borrow a sentence from the British Counter Case—

"'Her Majesty's government knows of no distinction between more dignified and less dignified powers; it regards all sovereign states as enjoying equal rights, and equally subject to all ordinary international obligations; and it is firmly persuaded that there is no state in Europe or America which would be willing to claim or accept any immunity in this respect on the ground of its inferiority to others in extent, military force, or population.'

"Admitting this position in its fullest extent, it may at the same time be affirmed that if Her Majesty's government were to enter into a contract with these various states, as a neutral power, to use due diligence in certain emergencies, not one even of the smallest of them would fail to deny that Her Maj-

esty's government was the exclusive judge of the measure of its obligations contracted under those words.

"What is, then, the rule by which the actual performance of this duty can be estimated? It seems to me tolerably plain. Whatever may be the relative position of nations, the obligation between them rests upon the basis of exact and complete reciprocity. Hence the compact embraced in the words 'due diligence' must be fulfilled according to the construction placed upon the terms by each separate nation, subject to reasonable modifications by the just representations of any other nation with which it is in amity, suffering injury from the consequences of a mistake of negligence or intention. These may very naturally grow out of the great differences in their relative position, which should properly be taken into consideration. In the struggle which took place in America 'due diligence' in regard to the commercial interests of one of the belligerents meant a very different thing from the same words applied to the other. The only safe standard is that which may be reached by considering what a nation would consider its right to demand of another were their relative positions precisely reversed. If the due diligence actually exercised by one nation toward another does not prove to be exactly that diligence which would be satisfactory if applied to itself under parallel circumstances, then the obligation implied by the words has not been properly fulfilled, and reparation to the party injured is no more than an act of common justice.

"Such seems to be the precise character of the present controversy. Her Majesty's government denies that the measure of diligence due by her as a neutral to the United States as a belligerent during the late struggle was so great under the law of nations as it has been, with her consent, made by the terms of the treaty. But in either case she claims to be the exclusive judge of her fulfillment of it, apart from the establishment of this tribunal, to which she has consented to appeal. But this very act implies the consciousness of the possibility of some debt contracted in the process by the use of these terms that may justly be claimed by another party. Of the nature and extent of that debt, and how far actually paid, it is the province of this tribunal to determine, after full consideration of the evidence submitted. Such is the construction I have placed upon the words 'due diligence.'"

Opinion of Sir Alexander Cockburn.

Sir Alexander Cockburn, in his opinion, said:[1]

"The diligence required of a government to prevent infractions of neutrality may relate (1) to the state of its municipal law; (2) to the means possessed by it to prevent such infractions; (3) to the diligence to be used in the application of such means to the end desired.

[1] Papers relating to the Treaty of Washington, IV. 265.

"As to the law, the subject may be divided into the prohibitive law or, as it is termed in the American case, the punitive law, and the preventive law—that is, the law whereby the government is armed with the power and means of prevention.

"As regards the prohibitive or punitive law, no difficulty can arise. It is plain that to satisfy the exigency of due diligence, and to escape liability, a neutral government must take care not only that its municipal law shall prohibit acts contravening neutrality, but that the law shall be upheld by the sanction of adequate punishment—that is to say, of such as may reasonably be expected to deter persons from offending against it.

"As regards the preventive law, doubtless a government should be armed by law with power to prevent an infraction of the law, when it knows or has reasonable ground to believe that such infraction is about to take place.

"But when we come to the question of the means which by law should be placed at the disposal of the government, difficulties of a very formidable character immediately present themselves.

"The more despotic and unlimited the power of a government, the more efficacious will be the means at its command for preventing acts which it is desired to prevent.

"Is this a reason, in a country where absolute and unlimited power is unknown, where every power is exercised in subordination to the law, and where, for any interference by the government with the rights of person or property, redress may immediately be sought, for investing the executive with an absolute and irresponsible power, at variance with the whole tenor and spirit of the national institutions, in order to protect a belligerent from the possibility of injury from a violation of neutrality?

"Again, a nation has a system of procedure which is in harmony with its institutions and with which it is satisfied. According to that system, persons against whom the law is to be put in force can not be subjected to be interrogated in order to establish their criminality. Proof must first be produced, from which, while it remains unanswered, a presumption of guilt arises, before they can be called upon for a defense. Because a different system might be more efficacious in enabling the government to establish a case for confiscating a suspected vessel, for the protection of a belligerent, is the legislature called upon to change the law because other nations become involved in war?

"Again, the government of a country has been carried on for years according to an established system of official routine. This system may be somewhat complicated, and may render the action of the executive less speedy than it might otherwise be. But it is safe, and has been found to work sufficiently well in carrying on the affairs of the nation at home and abroad. Because a more rapid and a more direct action on the point to be reached might be obtained by a simplification of the official

machinery, is a government to be held guilty of negligence because, not foreseeing what was about to happen, it had not altered its ministerial arrangements accordingly?

"A government, in all matters involving legal consideration, is in the habit of consulting and acting under the advice of lawyers specially appointed to advise it. The purpose is the laudable one of insuring the perfect legality of the proceedings of the government; but this advantage necessarily involves some loss of time, during which the action of the executive is for the moment suspended. Is this practice inconsistent with the diligence required of a neutral government? Honestly intending to do what was right, is it to be held responsible because a vessel equipped for war has taken advantage of such a delay, though, perhaps, in the particular instance, accidentally prolonged?

"I can only answer these questions in the negative. I do so on the ground, as to some of them, that they are things which no government could reasonably be asked to do; as to all, that they were not such things as a government of ordinary prudence and sagacity, carrying on its affairs in the usual way in which the affairs of governments are carried on, could have foreseen the necessity of providing for.

"Passing from the law, and the means which the law should place at the disposal of a government to enable it to repress intended violations of neutrality on the part of its subjects, to the action of the government in the use of such means, it seems to me that two things are incumbent on a government:

"1st. That it shall use due diligence to inform itself, by the use of the means at its disposal, whether a violation of the law is about to be committed; and,

"2d. That, being satisfied of the fact, it shall use due diligence in applying its means and power of prevention.

"These conditions honestly and *bona fide* satisfied, no government, as it seems to me, can be held liable for the acts of its subjects, but such acts must be deemed to be beyond the reach of any control which it can reasonably be expected to exercise.

"But here questions of great importance, and of equal difficulty, present themselves:

"1. Is a government, intending faithfully to discharge its duty toward another government, to be held responsible for a mere error of judgment? As, for instance, in thinking a vessel not liable, in point of law, to seizure, when in fact she was so; or in thinking the evidence in a particular case insufficient when it was sufficient.

"2. Is a government wanting in due diligence if it declines to seize a vessel at the instance of a belligerent, when properly satisfied that, though there may be circumstances of a suspicious character, the only evidence which can be adduced will not justify the seizure before the law, and that the vessel will therefore be released?

"3. Having seized a vessel, and brought the matter before the proper legal authority, is a government to be held responsible because, through some mistake of the court, either of law or fact, there has been a miscarriage of justice?

"4. Is it to be answerable for accidental delay, through which an opportunity becomes afforded to a vessel to evade the eventual decision of the government to seize her?

"5. Is a government to be held responsible for error of judgment in its subordinate officers, especially when these officers are at great distance, and not acting under its immediate control? Is it, under such circumstances, to be answerable for their possible negligence, or even for their misconduct?

"These are matters of infinite importance to neutral nations, who may be drawn within the vortex of wars in which they have no concern, if they are not only to be harassed and troubled by the demands and importunities of jealous and angry belligerents, but are, in addition, to be held responsible—to the extent, perhaps, of millions—for errors of judgment, accidental delay, judicial mistake, or misconduct of subordinate officers, acting not only without their sanction, but possibly in direct contravention of their orders.

"We are not informed whether the two governments have, in compliance with the pledge contained in the Treaty of Washington, invited other nations to adopt its rules; but if it is to be established that these rules carry with them a liability so extensive I should very much doubt whether such an invitation, if made, would be attended with much success.

"Any decision of this tribunal founded on such a liability would have the effect, I should imagine, of making maritime nations look upon belligerent powers with very considerable dread.

"It is to be remembered that a government cannot be taken to guarantee the event; in other words, to be answerable at all hazards and under all circumstances for a breach of neutrality by a subject, if it occurs. In spite of the law, and of the vigorous administration of the law, offenses will take place, and neither at home nor abroad can rulers be held, under all circumstances, answerable to those who suffer from them. All that can be expected of the government of a country is that it shall possess reasonable means to prevent offenses, and use such means honestly and diligently for the benefit of those who are entitled to its protection. The terms of the treaty, which require no more than 'due diligence,' exclude all notion of an absolute unconditional responsibility. This is evidently the meaning of an observation of the British counsel at the close of the fifth section of his argument on 'due diligence,' which the president of the tribunal appears to have found some difficulty in understanding.

"This being so, I have some difficulty in saying that a government acting in good faith, and desiring honestly to fulfill its obligations, can be held liable for errors of judgment, unless,

indeed, these are of so patent a character as to amount to *crassa negligentia.*

"Prolonged and unnecessary delay is, in the very nature of things, incompatible with diligence. But delay within reasonable limits, honestly intended for the investigation of facts or the due consideration of the proper course to be pursued, is not so. Delay arising simply from accident ought not to be imputed as negligence. Accident can never be made the ground of an imputation of negligence, though it may found a legal claim where a party is *in mora.*

"As regards the seizure of a vessel under the foreign-enlistment act, with a knowledge that the evidence would be insufficient to justify it, I hold that such a seizure, whether for the purpose of furthering the ends of a belligerent or because some suspicion might attach to the vessel, would have been unjustifiable both in policy and principle. For no government can be called upon to institute legal proceedings under such circumstances. Every government prosecution which ends in failure is, in itself, productive of mischief. It lessens the authority of the executive by making it appear to have acted harshly and unjustly, and creates sympathy, perhaps unmerited, for parties against whom its efforts have been directed and who have escaped from its pursuit. It impairs the authority of the law by leading to the belief that it may be infringed with impunity, thereby holding out encouragement to crime. A government would be acting in violation of the spirit of the constitution, as well as against law and right, if it seized a vessel, the property of a subject, unless it believed such vessel to be justly and legally liable to condemnation on legal and sufficient proof. Moreover, such a proceeding would be useless as well as arbitrary. The government would be unable to defer indefinitely the decision of the question, but, on the contrary, would be bound to submit the case to the proper tribunal at the earliest practicable moment. In the case supposed, the result would necessarily be that the vessel must be released and allowed to depart unmolested.

"It must be borne in mind that the British Government possesses no despotic or arbitrary power. It could neither assume nor exercise such a power, even to protect a belligerent or maintain its own neutrality.

"As regards any miscarriage of justice in matters within the sphere of the municipal law, it appears to me utterly out of the question to hold that a government, having done what in it lay, as by seizing a vessel and bringing it properly before the competent court, can be held liable because, through some mistake or accident, justice may have been defeated.

"A breach of the law having been committed in the equipping or arming of a vessel for belligerent purposes, all that the government could do, under the foreign-enlistment act, was to seize the delinquent vessel, and bring it into a proper court for condemnation. This done, and the evidence of the facts in

such a case having been submitted by the public prosecutor to the court, the functions of the government are at an end. It can do no more. The rest is with the law. In England, in America, in every well-constituted and well-regulated state, the executive and judiciary powers are separated by a broad and impassable barrier. There is no authority in the state, however high, that would venture to interfere with the discharge of the judicial office. It would be considered a violation of the most sacred principles, and an outrage on all propriety, to seek to control, or even to influence, directly or indirectly, the decision of a judge, even of the most inferior tribunal.

"This being so, the government of a neutral can not justly or reasonably be held responsible for all the mischief which a vessel, equipped in violation of its law, may do throughout the course of, possibly, a protracted war because a suit which it has properly instituted fails through a mistake of the judge. To decide in the affirmative would be to establish a rule hitherto unknown, and calculated to impose on neutral states a degree of responsibility altogether unprecedented and unheard of.

"As regards liability for the acts or omissions of subordinate officers, it seems to me that, while a government may properly be held responsible for what is done, or omitted to be done, by its orders or under its own immediate control, it would be most unreasonable to hold it answerable for the acts or negligences of subordinates, at all events, unless it afterward ratifies and adopts what these may have done.

"In the matter of civil rights, individuals may be liable for the negligence of those to whom they depute the conduct of their affairs; but, considering the complicated machinery of political government, especially when distant colonies and dependencies are concerned, and the consequent necessity of employing subordinate officers, it would be unreasonable and unjust to hold that the negligence of a subordinate, more especially from mere error of judgment, as, for instance, in allowing a vessel to take too much coal, was a want of "due diligence" on the part of the government, for which it can justly be held liable.

"The following passage from the British Counter Case sums up so well the different sides of this question, that I do not hesitate to produce it at length:

"'That due diligence requires a government to use all the means in its power is a proposition true in one sense, false in another; true, if it means that the government is bound to exert honestly and with reasonable care and activity the means at its disposal; false, impracticable, and absurd, if it means that a liability arises whenever it is possible to show that an hour has been lost which might have been gained, or an accidental delay incurred which might, by the utmost foresight,

have been prevented; that an expedient which might have succeeded has not been tried; that means of obtaining information which are deemed unworthy or improper have not been resorted to; or that the exertions of an officer or servant of government have not been taxed to the utmost limit of his physical capacity.

"'Nor can we fail to observe that, in proportion as we extend the duty of prevention incumbent on neutral governments, from hostile enterprises which are open and flagrant to acts of a more doubtful character which border on the line betwixt the lawful and the unlawful, it becomes more and more difficult to exact from the neutral, in the performance of that duty, peculiar and extraordinary vigilance and activity. The duty of preventing the open assembling within neutral territory of an armed hostile expedition against a neighboring country is plain and obvious, and requires only a prompt exercise of adequate force. But it is otherwise when we come to acts of a different class, the criminality of which depends on a latent intention; such, for example, as the mere procuring for belligerent purposes from the yards of a neutral shipbuilder, whose ordinary business it is to build ships of all kinds for customers of all nations, a vessel with some special adaptation for war. There is nothing in the relation of a neutral to a belligerent to cast on the former the duty of exercising within his own territory a constant and minute espionage over ordinary transactions of commerce for the protection of the latter. This relation, always onerous to the neutral, is, at the same time, it must be remembered, purely involuntary on his part. It is forced on him by the quarrels of his neighbors in which he has no concern, or by their internal discords when those discords break out into civil war.'[1]

"While I readily admit that the measure of diligence which a government applies to the affairs it has to administer, if the ordinary course of its administration is negligent and imperfect, is not necessarily to be taken—any more than it would be in the case of an individual—as the measure of diligence which it is to apply in the discharge of international obligations, yet credit should be given to a government for a properly diligent discharge of public duty.

"Furthermore, if a given law and a particular system of administration have been found by practical experience sufficient to protect the interests of the government in the important matter of the public revenue, and also to insure the observance of neutral duties on the occasion of all former wars, surely it is highly unreasonable and unjust to condemn the whole system as defective, and the government as negligent, for not having amended it in anticipation of future events."

[1] British Counter Case, 22.

Award of the Tribunal.

The tribunal of arbitration, in its award, said:

"The 'due diligence' referred to in the first and third of the said rules [of Article VI. of the Treaty of Washington] ought to be exercised by neutral governments in exact proportion to the risks to which either of the belligerents may be exposed, from a failure to fulfill the obligations of neutrality on their part. * * * The circumstances out of which the facts constituting the subject-matter of the present controversy arose were of a nature to call for the exercise on the part of Her Britannic Majesty's government of all possible solicitude for the observance of the rights and the duties involved in the proclamation of neutrality issued by Her Majesty on the 13th day of May 1861."

2. DUTY TO DETAIN AN OFFENDING CRUISER WHEN IT RETURNS TO THE NEUTRAL'S JURISDICTION, AND THE EFFECT OF A COMMISSION ON SUCH CRUISER.

Case of the United States.

As to the intimation which had been made in the correspondence and discussions touching the *Alabama* claims, that the power of Great Britain to interfere with, to arrest, or to detain either of the belligerent cruisers whose acts were complained of, ceased when it was commissioned as a man-of-war, the Case of the United States said:

"The United States might well content themselves with calling the attention of the tribunal of arbitration to the utter uselessness of discussing these questions, if the liability to make compensation for the wrong can be escaped in such a frivolous way. It is well known how the several British-built and British-manned cruisers got into the service of the insurgents. Few of them ever saw the line of the coast of the Southern insurgent States. The *Florida*, indeed, entered the harbor of Mobile, but she passed the blockading squadron as a British man-of-war. In most cases the commissions went out from England—from a branch office of the insurgent navy department, established and maintained in Liverpool at the cost and expense of the insurgent (so called) government. From this office the sailing orders of the vessels were issued; here their commanders received their instructions; and hence they departed to assume their commands and to begin the work of destruction. They played the comedy of completing on the high seas what had been carried to the verge of completion in England. The parallel is complete between these commissions and those issued by Genet in 1793, which were disregarded by the United States at the instance of Great Britain. If a piece of paper, emanating through an English

office, from men who had no nationality recognized by Great Britain, and who had no open port into which a vessel could go unmolested, was potent not only to legalize the depredations of British built and manned cruisers upon the commerce of the United States, but also to release the responsibility of Great Britian therefor, then this arbitration is indeed a farce. Such, however, can not be the case."[1]

The United States, said the Case, did not deny the force of the commission of a man-of-war issuing from a recognized power,[2] nor did they deny that since Great Britain had recognized the existence of a civil war between the United States and the insurgents, she might, without a violation of the law of nations, allow such insurgent vessels of war as had not been built, armed, equipped, furnished, fitted out, supplied, or manned within her territory, in violation of her duty to the United States, the same rights of asylum, hospitality, and intercourse which she conceded to the vessels of war of the United States. But they denied that the receipt of a commission by a vessel like the *Alabama*, or the *Florida*, or the *Georgia*, or the *Shenandoah*, exempted Great Britain from liability growing out of the violation of her neutrality. In support of this proposition the Case of the United States referred to the case of the *Santissima Trinidad*, 7 Wheaton, 283, and the case of the *Gran Para*, 7 Wheaton, 471.

The British Case.

The British Case maintained the following propositions:[3]

"7. A vessel becomes a public ship of war by being armed and commissioned; that is to say, formally invested by order or under the authority of a government with the character of a ship employed in its naval service and forming part of its marine for purposes of war. There are no general rules which prescribe how, where, or in what form the commissioning must be effected, so as to impress on the vessel the character of a public ship of war. What is essential is that the appointment of a designated officer to the charge and command of a ship likewise designated be made by the government, or the proper department of it, or under authority delegated by the government or department, and that the charge and command of the ship be taken by the officer so appointed. Customarily a ship is held to be commissioned when a commissioned officer appointed to her has gone on board of her and hoisted the colors appropriated to the military marine. A neutral power may

[1] Papers relating to the Treaty of Washington, I. 84.
[2] *Schooner Exchange* v. *McFadden*, 7 Cranch, 116.
[3] Papers relating to the Treaty of Washington, I. 237.

indeed refuse to admit into its own ports or waters as a public ship of war any belligerent vessel not commissioned in a specified form or manner, as it may impose on such admission any other conditions at its pleasure, provided the refusal be applied to both belligerents indifferently; but this should not be done without reasonable notice.

"8. The act of commissioning, by which a ship is invested with the character of a public ship of war, is, for that purpose, valid and conclusive, notwithstanding that the ship may have been at the time registered in a foreign country as a ship of that country, or may have been liable to process at the suit of a private claimant, or to arrest or forfeiture under the law of a foreign state. The commissioning power, by commissioning her, incorporates her into its naval force; and by the same act which withdraws her from the operation of ordinary legal process assumes the responsibility for all existing claims which could otherwise have been enforced against her.

Argument of the United States.

The argument of the United States advanced the following positions:[1]

"I. This subject, discussed at some length in the British Case and Counter Case, may be disposed of by a few elementary propositions:

"(*a*) It is undoubtedly consonant with principle and usage, that a public armed vessel of a sovereign power should be accorded certain privileges in the ports and waters of other national jurisdictions not accorded to private vessels. The substance of these privileges is a limited concession of the character of continued territoriality of the state to which they belong, and a consequent exemption from the *jurisdiction of the courts and process* of the nation whose ports or waters they visit. But the same reason which gives support to this immunity throws them under the immediate political treatment of the hospitable state, as represented by its executive head, in the conduct of this international, if subordinate, relation. How, under the circumstances of each case calling for executive action, the vessels are to be dealt with is determined, in the first instance, by the government having occasion to exhibit the treatment. For its decision, and the execution of it, it is responsible, politically and internationally, and not otherwise, to the sovereign whose public ships have been so dealt with. That ordinarily the offense calling for remonstrance or intervention would not be made the subject of immediate and forcible correction, applied to the vessel itself, but would be brought to the attention of its sovereign for correction or punishment and apology, or other amends, may be assumed. But all this is at the discretion of the power having occasion to exert, control, seek redress, or exhibit resentment. The flagrancy or

[1] Papers relating to the Treaty of Washington, III. 152. See also, 176.

urgency of the case may dictate another course, to be justified to the sovereign affected upon such considerations.

"(*b*) When, however, the anomalous vessels of a belligerent *not recognized as a nation or as a sovereign* claim a public character in the port of hospitality, the only possible concession of such character must, in subtracting them from judicial control, subject them to immediate political regulation *applied to the vessels themselves*. There is behind them no sovereign to be dealt with, diplomatically or by force. *These vessels themselves* present and represent at once whatever theoretical public relation exists or has been accepted. To hold otherwise would make the vessels wholly lawless and predominant over the complaisant sovereign, helplessly submissive to the manifold *irresponsibilities* the *quasi* public vessels assume to themselves.

"(*c*) The necessary consequence is that when the offending vessels of the nonsovereign belligerent have taken the seas only by defrauding or forcing the neutrality of the nation whose hospitality they now seek, such nation has the right, and, as toward the injured nation demanding its action upon the offending vessels, is under the obligation, to execute its coercive, its repressive, its punitive control over the vessels themselves. It can not excuse itself to the injured nation for omission or neglect so to do by exhibiting its resentment against, or extorting redress from, any responsible sovereign behind the vessels; nor can it resort to such sovereign for indemnity against its own exposure to reprisals or hostilities, by the injured nation, or for the cost of averting them.

"II. Upon these plain principles, it was the clear duty of Great Britain, in obedience to the international obligations insisted upon by the treaty, and the supporting principles of the law of nations invoked by its requirement, to arrest these offending vessels as they fell under its power, to proscribe them from all hospitality or asylum, and thus to cut short and redress the injury against the United States which it had, for want of 'due diligence' in fulfilling its duty of neutrality, been involved in. The *power*, full and free, to take this course is admitted by the British Government in its Case and Counter Case. Whatever motives governed Great Britain in refusing to exercise this power, such refusal, as toward the United States, is without justification, and for the continued injuries inflicted by the offending vessels Great Britain is responsible, and must make indemnity."

British Supplemental Argument.

The effect of commissions on the offending cruisers was discussed in the British Counter Case,[1] and in the British Argument.[2] It was also discussed in the British Supplemental Argument, in which

[1] Part 2, pp. 18–20.

[2] Papers relating to the Treaty of Washington, III. 296.

the views of Her Majesty's government were defined as follows:[1]

"It is contended by the United States that these ships (or at least such of them as had been illegally equipped in British territory) ought to have been seized and detained, when they came into British ports, by the British authorities. This argument depends upon a forced construction of the concluding words of the first rule, in Article VI. of the Treaty of Washington, which calls upon the neutral state to 'use due diligence to *prevent the departure from its jurisdiction* of any vessel *intended* to cruise or carry on war as above, such vessel having been specially adapted, in whole or in part, within such jurisdiction, to warlike use.' Does this rule authorize the arbitrators to treat it as a duty undertaken by Great Britain to seize Confederate cruisers commissioned as public ships of war and entering British ports in that character without notice that they would not be received on the same terms as other public ships of war of a belligerent state, if they were believed to have been 'specially adapted, in whole or in part, within British jurisdiction, to warlike use?' The negative answer to this inquiry results immediately from the natural meaning of the words of the rule itself, which plainly refer to a departure from the neutral territory of a vessel which has not at the time of such departure ceased to be *subject*, according to the law of nations, to *the neutral jurisdiction*, and the cruising and carrying on war by which still rests in *intention and purpose only*, and has not become an accomplished fact, under the public authority of any belligerent power.

"If a public ship of war of a belligerent power should enter neutral waters in contravention of any positive regulation or prohibition of the neutral sovereign, of which due notice had been given, she might, according to the law of nations, be treated as guilty of a hostile act, a violation of neutral territory; and hostile acts may of course be justifiably repelled by force. But the original equipment and dispatch from neutral territory of the same ship, when unarmed, whether lawful or unlawful, was no hostile act; and a foreign power, which afterward receives such a ship into the public establishment of its navy, and gives her a new character by a public commission, can not be called upon to litigate with the neutral sovereign any question of the municipal law of the neutral state to whose jurisdiction it is in no matter subject. The neutral state may, if it think fit, give notice (though no authority can be produced for the proposition that it is under any international obligation to do so) that it will not allow the entrance of a particular description of vessels, whether commissioned or not, into its waters; if it gives no such notice it has no right, by the law of nations, to assume or exercise any jurisdiction whatever

[1] Papers relating to the Treaty of Washington, III. 126.

over any ship of war coming into its waters under the flag and public commission of a recognized belligerent. Such a ship, committing no breach of neutrality while within neutral waters, is entitled to extraterritorial privileges; no court of justice of the neutral country can assume jurisdiction over her; the flag and commission of the belligerent power are conclusive evidence of his title and right; no inquiry can be made, under such circumstances, into anything connected with her antecedent ownership, character, or history. Such was the decision (in accordance with well-established principles of international law) of the highest judicial authority in the United States in 1811, in the case of the *Exchange*, a ship claimed by American citizens, in American waters, as their own property, but which, as she had come in as a public ship of war of France, under the commission of the first Emperor Napoleon, was held to be entitled to recognition as such in the waters of the United States, to the entire exclusion of every proceeding and inquiry whatever which might tend in any way to deprive her of the benefit of that privileged character."[1]

Mr. Evarts's Supplemental Argument.

Mr. Evarts, in his Supplemental Argument, maintained that while the first clause of the first rule was by its terms limited to an original equipment or outfit of an offending vessel, the second clause was intended to lay down the obligation of detaining in port, and of preventing the departure of, every such vessel whenever it should come within British jurisdiction. The public ship of a nation, said Mr. Evarts, received into the ports of another nation is, as a concession to the sovereign's dignity, exempt from the jurisdiction of the courts and all judicial process of the nation whose waters it visits. But there is no concession of extraterritoriality to the extent that the *sovereign* visited is *predominated* over by the sovereign receiving hospitality to its public vessels. If an offense is committed by such vessels, or any duty arises in respect of them, the sovereign visited, at his discretion and under international responsibility, makes it the subject of remonstrance, of resentment, of reprisal, or of an immediate exertion of force if the circumstances seem to exact it. What, then, inquired Mr. Evarts, is the tenor of the authorities in respect to a public vessel not of a sovereign, but of a belligerent who has not been recognized as

[1] *Schooner "Exchange" v. McFadden*, 7 Cranch, 116. The British Supplemental Argument also referred to passages cited at length from Ortolan-Hautefeuille, Pando, and other writers in the British Counter Case, pp. 14, 15; and to Azuni, vol. 2 (Paris edition 1805), pp. 314, 315; Bluntschli, Droit International, article 321, p. 184, Lardi's French edition.

a sovereign? The courts, when the question arises as a judicial one, turn to the political authority, and if that authority has recognized the belligerency, the vessel is treated as exempt from judicial process and from the jurisdiction of the courts. But the vessel remains subject to the control or dominion of the sovereign whose ports it has visited, and it remains there under the character of a limited recognition, and not in the public character of a representative of recognized sovereignty. As there is no sovereign behind the vessel to whom appeals can be made, the vessel and its conduct are the only subjects that can be dealt with; and there is no rule that carries respect to belligerent vessels beyond the exemption from jurisdiction of courts and judicial process. Now, in respect of the vessels before the tribunal, there was, continued Mr. Evarts, on the one hand, a clear duty resting upon Great Britain toward the United States, and on the other only the supposed obligation of courtesy or comity toward the offending belligerent, which could have been terminated at any time at the will of the neutral sovereign. A subtraction of this courtesy or comity was all that was necessary to have determined the careers of the cruisers, all of which drew their origin out of the violated neutrality of Great Britain, exposing that nation to accountability to the United States for their hostilities. In the propositions of the British counsel, Mr. Evarts declared that he found really no objection made to the peremptory course which the United States insisted upon, except that seizing the vessels, *without previous notice*, would have been a violation of comity and decorum, and so far a wrong. This argument seemed, said Mr. Evarts, to make justice and right, in the greatest responsibilities, yield to mere ceremonial politeness. But, in reality, the acts done in violation of the neutrality of Great Britain by the offending belligerent, in fitting out hostile expeditions from British territory, were hostile acts, such as destroyed any obligation of courtesy or comity toward the cruisers. Undoubtedly the Confederate authorities would not have looked with equal favor upon Great Britain if she had terminated the career of the cruisers by seizing them or excluded them from her ports. This was, however, a question between Great Britain and the belligerent that had violated her neutrality. Having the power and the right, the question of courtesy in giving notice was to be determined at the cost of Great Britain and not of the United States. But it

ceased to be a question of courtesy when the notice had not been given at all, and when the choice had thus been made that the cruisers should be permitted to continue their career unchecked.[1]

Effect of Entering a Belligerent Port.

At the request of the arbitrators special arguments were made by counsel on the question as to the legal effect of the entrance of the *Florida* into the port of Mobile, on the responsibility, if any, of Great Britain for that ship.

Counsel for Great Britain maintained that after the vessel had been *bona fide* received into Mobile, as her proper port, and had there obtained the crew that gave her her capacity to cruise, a line of separation was drawn between everything that occurred before she entered that port and everything that occurred afterward; and that, no hostile cruising against the United States having taken place during the interval between her leaving Liverpool and her entrance into Mobile, Great Britain had no just cause for afterward refusing to her the ordinary immunities and privileges of a duly commissioned ship of war of a belligerent power, and certainly was not under any obligation toward the United States to do so, even if a different rule would have been applicable to such a ship as the *Alabama*, which was not dispatched for her cruise from any Confederate port. The offense of the vessel against the British municipal law was not such an offense by general international law as to call for or justify war or reprisals against the Confederate States, nor such as to adhere to the ship through all subsequent circumstances. By analogy to the rules of contraband the offense was "deposited" at Mobile.[2]

Counsel for the United States in reply said that the analogy to contraband trade, as giving the measure of the endurance of the responsibility of Great Britain for the hostile expedition of the *Florida*, was but a subtle form of the argument that the outfit of the *Florida* was but a dealing in contraband of war, and was to carry no other responsibility than the law of nations affixed to that dealing. This argument had been suppressed by the rules of the treaty. As to the argument that the seamen enlisted at Mobile became thereafter the effective maritime war of the *Florida*, and that the cruiser and her warlike and navigable qualities "suffered a sea change," which

[1] Papers relating to the Treaty of Washington, III. 448–455.
[2] Papers relating to the Treaty of Washington, III. 541.

divested them of all British character and responsibility, counsel for the United States said that this reasoning was an inversion of the proposition, *omne principale ad se trahit accessorium*, and that, as a matter of fact, the evidence concerning what happened at Mobile by no means exhibited the crew with which the *Florida* left Mobile as original enlistments there.[1]

Opinion of Count Sclopis.

Count Sclopis, in his opinion, said:[2]

"If we consult the most esteemed authors on public international law, and especially two writers of great weight, whose authority will be denied neither by America nor by England, namely, Story and Phillimore, we find that the privilege, usually accorded to ships of war, of being considered as a portion of the state whose flag they carry, and being thus exempt from all other jurisdiction, was in its origin a privilege only granted by courtesy. As this privilege is only derived from the usage of nations, it can be canceled at any moment without cause for offense being given.

"The opinion of Story, delivered in the case of the *Santissima Trinidad*, and quoted by Phillimore,[3] appears to me decisive:

"'It may therefore,' he says, 'be justly laid down as a general proposition, that all persons and property within the territorial jurisdiction of a sovereign are amenable to the jurisdiction of himself or his courts; and that the exceptions to this rule are such only as, by common usage and public policy, have been allowed, in order to preserve the peace and harmony of nations, and to regulate their intercourse in a manner best suited to their dignity and rights. It would, indeed, be strange, if a license, implied by law from the general practice of nations for the purposes of peace should be construed as a license to do wrong to the nation itself, and justify the breach of all those obligations which good faith and friendship, by the same implication, impose upon those who seek an asylum in our ports

"Taking these general principles, and above all the eternal rules of good sense and the dictates of good faith, as our point of departure, is it possible to admit that a vessel, which has been fraudulently built on the territory of a sovereign, in open contravention of the duties of neutrality which that sovereign is bound to fulfill, and with the object of privateering on behalf of one of the belligerents, can, by the simple act of such belligerent, with a view to escape disasters, be transferred into a commissioned vessel, and thus, with impunity, defy that same sovereignty against which she had at the outset so gravely offended? Assuredly not; these changes to the eye, like the shifting of a scene, these transformations, effected

[1] Papers relating to the Treaty of Washington, III. 546.
[2] Id. IV. 69.
[3] Int. Law, 3d edition, I. 478.

with equal audacity and ease, can not be taken seriously. The contravention of which the ship was guilty at the commencement of her career, with respect to the sovereign of the place where she was built, is not effaced by the operation of an indecent stratagem. All the written maxims of reason revolt against such trickery: *Dolus nemini patrocinari debet.* We must look to the bottom of the matter, and mete out full justice to the fraud; *plus valet quod agitur quam quod simulate concipitur.* The guilt inherent to the vessel will not be purged even when she has received a commission, a commander, and a flag from the power who can only profit by the fraud in flagrant violation of all the rights of neutrality.

"The weighty authority of Story, in the case of the *Santissima Trinidad*, is generally quoted with regard to the question now raised before us (and I have myself quoted him). But I observe that Story's doctrine, on the respect due to the commission given to a ship by a government, is only a general thesis, on which everybody agrees; it does not directly touch on the question of the original guilt incurred by a vessel before her commissioning, and which can not be blotted out without a disturbance of all the principles which govern the duties of neutrality.

"After all, even if precedents could be quoted contrary to the opinion which I maintain, I should reply that the letter and spirit of the three rules laid down in the sixth article of the Treaty of Washington do not allow us to follow the old ruling.

"It must be steadily borne in mind that it is a new law, full of equity and foresight, which we are now to follow.

"It is true that, according to generally accepted ideas, a sovereign who is no longer willing to grant the privilege of exterritoriality to the commissioned ships of other powers, must previously give notice to that effect, so that foreign navies, forewarned, may take their precautions in this respect. But this does not mean that there may not be exceptions arising from a certain special train of circumstances, and not from the simple caprice of the sovereign and his government. Now, it is on the nature of these special circumstances that the first rule, laid down in Article VI. of the Treaty of Washington, specifically rests. The operation of this rule would be illusory if it could not be applied to vessels subsequently commissioned. The object in view is to prevent the construction, arming, and equipping of a vessel, and to prevent her departure when there is sufficient ground for believing that she is intended to carry on war on behalf of one of the belligerents; and when probability has become certainty, shall not the rule be applicable to the direct and palpable consequences which it originally was intended to prevent? Can this act, in vindication of a right which has at the first been obviously violated, be looked upon as a violation of public good faith and

of the law of nations in regard to one of the belligerents? I can see no violation of public good faith where there is only a flagrant abuse, a manifest contravention of the principles of neutral duties sanctioned by the foregoing rule.

"The honorable attorney-general, in the memorable speech which he made in the House of Commons on the 13th of May 1864, in reply to Mr. Baring, formally declared 'that he had not the least doubt that England had the right, if she thought fit, to exclude from her ports any particular ship, or class of ships, if she considered that they had violated her neutrality, but that such power is simply discretionary, and should be exercised with a due regard to all the circumstances of the case.' (United States Documents, Vol. V., p. 583). Why was not, then, this right exercised at least with respect to the vessels which had flagrantly violated the duties of neutrality?

"I will not follow the argument of the United States in the distinction it seeks to draw between public ships of recognized and sovereign nations and the ships belonging to a belligerent power whose sovereignty is not recognized. The status of belligerents having been accorded to both parties in America, it is not necessary to dwell on this question. I will say, with the American Judge Grier, 'foreign nations recognize that there is war by a proclamation of neutrality.'

"The fact that a vessel, after having been commissioned, has been received as a ship of war in the ports of different powers before her entrance into the ports of the power whose neutrality she had originally violated, should not, in my opinion, influence the recognition of the character of such vessel. Where the vessel had no liability to answer for, it was natural that she should be admitted as a ship of war; but circumstances entirely change when the vessel enters the territorial waters of the sovereign toward whom she is guilty, of the sovereign whom she has compromised as regards the other belligerent. Here her guilty character can not be overlooked; she may be seized and condemned.

"I think that it is for the interest of all maritime nations that they should hold to the principles which have just been propounded. The number of vessels fraudulently built on neutral territory, with the intention of privateering on behalf of belligerents, will decrease in proportion as increased severity is shown toward them, even when they present themselves under the protection of false pretensions to which they are not entitled.

"The powers which signed the Treaty of Washington express, in this same Article VI., the desire and hope that the three rules which they have there laid down will be adopted by the other maritime powers. It must, then, be inferred that the signing powers considered these rules as clear, precise, and applicable to the various cases which are therein contemplated. If, on the contrary, it is to be supposed that the intention of the

contracting parties at Washington was to admit explanations and reservations of these same rules in the sense 'of not largely transcending the views of international maritime law and policy which would be likely to commend themselves to the general interests and intelligence of that portion of mankind,' the advantage of the example given would be entirely lost. The uncertainty of its interpretation would always endanger the stability of the rule."

Viscount d'Itajubá's Opinion.

Viscount d'Itajubá delivered the following opinion:[1]

"The object of the special question submitted for the decision of the tribunal of arbitration is, to determine the extent of the effect which can be attributed to the commission with which a vessel of war may be provided; whether that effect is the same in the case of a vessel built in conformity with the laws of neutrality as in that of a vessel built in violation of those laws; that is to say, whether the fact of holding such a commission gives to a vessel built in violation of the laws of a neutral state the right of requiring of such state that it should be treated in its ports in the same manner as any other vessel of war belonging to a belligerent state and built according to law.

"The question, put in this form, answers itself.

"In fact, a neutral wishing to preserve his neutrality is bound to abstain from assisting either of the belligerent parties in their warlike operations; he is bound faithfully to guard against vessels of war, destined for the use of one of the belligerents, being built or equipped within his territory; and, according to the latter part of the first rule of Article VI. of the Treaty of Washington, he is bound 'also to use due diligence to prevent the departure from his jurisdiction of any vessel intended to cruise or carry on war as above, such vessel having been specially adapted, in whole or in part, within such jurisdiction, to warlike use.'

"Such being the duties of a neutral, he has *per contra* the right to require the belligerents to respect his territory; and it is the duty of the belligerents not to commit, within the territory of the neutral state, acts contrary to that neutrality. It is only by a scrupulous observance of this duty that belligerents acquire the indisputable right of exacting from the neutral perfect impartiality.

"If, then, a vessel, built on neutral territory for the use of a belligerent, fraudulently, and without the knowledge of the neutral, comes again within the jurisdiction of the sovereign whose neutrality it has violated, it ought to be seized and detained; for it is impossible to allow to such vessel the same exterritorial rights as are allowed to other belligerent vessels

[1] Papers relating to the Treaty of Washington, IV. 96.

of war, built in accordance with law and without any infraction of neutrality. The commission with which such a vessel is provided is insufficient to protect her as against the neutral whose neutrality she has violated.

"And how can the belligerent complain of the application of this principle? By seizing or detaining the vessel the neutral only prevents the belligerent from deriving advantage from the fraud committed within his territory by the same belligerent; while by not proceeding against a guilty vessel, the neutral justly exposes itself to having its good faith justly called in question by the other belligerent.

"This principle of seizure, of detention, or at any rate of preliminary notice that a vessel, under such circumstances, will not be received in the ports of the neutral whose neutrality she has violated, is fair and salutary, inasmuch as it is calculated to prevent complications between neutrals and belligerents, and to contribute toward freeing neutrals from responsibility by proving their good faith in the case of a fraud perpetrated within their territory.

"The converse of this principle is repugnant to the moral sense, for it would be allowing the fraudulent party to derive benefit from his fraud.

"The rules established by the Empire of Brazil confirm the principle which we have just laid down, for in its regulations respecting neutrality directions are given—

"'§ 6. Not to admit into the ports of the empire a belligerent who has once violated the neutrality; and,

"'§ 7. To compel vessels which may attempt to violate the neutrality to leave the maritime territory of the empire immediately, without supplying them with anything whatever.'

"In fine, the commission with which a vessel of war may be provided has not the power to protect her as against the neutral whose neutrality she has previously violated."

Mr. Staempfli, in his opinion, said:[1]

Opinion of Mr. Staempfli.

"5. The fact that a vessel, built in contravention of the laws of neutrality, escapes and gets out to sea, does not free that vessel from the responsibility she has incurred by her violation of neutrality; she may, therefore, be proceeded against if she returns within the jurisdiction of the injured state. The fact of her having been transferred or commissioned in the meanwhile does not annul the violation committed, unless the transfer or commissioning, as the case may be, was a *bona-fide* transaction."

Mr. Adams expressed the following opinion:[2]

Mr. Adams's Opinion.

"On behalf of Great Britain, it is claimed that the rule is perfectly established that a vessel belonging to any power recognized as sovereign, or as a belligerent, has, in virtue of its commission, a right to claim

[1] Papers relating to the Treaty of Washington, IV. 105. [2] Id. 146.

a reception, and the privilege of extraterritoriality, without regard to its antecedents, in the ports of every neutral power.

"The authorities quoted to sustain this position sustain it as an established general rule. I see no reason to question it.

"But the question that has been raised in the present controversy is an exceptional one, which is not touched by these decisions.

"The reception of vessels having an origin exclusively or even partially American, and bearing on their front no evidence of fraud or violence, does not seem to have been brought into question in this controversy. Such vessels were the *Sumter*, the *Nashville*, the *Tallahassee*, the *Chickamauga*, etc.

"The case is different in regard to that class of vessels which derive their origin exclusively from a systematic and fraudulent abuse of the amity of a neutral power, setting at defiance its laws within its own jurisdiction, and taking advantage of its forbearance in the hope of involving it the more with its opponent in a responsibility for tolerating its own misdeeds.

"It admits of no question, in my mind, that the outfit and equipment of the *Florida*, the *Alabama*, the *Georgia*, and the *Shenandoah* were each and all made in defiance of the laws of Great Britain and the injunction of the Queen's proclamation of neutrality. By this conduct the perpetrators had not only clearly forfeited all right to consideration, but had subjected themselves to the penalties of malefactors if they ever returned within the jurisdiction which they had insulted. The right to exclude vessels from British ports on these grounds, without regard to their commissions, is distinctly affirmed by Sir Roundell Palmer, one of the lawyers of the crown during the whole period in question, and seems to be indubitable. To deny it would place every sovereign power at the mercy of any adventurous pirate on the ocean who might manage to cover himself with the threadbare mantle of the minutest belligerent.

"It is a perfectly well understood principle of law that no citizen of a foreign nation, excepting, perhaps, in certain cases, a representative clothed with diplomatic privileges, is free from the obligation of conforming himself to the laws of the country in which he is residing. If he willfully violates them he is subject to the same penalties which are imposed upon native citizens. Even though not a citizen he is subject in Great Britain to be tried for *quasi* treason. If instead of conspiring against the Queen he enters into combinations which involve the kingdom in complications with foreign powers with which it is at peace, he surely can not come forward and plead the possession of a commission from the authorities of his own country in his justification. Neither is the commander of a ship of a foreign power which comes within the harbor of another free from the same general obligation. If he violates any of the regulations prescribed for his government he is liable to pay the penalty by a withdrawal of his privileges or by an immediate order of exclusion from the port.

"For myself, therefore, I can not see any reason why the existence of a commission should have stood in the way of a clear expression by Great Britain of its sense of the indignities heaped upon Her Majesty's government by the violation of her laws within her various dominions, continuously persisted in during the existence of this belligerent. In my opinion it would have justified the seizure and detention of the offending vessels wherever found within the jurisdiction. But if that were considered inconsistent with a clear impartiality, it certainly demanded an entire exclusion from Her Majesty's ports. The right to decide such a point rests exclusively with every sovereign power. But an opportunity was lost for establishing a sound principle of international maritime intercourse which may not soon occur again."

Sir Alexander Cockburn's Opinion.

Sir Alexander Cockburn argued that the commissions issued by the Confederate States being valid the vessels were thereafter entitled to the privilege of extraterritoriality and were not liable to seizure. To say that a country whose belligerency had been recognized, but whose independent nationality had not been acknowledged, had no rights of sovereignty, and consequently could not by its commission exclude the right of the local sovereign to seize one of the vessels of war for an infraction of municipal law would deprive the recognition of belligerency of one of its most important consequences to a belligerent government, that of having its armed vessels invested with the privileges conceded to men of war. As to the argument that, assuming the commissions to be valid, it was nevertheless the duty of the government whose neutrality had been violated to seize the vessels, Sir Alexander Cockburn said it seemed monstrous to assert that the neutral was bound to have recourse to force, and possibly to become involved in war for the benefit of another belligerent. Nothing short of a breach of neutrality, according to international law, could justify a resort to forcible measures on the part of the neutral as for a violation of his neutral rights. The equipment of the *Florida* in England constituted no violation of neutrality by international law, the vessel not having been armed, or sent out for the present purpose of war. So, her arriving at Green Cay was at the utmost only a breach of municipal law. And even assuming that a neutral state would be entitled to seize a vessel, though armed with a commission from a belligerent power, by reason of some offense against its neutrality as a reparation for a wrong done against itself, how could it possibly be asserted that it was under any obligation to do so?[1]

[1] Papers relating to the Treaty of Washington, IV. 409, et seq.

Decision of the Tribunal.

On the question under consideration, the tribunal of arbitration rendered the following decision:[1]

"The effects of a violation of neutrality committed by means of the construction, equipment, and armament of a vessel are not done away with by any commission which the government of the belligerent power, benefited by the violation of neutrality, may afterward have granted to that vessel; and the ultimate step, by which the offence is completed, cannot be admissible as a ground for the absolution of the offender, nor can the consummation of his fraud become the means of establishing his innocence. The privilege of exterritoriality accorded to vessels of war has been admitted into the law of nations, not as an absolute right, but solely as a proceeding founded on the principle of courtesy and mutual deference between different nations, and therefore can never be appealed to for the protection of acts done in violation of neutrality. The absence of a previous notice cannot be regarded as a failure in any consideration required by the law of nations, in those cases in which a vessel carries with it its own condemnation."

3. Supplies of Coal.

It was maintained in the Case of the United States that an undue indulgence was shown to Confederate cruisers in the extent to which they were permitted to obtain supplies of coal in British ports, and that in this way they were enabled to use those ports as a base of hostile operations against the United States in violation of the duty defined in the second rule of the treaty. These allegations were denied in the British Case.

The British Supplemental Argument declared that supplies of coal in British ports were afforded equally and impartially to both the contending parties; that they were obtained, on the whole, more largely by ships of war of the United States than by the Confederate cruisers; and that such supplies were lawful under the principles of international law.[2]

Mr. Evarts, in his Supplemental Argument,[3] and Mr. Waite, in another special argument,[4] argued that the permission to take coal, unless properly restricted, amounted to permitting the belligerent to make use of the neutral ports as a base of naval operations, and that the Confederate cruisers were suffered to obtain supplies of coal in British ports to facilitate their belligerent operations.

[1] Papers relating to the Treaty of Washington, IV. 50.
[2] Id. III. 433.
[3] Id. 458.
[4] Id. 513.

Opinion of Count Sclopis.

On this subject Count Sclopis expressed the following opinion:[1]

"I can only treat the question of the supply and shipment of coal as connected with the use of a base of naval operations directed against one of the belligerents, or as a flagrant case of contraband of war.

"I will not say that the simple fact of having allowed a greater amount of coal than was necessary to enable a vessel to reach the nearest port of its country constitutes in itself a sufficient grievance to call for an indemnity. As the Lord Chancellor of England said on the 12th of June 1871, in the House of Lords, England and the United States equally hold the principle that it is no violation of international law to furnish arms to a belligerent. But if an excessive supply of coal is connected with other circumstances which show that it was used as a veritable *res hostilis*, then there is an infringement of the second rule of Article VI. of the treaty. It is in this sense also that the same Lord Chancellor, in the speech before mentioned, explained the intention of the latter part of the said rule. Thus, when I see, for example, the *Florida* and the *Shenandoah* choose for their field of action, one, the stretch of sea between the Bahama Archipelago and Bermuda, to cruise there at its ease, and the other, Melbourne and Hobson's Bay, for the purposes, immediately carried out, of going to the arctic seas, there to attack the whaling vessels, I can not but regard the supplies of coal in quantities sufficient for such purposes as infringements of the second rule of the sixth article."

Mr. Adams, in his opinion, said:[2]

Mr. Adams's Opinion.

"This question of coals was little considered by writers on the law of nations, and by sovereign powers, until the present century. It has become one of the first importance, now that the motive power of all vessels is so greatly enhanced by it.

"The effect of this application of steam power has changed the character of war on the ocean, and invested with a greatly preponderant force those nations which possess most largely the best material for it within their own territories and the greatest number of maritime places over the globe where deposits may be conveniently provided for their use.

"It is needless to point out the superiority in this respect of the position of Great Britain. There seems no way of discussing the question other than through this example.

"Just in proportion to these advantages is the responsibility of that country when holding the situation of a neutral in time of war.

"The safest course in any critical emergency would be to

[1] Papers relating to the Treaty of Washington, IV. 74. [2] Id. 148.

deny altogether to supply the vessels of any of the belligerents, except perhaps when in positive distress.

"But such a policy would not fail to be regarded as selfish, illiberal, and unkind by all belligerents. It would inevitably lead to the acquisition and establishment of similar positions for themselves by other maritime powers, to be guarded with equal exclusiveness, and entailing upon them enormous and continual expenses to provide against rare emergencies.

"It is not therefore either just or in the interest of other powers, by exacting severe responsibilities of Great Britain in time of war, to force her either to deny all supplies, or, as a lighter risk, to engage herself in war.

"It is in this sense that I approach the arguments that have been presented in regard to the supply of coals given by Great Britain to the insurgent American steamers as forming a base of operations.

"It must be noted that throughout the war of four years supplies of coal were furnished liberally at first, and more scantily afterward, but still indiscriminately, to both belligerents.

"The difficulty is obvious how to distinguish those cases of coals given to either of the parties as helping them impartially to other ports, from those furnished as a base of hostile operations.

"Unquestionably, Commodore Wilkes, in the *Vanderbilt*, was very much aided in continuing his cruise at sea by the supplies obtained from British sources. Is this to be construed as getting a base of operations?

"It is plain that a line must be drawn somewhere, or else no neutral power will consent to furnish supplies to any belligerent whatever in time of war.

"So far as I am able to find my way out of this dilemma, it is in this wise:

"The supply of coals to a belligerent involves no responsibility to the neutral, when it is made in response to a demand presented in good faith, with a single object of satisfying a legitimate purpose openly assigned.

"On the other hand, the same supply does involve a responsibility if it shall in any way be made to appear that the concession was made, either tacitly or by agreement, with a view to promote or complete the execution of a hostile act.

"Hence I perceive no other way to determine the degree of the responsibility of a neutral in these cases than by an examination of the evidence to show the *intent* of the grant in any specific case. Fraud or falsehood in such a case poisons everything it touches. Even indifference may degenerate into willful negligence, and that will impose a burden of proof to excuse it before responsibility can be relieved.

"This is the rule I have endeavored to apply in judging the nature of the cases complained of in the course of this arbitration."

Sir Alexander Cockburn's Opinion.

Sir Alexander Cockburn contended that the term "base of naval operations" had no relation to the case of a vessel which, while cruising against an enemy's ships, puts into a port, and after obtaining necessary supplies again pursues her course, but that it referred to the use of a port or water as a place from which a fleet or a ship might watch an enemy and sally forth to attack him, with the possibility of falling back upon the port or water in question for fresh supplies, or shelter, or a renewal of operations. The term signified "a local position which serves as a point of departure and return in military operations, and with which a constant connection and communication can be kept up, and which may be fallen back upon whenever necessary."[1]

Opinion of Mr. Staempfli.

Mr. Staempfli, in his opinion in the case of the *Sumter*, said:[2]

"The permission given to the *Sumter* to remain and to take in coal at Trinidad does not in itself constitute a sufficient basis for accusing the British authorities of having failed in the observance of their duties as neutrals; because this fact can not be considered by itself, since the *Sumter*, both before and after that time, was admitted into the ports of many other states, where it stayed and took in coal, and it is proved that the last supply she obtained to cross the Atlantic did not take place in a British port; so that it can not be held that the port of Trinidad served as a base of operations for the *Sumter*."

Decision of the Tribunal.

The tribunal of arbitration, in its award, said:

"In order to impart to supplies of coal a character inconsistent with the second rule, prohibiting the use of neutral ports or waters as a base of naval operations for a belligerent, it is necessary that the said supplies should be connected with special circumstances of time, of persons, or of place, which may combine to give them such character."[3]

Statement of Viscount d'Itajubá.

In signing the award, Viscount d'Itajubá made the following statement:

"Viscount d'Itajubá, while signing the decision, remarks, with regard to the recital concerning the supply of coals, that he is of opinion that every government is free to furnish to the belligerents more or less of that article."[4]

[1] Papers relating to the Treaty of Washington, IV. 422.
[2] Id. 136. [3] Id. 50. [4] Id. 47.

It did not appear that in any case Great Britain was held responsible for the acts of a vessel in consequence of supplies of coal.

4. International Law, and not Municipal Law, the Measure of Neutral Duty.

As has been seen, Article VI. of the Treaty of Washington provided that the arbitrators should be governed by the three rules therein agreed upon, and by such principles of international law, not inconsistent therewith, as they should determine to have been applicable to the case. But while it was thus agreed that the duties which a neutral is bound to perform are not to be measured by municipal law, the question was much debated as to how far a nation, charged with a failure to perform its neutral duties, might justify itself by showing that it had employed the means provided by its municipal law for the fulfillment of those duties.

Case of the United States.

In the case of the United States, the following position was taken:[1]

"It must be borne in mind, when considering the municipal laws of Great Britain, that, whether effective or deficient, they are but machinery to enable the government to perform the international duties which they recognize, or which may be incumbent upon it from its position in the family of nations. The obligation of a neutral state to prevent the violation of the neutrality of its soil is independent of all interior or local law. The municipal law may and ought to recognize that obligation; but it can neither create nor destroy it, for it is an obligation resulting directly from international law, which forbids the use of neutral territory for hostile purpose.

"The local law, indeed, may justly be regarded as evidence, as far as it goes, of the nation's estimate of its international duties; but it is not to be taken as the limit of those obligations in the eye of the law of nations."

Again, the Case of the United States declared that "a neutral is bound to enforce its municipal laws and its executive proclamations, and that a belligerent has the right to ask it to do so; and also the right to ask to have the powers conferred upon the neutral by law increased if found insufficient."[2]

[1] Papers relating to the Treaty of Washington, I. 47.

[2] Papers relating to the Treaty of Washington, I. 87.

British Counter Case.

In the Counter Case of Great Britain, the question was presented as follows:[1]

"The propositions advanced on the part of the United States are the following:

"'1. That it is the duty of a neutral to preserve strict and impartial neutrality as to both belligerents during hostilities.'

"The British Government willingly assents to this proposition. No one indeed has yet been found to deny that it is the duty of a neutral power to be neutral; or that neutrality is, by its very definition, a condition of impartiality in matters relating to the war; or to affirm that it is possible to be neutral as to one of two belligerents without being neutral as to the other.

"'2. That this obligation is independent of municipal law.'

"The British Government accepts this proposition also.

"'3. That a neutral is bound to enforce its municipal laws and its executive proclamations, and that a belligerent has the right to ask it to do so, and also the right to ask to have the powers conferred upon the neutral by law increased, if found insufficient.'

"The British Government does not dispute that a belligerent government may, if it think fit, ask for any of these things. But that a neutral power is under an international obligation to comply with the request, or to enforce its municipal laws and all proclamations or orders issued by the executive government, is far from being universally true; it is admissible only under very material qualifications, which will be presently stated. Still less can it be admitted to be generally true that a belligerent power has a right to call upon the neutral state to make changes in its domestic legislation.

* * * * * * *

"Her Britannic Majesty's government declares, on the contrary, in the most explicit manner, that the law to which it has submitted its conduct, and by which it has consented to be tried, is the international law recognized in common by all civilized states, coupled with the three rules embodied in the treaty; that this law is to be gathered, not from British statutes or ordinances, but from the general consent of nations, evidenced by their practice; and that the laws and ordinances of Great Britain herself can be appealed to only for the single purpose of proving that her government was armed with sufficient power to discharge its international duties, and not for the purpose of extending, any more than of restricting, the range of those duties."

Argument of the United States.

From the argument of the United States we may extract the following passages:[2]

"(*b*) The efforts of the [British] Case and Counter Case to ascribe to or apportion among the various departments of national authority, legislative, judicial, and

[1] Papers relating to the Treaty of Washington, II. 207, 123.

[2] Id. III. 147.

executive, principal or subordinate, the true measure of obligation and responsibility, and of fault or failure, in the premises, *as among themselves*, seem wholly valueless. If the sum of the obligations of Great Britain to the United States was not performed, the nation is in fault wherever, in the functions of the state or in their exercise, the failure in duty arose.

"(*c*) So, too, the particular institutions or habits of the people of Great Britain, or the motives or policy of its government in respect of commercial freedom, unrestricted activity, maxims or methods of judicial procedure, limitations of prerogative, and similar internal arrangements of people and government, cease to have any efficacy in determining the judgment of this tribunal upon the fulfillment of, or default in, international duty. Domestic liberty, however valuable to and in a state, is not a warrant for international license; nor can its advantages be cherished by government or people at the cost of foreign nations. Indeed, when a special obligation or particular motive induces, and in some sense justifies, failure in international duty, the offending nation assumes the necessary amends and reparation to the foreign state. A notable instance of this is found in the course of the United States toward Great Britain, when the former had failed in what they admitted to be their international duty to prevent the outfit of French privateers by reason of certain special relations to France. Compensation to Great Britain for injuries by the offending cruisers was conceded.

"VII. The preceding observations leave the affirmative statement of the obligations resting upon Great Britain to secure the fulfillment of this international duty to the United States free from difficulty.

"(*a*) These obligations required that all *seasonable*, *appropriate*, and *adequate* means to the accomplishment of the end proposed should be applied and kept in operation by Great Britain from the first occasion for their exhibition until the necessity was over.

"(*b*) As the situation calling for the discharge of these obligations on the part of Great Britain was not sprung upon it unawares, but was created by the Queen's proclamation (a measure of state adopted after deliberation in its own government and upon conference with another great European power), the means to meet the *duties* of the proclaimed neutrality should at once have been found at the service of the government, or promptly prepared, if deficient, that no space might intervene between the deliberate assumption of these duties by the government, and a complete accession of power to fulfill them."

British Argument.

In the British argument the question was stated thus:[1]

"32. It is absolutely necessary, in considering charges such as are made against Great Britain by the United States, to

[1] Papers relating to the Treaty of Washington, III. 269–272.

take into account, for some purposes, the laws and institutions of the nation charged, the powers with which its government is invested, and its ordinary modes of administrative and judicial procedure. * * *

"33. These considerations in no way affect the principle that the duties of neutrality are in themselves independent of municipal law. Those duties are not created by municipal law; they can not be abolished or altered by it. But since, in the discharge of international duties, every nation acts through its government, and each government is confined within the sphere of its legal powers, the local law and local institutions can not be disregarded when the question arises, whether in a given case a government has sufficient grounds of belief to proceed upon, and whether it acted with proper diligence.

"34. It was therefore material to show what, at the time when the acts complained of by the United States are alleged to have been done, was the state of British law in relation to such matters; what powers the executive government possessed; in what modes those powers could be exercised, and what were the general rules of administrative and judicial procedure, including those relating to the judicial investigation of facts and the reception of evidence.

"35. In reference to this part of the question, the following propositions, already laid down on the part of Great Britain, may be repeated here:

"In every country where the executive is subject to the laws, foreign states have a right to expect—

"(*a*) That the laws be such as in the exercise of ordinary foresight might reasonably be deemed adequate for the repression of all acts which the government is under an international obligation to repress, when properly informed of them;

"(*b*) That, so far as may be necessary for this purpose, the laws be enforced and the legal powers of the government exercised.

"But foreign states have not a right to require, where such laws exist, that the executive should overstep them in a particular case in order to prevent harm to foreign states or their citizens; nor that, in order to prevent harm to foreign states or their citizens, the executive should act against the persons or property of individuals, unless upon evidence which would justify it in so acting if the interests to be protected were its own or those of its own citizens. Nor are the laws or the mode of judicial or administrative procedure which exist in one country to be applied as constituting a rule or standard of comparison for any other country. Thus, the rules which exist in Great Britain as to the admission and probative force of various kinds of testimony, the evidence necessary to be produced in certain cases, the questions proper to be tried by a jury, the functions of the executive in regard to the prevention and prosecution of offenses, may differ, as the organization of the magistrature and the distribution of authority among central and local officers also differ, from those which exist in

France, Germany, or Italy. Each of these countries has a right, as well in matters which concern foreign states or their citizens as in other matters, to administer and enforce its own laws in its own forum and according to its own rules and modes of procedure; and foreign states can not justly complain of this unless it can be clearly shown that these rules and modes of procedure conflict in any particular with natural justice, or, in other words, with principles commonly acknowledged by civilized nations to be of universal obligation.

* * * * * * *

"39. It is therefore abundantly clear that no argument against Great Britain can be founded on any supposed defect in the foreign-enlistment act.

"40. As to the general powers of the executive government in Great Britain and the rules of procedure established there, the following statements have been made on her part to the arbitrators:

"(*a*) The executive can not deprive any person, even temporarily, of the possession or enjoyment of property, nor subject him to bodily restraint, unless by virtue and in exercise of a power created and conferred on the executive by law.

"(*b*) No person can be visited with a forfeiture of property, nor subjected to any penalty, unless for breach of a law, nor unless such breach is capable of being proved against him.

"(*c*) Under the foreign-enlistment act the government had no power to seize or detain a ship, unless with a view to subsequent condemnation in due course of law, and on the ground of an infringement of the law sufficient to warrant condemnation.

"(*d*) Before authorizing the condemnation of a suspected vessel, the law required that the facts alleged against her should be capable of proof. Open investigation before a court is the mode appointed by law for sifting all allegations and distinguishing ascertainable facts from mere rumor. This is an ordeal which a British Government must always be prepared to encounter if, in the exercise of the powers intrusted to it, it seizes or interferes with the person or property of anyone within its jurisdiction. The British Government therefore justly held itself entitled and bound, before seizing any vessel, either to have sufficient proof in its possession or to have reasonable grounds for believing that it would be forthcoming before the trial if the case should begin.

"(*e*) By proof, in an English court of law, is understood the production of evidence sufficient to create in the mind of the judge or jury (as the case may be) a reasonable and deliberate belief of the truth of the fact to be proved, such as a reasonable person would be satisfied to act on in any important concerns of his own. And by evidence is understood the testimony, on oath, as to facts within his or their personal knowledge, of a witness or witnesses produced in open court and subject to cross-examination."

Sir Roundell Palmer's Supplemental Argument.

In Supplemental Arguments, Sir Roundell Palmer[1] for Great Britain, and Mr. Evarts[2] for the United States, discussed at length the prerogative powers of the British crown with respect to the prevention of hostile acts within the British realms. It was admitted by Sir Roundell Palmer "that if any military or naval expeditions, or any other acts or operations of war against the United States, in the true and proper sense of those words, had been attempted within British territory, it would not have been necessary for the British Government either to suspend the habeas corpus act or to rely on the foreign-enlistment act in order to enable it to intercept and prevent by force such expeditions or such acts or operations of war. The whole civil police," continued Sir Roundell Palmer,

"and the whole naval and military forces of the British crown would have been lawfully available to the executive government, by the common law of the realm, for the prevention of such proceedings. But the fact is, that nothing of this kind ever happened or was attempted, during the civil war in the United States, in Great Britain or in any of the British possessions, except (in the year 1863–64) in some of the British North American provinces; and when such attempts were made in those provinces the powers of the common law were at once put in force for their repression and were strengthened by special and extraordinary legislation; nor is any complaint now made by the Government of the United States of any want of due diligence on the part of the British North American authorities in that respect. Not only was no military or naval expedition and no act or operation of war ever attempted elsewhere within British territory against the United States, but (unless the arming of the *Florida* at Green Cay, in the Bahamas, be an exception) no attempt was ever made in any other part of the British dominions so much as to equip or dispatch for the Confederate service any armed vessel, by which the question whether it had or had not the character of a naval expedition prohibited by international law might have been raised."

Mr. Evarts's Oral Argument.

Mr. Evarts, in reply, said:

"If this is undoubtedly part of the common law of England, as the learned counsel states, the argument here turns upon nothing else but the old controversy between us, whether these acts were in the nature of *hostile acts*, under the condemnation of the law of nations as such, that ought to have been intercepted by the exercise of

[1] Papers relating to the Treaty of Washington, III. 399. [2] Id. 475.

prerogative, or by the power of the crown at common law, whichever you choose to call it. The object of all the discussion of the learned counsel is continually to bring it back to the point that within the kingdom of Great Britain the foreign-enlistment act was the sole authority for action and prevention, and if these vessels were reasonably proceeded against, under the requirements of administrative duty in enforcing the foreign-enlistment act, as against persons and property for confiscation or for punishment, that was all that was necessary or proper.

"Sir ALEXANDER COCKBURN. Am I to understand you as a lawyer to say that it was competent for the authorities at the port whence such a vessel escaped to order out troops and command them to fire?

"Mr. EVARTS. That will depend upon the question whether that was the only way to compel her to an observance.

"Sir ALEXANDER COCKBURN. I put the question to you in the concrete.

"Mr. EVARTS. That would draw me to another subject, viz, a discussion of the facts. But I will say that it depends upon whether the act she is engaged in committing comes within the category of *hostile acts*.

"Sir ALEXANDER COCKBURN. But taking this case, and laying aside the question of due diligence. The vessel is going out of the Mersey. Do you say as a lawyer that she should be fired upon?

"Mr. EVARTS. Under proper circumstances, yes.

"Sir ALEXANDER COCKBURN. But I put the circumstances.

"Mr. EVARTS. You must give me the attending circumstances that show such an act of force is necessary to secure the execution of the public authority. You do not put in the element that that is the only way to bring such a vessel to. If you add that element, then I say yes.

"Sir ALEXANDER COCKBURN. She is going out of the port. They know she is trying to escape from the port. Do you, I again ask—do you as a lawyer say that it would be competent for the authorities without a warrant, simply because this is a violation of the law, to fire on that vessel?

"Mr. EVARTS. Certainly, after the usual preliminaries of hailing her and firing across her bows to bring her to. Finally, if she insists on proceeding on her way, and thus raises the issue of escape from the government or forcible arrest by the government, you are to fire into her. It becomes a question whether the government is to surrender to the ship or the ship to the government. Of course, the *lawfulness* of this action depends upon the question whether the act committed is, under the law of nations, *a violation of the neutrality of the territory and a hostile act*, as, it is conceded throughout this argument. the evasion of an *armed* ship would be."

Opinion of Count Sclopis.

Count Sclopis, in his opinion, said:[1]

"I willingly admit * * * that the duties of the neutral power can not be determined by the laws which that power may have made in its own interest. This would be an easy means of eluding positive responsibilities which are recognized by equity and imposed by the law of nations. There exists between nations a general law, or, if it is preferred, a common tie, formed by equity and sanctioned by respect for reciprocal interests. This general law receives especial development in its application to acts which take place at sea, where no frontiers are marked out, and where there is the greater necessity that liberty should be secured by a common law, without which it would be impossible to defend one's self by positive guaranties from the most flagrant acts of injustice. This is what prompted the saying of one who had been brought up in the habits of servility to say: 'The Emperor is master of the earth, but the law is the mistress of the sea.' (Dix, lib. 1, de Lege Rhodia.) I grant, then, the right of the belligerent to require that the neutral should not shelter his responsibility under rules made by himself in his own interest, and I enter fully into the views of Article VI. of the Treaty of Washington, which simply gives the preference to rules of general equity over the provisions of any particular system of legislation, whatever it may be.

"It does not, however, seem to me admissible that a belligerent should be able to require of a neutral that, in order to fulfill his neutral duties, he should increase his military establishments or his ordinary system of defense. This would be an encroachment on the independence of a state, which is not bound to abdicate a portion of its material sovereignty because it finds itself involuntarily in a special position with regard to the belligerent. The neutral may be asked to put the powers of his government into full activity in order to maintain his neutrality; he can not reasonably be expected to modify the organization of his administrative machinery to serve the interests of another power.

"We must beware of rendering the condition of neutrals too difficult and almost impossible. The importance of circumscribing war is a matter of continual remark, and if neutrals are to be overwhelmed with a burden of precautions and a weight of responsibility which is in excess of the interest they have to remain neutral, they will be forced to take an active part in the war; instead of a proper inaction we should have an increase of hostilities. There will no longer be any *medii* between combatants; the disasters of war will be multiplied, and the part of mediators, which neutrals have often undertaken and brought to a successful conclusion, will forever disappear."

[1] Papers relating to the Treaty of Washington, IV. 59.

Mr. Staempfli's Opinion.

Mr. Staempfli, in his opinion, said:[1]

"The laws of a state touching neutrality do not constitute an element of the law of nations in the sense that they can not, at any time, be altered, modified, or added to without the cooperation or consent of other states, the law of nations itself being absolutely independent of these municipal laws; yet, so long as there exist such laws in a state, and they have not been abrogated, belligerent states have the right to require their loyal observance, as otherwise frauds or errors might be committed, to the detriment of one or other of the belligerents; as, for instance, when there is known to exist (although no attention may be paid to it) a decree forbidding a belligerent vessel of war to remain in a port for more than twenty-four hours, or to take on board more coal than is necessary for her to reach the nearest port of her country, or to obtain fresh supplies in the same port within three months.

"This principle, at the same time, implies that the absence of all municipal laws, or the want of sufficient laws on the subject, does not, in any way, detract from the law of nations either as regards international obligations or rights."

Award of the Tribunal.

The award of the tribunal of arbitration declared:[2]

"The government of Her Britannic Majesty can not justify itself for a failure in due diligence on the plea of insufficiency of the legal means of action which it possessed."

5. English Feeling toward the United States, and Toleration of Confederate Operations in England.

As has been seen, it was maintained in the Case of the United States that the feelings of the authorities in England were unfriendly to the United States, and that in consequence Confederate operations were tolerated.

Opinion of Count Sclopis.

Touching this point, Count Sclopis said:[3]

"The British Government was fully informed that the Confederates had established in England a branch of their means of attack and defense against the United States. Commissioners representing the government of Richmond were domiciled in London, and had put themselves in communication with the English Government. Lord Russell had received these Confederate representatives in an unofficial way. The first visit took place on the 11th of May 1861—that is to say, three days before the Queen's

[1] Papers relating to the Treaty of Washington, IV. 104.
[2] Id. IV. 51.
[3] Id. IV. 9.

proclamation of neutrality, and four days before Mr. Adams arrived in London as the minister of the United States. And further, the English Government could not but know that great commercial houses were managing the interests of the Confederates at Liverpool, a town which, from that time, was very openly pronounced in favor of the South. In Parliament itself opinions were before long openly expressed in favor of the insurgents. The Queen's ministers themselves did not disguise that in their opinion it would be very difficult for the American Union to reestablish itself as before. * * * It results from this, in my opinion, that the English Government found itself, during the first years of the war of secession, in the midst of circumstances which could not but have an influence, if not directly upon itself, at least upon a part of the population subject to the British Crown. No government is safe against certain waves of public opinion, which it can not master at its will. I am far from thinking that the *animus* of the English Government was hostile to the Federal Government during the war. Yet there were grave dangers for the United States in Great Britain and her colonies which there were no direct means for averting. England therefore should have fulfilled her duties as a neutral by the exercise of a diligence equal to the gravity of the danger. * * * It can not be denied that there were moments when its watchfulness seemed to fail and when feebleness in certain branches of the public service resulted in great detriment to the United States."

Expressions of Viscount d'Itajubá.

In a passage in his opinion on the effect of a commission, Viscount d'Itajubá said: "By seizing or detaining the vessel the neutral only prevents the belligerent from deriving advantage from the fraud committed within his territory by the same belligerent; while, by not proceeding against a guilty vessel, the neutral justly exposes itself to having its good faith justly called in question by the other belligerent."[1] Viscount d'Itajubá, however, expressed no opinion as to the state of feeling in England.

Views of Mr. Staempfli.

Mr. Staempfli, in one of his opinions, said[2] that the cases and documents put in by the two powers contained "a quantity of facts which should not be taken into consideration in the judgment to be pronounced by the tribunal," and among such facts he specified "expressions of sympathy or antipathy during the war, individual speeches in or out of Parliament or other official assemblies, the attitude of the press, etc." The facts to be taken into consideration were, he said, "only the acts

[1] Papers relating to the Treaty of Washington, 97–98.
[2] Id. 106.

and omissions of Great Britain with regard to each of the vessels which form the subject of complaint on the part of the United States."[1]

Opinion of Mr. Adams.

Mr. Adams in several places referred to evidences of feeling on the part of local authorities, as an explanation of their omission to take or to enforce legal proceedings against the operations of Confederate agents. As to the attitude of the British Government itself, he declared that in the earlier part of the conflict that government "considered it no part of its duty to originate any proceedings tending to prevention," or "to pass at all beyond the range of investigation especially pointed out by the agents of the American Government to its attention." "At a later stage of the difficulties," said Mr. Adams, "this policy appears to have been partially changed. The favorable effects of it are claimed as a merit in a portion of the papers before us, and I am ready, at any and all proper times, to testify to my sense of its efficiency and value wherever it is shown. But after close examination I fail to see any traces of this policy in the present instance."

These statements were made by Mr. Adams in his opinion in the case of the *Florida*.[2] Further on, in the same opinion, he referred to the conduct of Captain Hickley, of Her Majesty's ship *Greyhound*, in putting an officer temporarily in charge of the *Florida* at Nassau and recommending her seizure, and in this relation said:[3]

"The information of the act of Captain Hickley was transmitted to the government at London, and received the approbation of Earl Russell. Indeed, there is a degree of heartiness in the terms he uses to express it, and in his anxiety to see the officer properly secured from any hazard to himself by reason of his course, that clearly shows the earnestness of his satisfaction. I hope I may not be exceeding my just limits if I seize this occasion to do a simple act of justice to that eminent statesman. Much as I may see cause to differ with him in his limited construction of his own duty, or in the views which appear in these papers to have been taken by him of the policy proper to be pursued by Her Majesty's government, I am far from drawing any inferences from them to the effect that he was actuated in any way by motives of ill-will to the United States, or, indeed, by unworthy motives of any kind. If I were permitted to judge from a calm comparison of the relative

[1] Papers relating to the Treaty of Washington, IV. 106, 107.
[2] Id. 158.
[3] Id. 162.

weight or his various opinions with his action in different contingencies, I should be led rather to infer a balance of good-will than of hostility to the United States."

Views of Sir Alexander Cockburn.

Sir Alexander Cockburn argued at great length and with much vehemence against the charge of unfriendliness.[1]

6. DAMAGES.

The tribunal of arbitration awarded to the United States the gross sum of $15,500,000 in gold. As this amount was arrived at to some extent by mutual concessions,[2] it is not possible to state with absolute certainty all the items that entered into it, but there were certain principles that were explicitly decided, and there are certain other matters as to which it is possible to form reasonable conjectures.

Case of the United States.

In the Case of the United States the American claims were stated as follows:[3]

1. The claims for direct losses growing out of the destruction of vessels and their cargoes by the insurgent cruisers.

2. The national expenditures in the pursuit of those cruisers.

3. The loss in the transfer of the American commercial marine to the British flag.

4. The enhanced payments of insurance.

5. The prolongation of the war and the addition of a large sum to the cost of the war and the suppression of the rebellion.

The claims for direct losses were subdivided as follows:[4]

1. Claims for the destruction of vessels and property of the Government of the United States.

2. Claims for the destruction of vessels and property under the flag of the United States.

3. Claims for damages or injuries to persons, growing out of the destruction of each class of vessels.

Exclusion of the Indirect Claims.

As is elsewhere shown,[5] there arose, after the presentation of the Case of the United States, a controversy as to the jurisdiction of the tribunal of arbitration in respect of the third, fourth, and fifth classes of claims, which came to be known as the "indirect claims." The United States maintained that the

[1] Papers relating to the Treaty of Washington, IV. 313, et seq.
[2] Id. 8.
[3] Id. 185.
[4] Id. 186.
[5] *Supra*, Chapter XIV.

tribunal had jurisdiction of these claims; Great Britain denied it. On the 19th of June 1872, while an application of the agent of Great Britain was pending for an adjournment of the tribunal till the two governments might conclude a supplementary convention on the subject, Count Sclopis read, in behalf of all the arbitrators, the following statement:[1]

"The application of the agent of Her Britannic Majesty's government being now before the arbitrators, the president of the tribunal (Count Sclopis) proposes to make the following communication on the part of the arbitrators to the parties interested:

"The arbitrators wish it to be understood that in the observations which they are about to make they have in view solely the application of the agent of Her Britannic Majesty's government, which is now before them, for an adjournment, which might be prolonged till the month of February in next year; and the motives for that application, viz, the difference of opinion which exists between Her Britannic Majesty's government and the Government of the United States as to the competency of the tribunal, under the Treaty of Washington, to deal with the claims advanced in the case of the United States in respect of losses under the several heads of—1st, 'the losses in the transfer of the American commercial marine to the British flag;' 2d, 'the enhanced payments of insurance;' and 3d, 'the prolongation of the war, and the addition of a large sum to the cost of the war and the suppression of the rebellion;' and the hope, which Her Britannic Majesty's government does not abandon, that if sufficient time were given for that purpose a solution of the difficulty which has thus arisen, by the negotiation of a supplementary convention between the two governments, might be found practicable.

"The arbitrators do not propose to express or imply any opinion upon the point thus in difference between the two governments as to the interpretation or effect of the treaty; but it seems to them obvious that the substantial object of the adjournment must be to give the two governments an opportunity of determining whether the claims in question shall or shall not be submitted to the decision of the arbitrators, and that any difference between the two governments on this point may make the adjournment unproductive of any useful effect, and, after a delay of many months, during which both nations may be kept in a state of painful suspense, may end in a result which, it is to be presumed, both governments would equally deplore, that of making this arbitration wholly abortive. This being so, the arbitrators think it right to state that, after the most careful perusal of all that has been urged on the part of the Government of the United States in respect of these claims, they have arrived, individually and collectively, at the

[1] Papers relating to the Treaty of Washington, IV. 19.

conclusion that these claims do not constitute, upon the principles of international law applicable to such cases, good foundation for an award of compensation or computation of damages between nations, and should, upon such principles, be wholly excluded from the consideration of the tribunal in making its award, even if there were no disagreement between the two governments as to the competency of the tribunal to decide thereon.

"With a view to the settlement of the other claims to the consideration of which by the tribunal no exception has been taken on the part of Her Britannic Majesty's government, the arbitrators have thought it desirable to lay before the parties this expression of the views they have formed upon the question of public law involved, in order that after this declaration by the tribunal it may be considered by the Government of the United States whether any course can be adopted respecting the first-mentioned claims which would relieve the tribunal from the necessity of deciding upon the present application of Her Britannic Majesty's government."

On the 25th of June, Mr. Davis, the agent of the United States, made the following announcement:[1]

"The declaration made by the tribunal, individually and collectively, respecting the claims presented by the United States for the award of the tribunal for—1st, 'the losses in the transfer of the American commercial marine to the British flag;' 2d, 'the enhanced payments of insurance;' and 3d, 'the prolongation of the war and the addition of a large sum to the cost of the war and the supression of the rebellion,' is accepted by the President of the United States as determinative of their judgment upon the important question of public law involved.

"The agent of the United States is authorized to say that, consequently, the above-mentioned claims will not be further insisted upon before the tribunal of the United States, and may be excluded from all consideration in any award that may be made."

On the 27th of June, Lord Tenterden read the following statement:[2]

"The undersigned, agent of Her Britannic Majesty, is authorized by Her Majesty's government to state that Her Majesty's government find in the communication on the part of the arbitrators, recorded in the protocol of their proceedings of the 19th instant, nothing to which they can not assent, consistently with the view of the interpretation and effect of the Treaty of Washington hitherto maintained by them; and

[1] Papers relating to the Treaty of Washington, IV. 21.
[2] Id. 21.

being informed of the statement made on the 25th instant by the agent of the United States, that the several claims particularly mentioned in that statement will not be further insisted upon before the tribunal by the United States, and may be excluded from all consideration in any award that may be made; and assuming that the arbitrators will, upon such statement, think fit now to declare that the said several claims are, and from henceforth will be, wholly excluded from their consideration, and will embody such declaration in their protocol of this day's proceedings; they have instructed the undersigned, upon this being done, to request leave to withdraw the application made by him to the tribunal on the 15th instant for such an adjournment as might enable a supplementary convention to be concluded and ratified between the high contracting parties; and to request leave to deliver the printed argument, now in the hands of the undersigned, which has been prepared on the part of Her Britannic Majesty's government under the fifth article of the treaty with reference to the other claims, to the consideration of which by the tribunal no exception has been taken on the part of Her Majesty's government."

The declaraton of the arbitrators, accepted thus by both governments, disposed of the indirect claims, leaving only the claims for direct losses growing out of the destruction of vessels and their cargoes, and the national expenditures in the pursuit of the cruisers, for the consideration of the tribunal.

National Expenses in Pursuit of Cruisers.

As to the national expenditures in pursuit of the cruisers, the tribunal, by a majority of 3 to 2, Mr. Adams and Mr. Staempfli voting in the negative, decided that such expenditures were not properly distinguishable from the general expenses of the war carried on by the United States.[1]

This decision left only the claims for direct losses growing out of the destruction of vessels and their cargoes as a proper subject for an award of damages. Upon these claims various questions arose as to the values of the various vessels and cargoes, as to the allowance of prospective profits, especially of whalers, as to freights, as to double claims, and as to the allowance of interest.[2]

[1] Papers relating to the Treaty of Washington, IV. 43, 53.

[2] As to damages, see papers relating to the Treaty of Washington, II. 378, 392; III. 186, 212, 248–254, 315, 579; IV. 36–46. As to interest, see Id. II. 391; III. 220, 550, 568; IV. 43–46.

Prospective Profits.

At their session of the 29th of August 1872, the arbitrators unanimously decided to reject claims for prospective profits, reserving, however, the questions as to the wages of the whalers and the interest on the value of the vessels and their outfit.[1]

Freights.

As to claims for freight, the tribunal unanimously decided not to admit the gross freight, but only the net freight.[2]

Double Claims.

At its session of the 30th of August, the tribunal unanimously declared that the "double claims" should be dismissed. These were in the main cases in which the owner of the property destroyed and the insurer had each put in a claim for its value.[3]

Interest.

At the session of the 2d of September, the arbitrators by a majority of 4 to 1 decided that interest should be allowed as an element in the award of a sum in gross.[3]

Mr. Staempfli's Estimates.

At the same session Mr. Staempfli presented, at the request of the arbitrators, a synoptical table which he had prepared with reference to the award of a gross sum. This table was as follows:

Estimate of Mr. Staempfli for the determination of a sum in gross.

	After the last American table.	British allowance.	Mean.
Amount of claims	$14,437,000	$7,074,000	$10,905,000
Expenditure in pursuit	6,735,000	940,000	Struck out.
Prospective profits and interruption of voyage	4,009,100	Struck out as such, but for wages	588,000
		25 per cent on the values of vessels	400,000
			11,893,000
Round sum			$12,000,000

Interest from the 1st January 1864 to the 15th September 1872.

1. At 5 per cent during eight years and eight and one-half months	8 ×	$600,000 =	$4,800,000
	8½ ×	50,000 =	425,000
			$5,225,000
			17,225,000
Eventually one year's interest more			17,825,000

[1] Papers relating to the Treaty of Washington, IV. 43.
[2] Ibid. [3] Id. 44.

Interest from the 1st January 1864 to the 15th September 1872—Continued.

2. At 6 per cent during eight years and eight and one-half months	8 × $720,000 = $5,760,000		
	8½ × 60,000 = 510,000		
			$6,270,000
			18,270,000
Eventually one year's interest more			18,990,000
3. At 7 per cent during eight years and eight and one-half months	8 × $840,000 = $6,720,000		
	8½ × 70,000 = 595,000		
			7,315,000
			19,315,000
Eventually one year's interest more			840,000
			20,155,000
Round sum			20,000,000

Sir Alexander Cockburn's Memorandum.

Sir Alexander Cockburn, as one of the arbitrators, then presented the following memorandum on Mr. Staempfli's estimate:

"The figures in Mr. Staempfli's paper require some material corrections, as to which, as soon as they are pointed out, there can be no doubt.

"The total claim by the United States of $14,437,000 will be found, on an inspection of the United States tables, to include the following amounts:

"*a.* All the double claims, without exception, notwithstanding the clear expression of opinion on the part of the tribunal that they were to be struck out. These double claims amount to $1,682,243.

"*b.* The gross freights of the merchant vessels, amounting to $1,007,153. as to which the tribunal has decided that at the utmost only half—that is to say, $503,576—should be allowed.

"*c.* The new claim of $1,450,000, advanced for the first time on the 19th of August last, as to which claim Mr. Staempfli declared he would exclude it from consideration. It is important to observe that this new claim comprises over and above the entirely unsupported claims for shares of vessels, and for additional personal effects, the claims for wages extending over very long and varying periods. The tribunal has decided that one year's wages in respect of the whalers are to be allowed in lieu of prospective catch. For this one year's wages Mr. Staempfli has made a separate allowance of $588,000 (an allowance which can be shown to be excessive by at least $88,000), and he has therefore included in his calculation the claim for wages twice over.

"It is therefore clear that Mr. Staempfli, while he excludes some of the items of claim which the tribunal has disallowed, has omitted to strike out the other items, against which the tribunal has pronounced its opinion; but it is equally clear that all the disallowed items must be excluded before a comparison can be fairly or usefully made between the United States claim and the British estimate.

"It is necessary, therefore, in the first place, to deduct from the United States claim the three amounts specified in paragraphs *a*, *b*, and *c*, respectively, which will leave, as is shown by the annexed table, a properly reduced claim of $10,801,324, as against the British estimate of $7,465,764, if the difference between paper and gold currency be for the present purpose disregarded.

"It must, however, be carefully borne in mind that the claim of $10,801,324 includes the following items:

"1. *A claim for $659,021 for secured earnings*, which ought beyond a doubt to be reduced by an amount equivalent to the wear and tear of the whalers and their outfits, and the consumption of stores, which must have taken place before these earnings could be secured. and for which a deduction should be made, inasmuch as the full original values of the vessels and their outfits have been allowed.

"2. *The claims in respect of the merchant vessels.*—These are valued in the United States tables at more than $60 per ton on the average, although, according to the well-known official report presented to Congress in 1870, the cost of a first class perfectly new American vessel, made ready for sea, did not average that amount per ton, and although, according to the same report, the average value of American vessels engaged in the foreign trade was, in 1861, only $41, and has been since *only $45 per ton.*

"3. *The claims in respect of cargoes, the insurances*, commissions, and profits of the same, which profits are sometimes claimed at the rate of twenty, fifty, and even one hundred per cent. The various important considerations mentioned at page 13 of the British report, and the fact that numerous claims for cargoes, presented for the first time in April last, are unsupported by any vouchers, bills of lading, or like documents, undoubtedly require that a very considerable reduction should be made under this head.

"4. *Several large claims not supported by any affidavit or declaration on oath.*

"5. *Numerous clearly extravagant claims* specified in the British reports, such as the claim of $7,000 by a harpooner for personal injuries; the claim, by a passenger, of $10,000 for loss of office as consul; all the numerous claims by the masters of whalers for wages, sometimes at the rate of $15,000 or $20,000 a year, and which are, of course, superseded by Mr. Staempfli's allowance of $588,000; and many other equally exorbitant claims, more particularly specified in the British reports.

"From these considerations it is manifest that more than ample justice will be done to the United States by taking a mean between the claim of $10,301,324 and the British estimate of $7,464,764, and by adding thereto the allowance of $588,000 in lieu of prospective catch.

"Mr. Staempfli has also added, for some unknown reason, 25 per cent on the values of the whalers, an addition which can

be easily shown to be equivalent to altogether allowing over and above the original values of the whalers and their outfits a percentage exceeding 90 per cent, and this although the question of interest is still left open to the decision of the tribunal.

"Admitting, however, this extraordinary addition of 25 per cent, and the excessive estimate of the wages, it is shown by the annexed table that if Mr. Staempfli's figures be properly corrected, the estimate would scarcely exceed $10,000,000, even without any allowance being made for the great difference between the values of the paper and the gold currency.

"Mr. Staempfli's calculations of interest (supposing interest to be allowed) are made at the alternative rates of 5, 6, and 7 per cent, for the period of eight and one-half years, from the 1st of January 1864 to the 15th of September 1872.

"But to this he proposes to add another year's interest for the period of delay in payment after the date of the award which is allowed by the treaty.

"The tribunal has no power, under the treaty, to award payment of a gross sum with interest. The amount awarded is to be paid without interest, and if the tribunal were to add a year's interest to the gross sum which they would otherwise award, in respect of the year allowed for payment by the treaty, they would be doing indirectly what they have no authority to do directly, and would (it is submitted) be contravening the true intent of the treaty, and charging interest where it was the intention of the treaty that interest should not be paid.

"This is the more objectionable because it is proposed to charge a whole year's interest at either 5, 6, or 7 per cent, whereas the British Government has the option, under the treaty, to pay the sum awarded at any time *within* the year allowed for that purpose, and might certainly raise the money (if that operation were necessary) at a considerably lower rate of interest than 5 per cent."

Table in reference to the estimate of Mr. Staempfli.

Total United States claim in the last revised tables		$14,437,143
Necessary reductions to be made from the above supposed total:		
Double claims	$1,682,243	
New claims	1,450,000	
One-half gross freight	503,576	
		3,635,819
Making the total reduced claim		10,801,324
As against the British estimate of		7,464,764
The mean of these two sums is		9,133,044
Add to this Mr. Staempfli's allowances in lieu of prospective catch:		
One year's wages	$588,000	
Twenty-five per cent on the values of vessels	400,000	
		988,000
		10,121,044

Award of the Tribunal.

After a detailed deliberation, the tribunal, by a majority of 4 to 1, Sir Alexander Cockburn dissenting, decided to award in gross the sum of $15,500,000, to be paid in gold by Great Britain to the United States.

The formal award, in relation to damages, was as follows:[1]

"And whereas, so far as relates to the particulars of the indemnity claimed by the United States, the costs of pursuit of the Confederate cruisers are not, in the judgment of the tribunal, properly distinguishable from the general expenses of the war carried on by the United States:

"The tribunal is, therefore, of opinion, by a majority of three to two voices—

"That there is no ground for awarding to the United States any sum by way of indemnity under this head.

"And whereas prospective earnings can not properly be made the subject of compensation, inasmuch as they depend in their nature upon future and uncertain contingencies:

"The tribunal is unanimously of opinion—

"That there is no ground for awarding to the United States any sum by way of indemnity under this head.

"And whereas, in order to arrive at an equitable compensation for the damages which have been sustained, it is necessary to set aside all double claims for the same losses, and all claims for 'gross freights,' so far as they exceed 'net freights;'

"And whereas it is just and reasonable to allow interest at a reasonable rate;

"And whereas, in accordance with the spirit and letter of the Treaty of Washington, it is preferable to adopt the form of adjudication of a sum in gross, rather than to refer the subject of compensation for further discussion and deliberation to a board of assessors, as provided by Article X. of the said treaty:

"The tribunal, making use of the authority conferred upon it by Article VII. of the said treaty, by a majority of four voices to one, awards to the United States a sum of $15,500,000 in gold, as the indemnity to be paid by Great Britain to the United States, for the satisfaction of all the claims referred to the consideration of the tribunal, conformably to the provisions contained in Article VII. of the aforesaid treaty."

7. Decisions as to Particular Cruisers.

We now proceed to set forth the discussions, opinions, and decisions in respect of each cruiser before the tribunal. In the American Case claims were made not only on account of the *Florida*, the *Alabama*, the *Georgia*, and the *Shenandoah*, which originally proceeded from British ports, but also on account of

[1] Papers relating to the Treaty of Washington, IV. 53.

the *Nashville*, the *Sumter*, and other vessels, which were alleged to have used British ports as bases of supplies. The British Case and Counter Case maintained that the submission under the treaty was limited to the four vessels first above named. The tribunal, however, considered all the claims presented, and decided them on their merits. Damages were awarded only for the acts of the *Florida* and her tenders, the *Alabama* and her tenders, and of the *Shenandoah* after she left Melbourne. As to the *Georgia*, *Sumter*, *Nashville*, *Tallahassee*, and *Chickamauga*, respectively, the tribunal found that Great Britain had not incurred any liability.[1]

The cases of the *Sallie*, *Jefferson Davis*, *Music*, *Boston*, and *V. H. Joy*, respectively, were excluded from consideration for want of evidence.

The proceedings of the tribunal in respect of particular vessels were as follows:

a. The Sumter.

Position of the United States.

The Case of the United States set forth that the *Sumter* escaped from the passes of the Mississippi on the 30th of June 1861, and on the 30th of the following July arrived at the British port

[1] The votes of the tribunal on the question of Great Britain's liability in each of the cases considered was as follows:

Sumter	Unanimously "No."
Nashville	Unanimously "No."
Retribution	Mr. Adams, "Yes, for all the acts of this vessel." Mr. Staempfli, "Yes, as to the loss of the *Emily Fisher*." Sir Alexander Cockburn, Viscount d'Itajubá, and Count Sclopis answered "No."
Georgia	Unanimously "No."
Tallahassee	Unanimously "No."
Chickamauga	Unanimously "No."
Alabama	Unanimously "Yes."
Shenandoah	Mr. Adams, Mr. Staempfli, and Count Sclopis answered "Yes; but only for the acts committed by this vessel after her departure from Melbourne, on the 18th of February 1865." Viscount d'Itajubá and Sir Alexander Cockburn answered "No."
Florida	Mr. Adams, Viscount d'Itajubá, Mr. Staempfli, and Count Sclopis answered "Yes." Sir Alexander Cockburn answered "No."

The votes on the *Tuscaloosa*, the tender of the *Alabama*, and the *Clarence*, *Tacony*, and *Archer*, tenders of the *Florida*, were the same as on the principal vessels. (Papers relating to the Treaty of Washington, IV. 37, 38.)

of Trinidad. Here her commanding officer exhibited a commission signed by Jefferson Davis, as president of the Confederate States, whereupon she was recognized as a man-of-war, being the first vessel belonging to the Confederate States that was so recognized. She remained at Trinidad for six days, taking in "a full supply of coal and other necessary outfit." She sailed on August 5, 1861, and, after a cruise in which she destroyed six vessels carrying the flag of the United States, arrived at Gibraltar on the 18th of the following January. Here she was shut in by the U. S. man-of-war *Tuscarora*, which anchored off Algeciras. Being unable to escape, she lay at Gibraltar till December 19, 1862, when she was sold at "public auction." Mr. Adams, the minister of the United States at London, protested against the sale on the ground that the purchase of ships of war belonging to enemies was "held in the British courts to be invalid," as well as on the ground that the sale was fictitious. Earl Russell replied that the British Government "could not assume that the *Sumter* had not been legally and *bona fide* sold to a British owner for commercial and peaceful purposes," but that "it would not deny the right of the adverse belligerent to ascertain, if such vessel were captured by its cruisers, whether the vessel had rightfully, according to the law of nations, come into the possession of the neutral." It turned out that the purchaser was an agent of Fraser, Trenholm & Co., the Confederate depositaries at Liverpool. The vessel was taken to Liverpool, thoroughly repaired, and, under the name of the *Gibraltar*, furnished with a British register. She then took on board a cargo of arms and munitions of war with a view to run the blockade.

The Case of the United States asked the tribunal of arbitration to find that Great Britain had failed in her neutral duties on the following grounds:

1. That the *Sumter* was permitted to receive at Trinidad a full supply of coal. While there were no precedents at the time that settled absolutely the quantity of coal which might be furnished to a belligerent steam man-of-war by a neutral, instructions issued by Her Majesty's government a few months later provided that the supply should be measured by the capacity of the vessel to consume it, and should be limited to what might be necessary to take it to the nearest port of its own country, or to some nearer destination. The President's

proclamation of October 8, 1870, issued during the Franco-German war, limited the supply of coal to the vessels of war or privateers of the belligerents to so much as might be sufficient to carry the vessel, if without sail power, to the nearest European port of its own country; if with sail power, to half that quantity. Under this rule the *Sumter* would have been entitled to receive only what would be necessary to take her to New Orleans or Galveston.

2. That the *Sumter* was in the port of Gibraltar when the instructions of January 16, 1862, were published there, on the 11th of February, by which she ought to have been required to leave the port within twenty-four hours, or, if without coal, within twenty-four hours after getting a supply of it. She was permitted to remain twelve months, while the instructions were rigidly enforced against the vessels of the United States. Had they been enforced against the *Sumter*, vessels of the United States, which were then on her track, would have captured her.

3. That the sale of the *Sumter* was a palpable evasion. It was probable that there was never any change of ownership. But, if there was, it was equally probable that the money found its way to the credit of the insurgents in their Liverpool transactions.

Position of Great Britain.

On the part of Great Britain, liability on account of the *Sumter* was denied on the following grounds:

The *Sumter* was a merchant steamer purchased by the Confederate Government in one of its own ports about or soon after the commencement of the war, and afterward fitted and commissioned as a public ship of war of the Confederate States. After she put to sea she entered in succession the Spanish port of Cienfuegos, the Dutch port of St. Annes, Curaçao, the Venezuelan port of Puerto Cabello, the British port of Trinidad, the Dutch port of Paramaribo, the Brazilian port of San Juan de Maranham, the French ports of Port Royal and St. Pierre, in Martinique, the Spanish port of Cadiz, and the British port of Gibraltar. "In each of these ports she was received as a commissioned man-of-war. At Cienfuegos, Curaçao, Paramaribo, Trinidad, Maranham, and Martinique she obtained supplies of coal and provisions. At Curaçao she appeared to have stayed seven days; at Paramaribo, twelve; at Maranham, nine; at Martinique, fourteen; at Cadiz, thirteen. The

period of time which elapsed between the dates at which she was suffered to coal at various ports appears to have been as follows: From Cienfuegos to Curaçao, ten days; from Curaçao to Trinidad, six; from Trinidad to Paramaribo, fourteen; from Paramaribo to Maranham, six; from thence to Martinique, fifty-five; from Martinique to Cadiz, forty-two. As to the quantity of coal which she took on board, she appears to have obtained 100 tons at Cienfuegos, 120 tons at Curaçao, 80 at Trinidad, 125 at Paramaribo, and 100 at Maranham. At Martinique she received, by the written permission of the governor, a sufficient stock to carry her across the Atlantic. At Trinidad she had applied for leave to purchase coal from the government stores, but this request was refused, and she procured it from private merchants. * * * Of the prizes taken by the *Sumter* eleven were captured before she put in at Trinidad; none between the date of her leaving Trinidad and that of her arriving at Paramaribo; * * * two between Paramaribo and Puerto Cabello; three after leaving Martinique."

As to the grounds on which liability for the *Sumter* was sought to be established, Great Britain took the following grounds:

1. That "international law sets no limit to the quantity of coal which may be obtained by a belligerent cruiser in a neutral port;" and that there "is no such thing, therefore, as an 'excessive' supply." But if there had been any foundation for the "pretended rule" which the United States set up, there was no evidence that the supply of coal obtained by the *Sumter* at Trinidad was more than enough to carry her home.

2. That the *Sumter* arrived at Gibraltar after the orders limiting the period during which belligerent vessels of war were to be suffered to remain in British ports, and that they could not, therefore, with justice be applied to her.

3. That the *Sumter*, after her arrival at Gibraltar, was disarmed, and her crew dismissed, and after she was sold she was never used for war; that while the sale of a belligerent ship of war cooped up by an enemy in a neutral port had been adjudged by a prize court of that enemy to be *invalid* for the purpose of transferring title to the neutral and terminating the risk of capture, yet such a sale was not *illegal*. It violated no law, and called for no interference on the part of the neutral government; and when the *Sumter* left Gibraltar she left unarmed and at the mercy of any United States ship which might fall in with her.

Argument of the United States.

In the argument of the United States it was stated that when the *Sumter* appeared at Puerto Cabello, in Venezuela, she was ordered to "take her departure within four and twenty hours," and that she left on the morning of the next day; that on her arrival at Cadiz, on January 4, 1862, she was permitted, after a careful survey, to go into dock and make such slight repairs as were immediately necessary, but that the minister of the United States at Madrid reported that "if it had not been for the example of what had taken place with the *Nashville* in an English port" he believed "the *Sumter* would have been forced to go to sea from Cadiz as she came." It was also stated that when the United States complained of the reception of the *Sumter* at Curaçao and Paramaribo the Government of the Netherlands instructed its colonial authorities not to admit, except in case of shelter from stress (*relâche forcée*) the vessels of war and privateers of the two belligerent parties unless for twice twenty-four hours, and not to permit them, when they were steamers, to provide themselves with a quantity of coal more than sufficient for a run of twenty-four hours; that the crew of the *Sumter* was not discharged and paid off till April 1862, and that she was yet in port fully armed when, on December 8, she was advertised to be sold at public auction, a prior attempt to sell her by private contract having miscarried in consequence of an informality.

Opinion of Viscount d'Itajubá.

Viscount d'Itajubá expressed the opinion that Great Britain had not incurred any liability on account of the *Sumter*.

Mr. Adams's Opinion.

Mr. Adams held that, as to the question whether the *Sumter* had made use of the ports or waters of Great Britain as a base of naval operations, the only resemblance to such a thing was the supply of coals received at Trinidad. But this supply "was exhausted without an opportunity of doing damage before reaching the port of another sovereign, and nothing was ever received from British sources afterward. I fail, therefore," continued Mr. Adams, "to see wherein Her Majesty's government has omitted to fulfill any duty presented in this case, for I can not discover what duty she was called to fulfill. * * * It is alleged that she (the *Sumter*) was suffered to remain an undue length of time in the port of Gibraltar, and that a fraudulent sale was recognized which enabled the insurgents

to transfer the vessel to Liverpool, and use her again, under a British register, as a transport for their cause. The answer to this is, that her detention at Gibraltar, however it may be considered, was certainly productive of no damage, while her presence on the ocean might have been. And as to the fraudulent sale, the vessel was open to capture in her defenseless state, and it was conceded that no reclamation could have been made for it. So likewise she was open to capture in her latest capacity as transport. In neither case does Her Majesty's government appear to me to have incurred any responsibility under the three rules of the treaty which can be estimated in damages."

Mr. Staempfli's Opinion.

Mr. Staempfli held that Great Britain had not failed in her duties, as laid down in the three rules of the Treaty of Washington, in respect to the *Sumter* up to the arrival of the vessel at Gibraltar, and was not, therefore, responsible for the ships destroyed during her cruise. But he expressed the opinion that Great Britain had violated the second rule in affording her a protracted shelter, and in permitting her disarmament and pretended sale, in the port of Gibraltar, and was therefore responsible for the sum for which the vessel, her armament and equipment, were sold, for the expenses incurred by the ships of the United States in watching her during her stay at Gibraltar, and for the expense of her pursuit after her departure from that port. Mr. Staempfli, however, subsequently modified this opinion, and concurred in the decision unanimously reached by the arbitrators in the case of the *Sumter*.

Sir Alexander Cockburn's Position.

Sir Alexander Cockburn argued at length that Great Britain had not incurred any liability in the case.

Award.

In its award, the tribunal unanimously held that, in respect to the *Sumter*, "Great Britain has not failed, by any act or omission, to fulfill any of the duties prescribed by the three rules of Article VI. in the Treaty of Washington, or by the principles of international law not inconsistent therewith."

b. The Nashville.

(For the full record of the arbitration in this case see Papers relating to the Treaty of Washington, as follows: American Case, I. 132; British Case, id. 232; British Counter Case, II.

295; American Argument, III. 138; Mr. Evarts's Special Argument, id. 461; Opinion of Viscount d'Itajubá, IV. 101; Opinion of Mr. Adams, id. 212; Opinion of Sir Alexander Cockburn, id. 519; Award, id. 52.)

Case of the United States.

The Case of the United States set forth that the *Nashville*, a large paddle-wheel steamer formerly plying between New York and Charleston, armed with two guns and commanded by an officer who had been in the United States Navy, ran out from Charleston on the night of October 26, 1861, and arrived at the British port of St. George, Bermuda, on the 30th of the same month. Here, by permission of the government, she took on board 600 tons of coal, and this act was approved by Her Majesty's secretary of state for the colonies. In view of the rule as to supplies of coal which was subsequently adopted by Her Majesty's government, the United States insisted, as they had done in the case of the *Sumter*, that a supply of 600 tons was greatly in excess of the *Nashville's* needs, and that the most she should have received was enough to take her back to Charleston. She left Bermuda on November 5 and arrived at Southampton on the 21st of the same month, having destroyed at sea a United States merchant ship. At Southampton she underwent repairs and received 150 tons of coal. On the 4th of February 1862 she left Southampton and proceeded to Bermuda, where she arrived on the evening of the 20th. On the preceding day the consul of the United States had received from the government official notice that the government of Her Majesty had determined not to allow the formation in any British colony of a coal depot for the use of vessels of war of the United States. The *Nashville*, however, took on board 150 tons of coal, and left the port under the escort of Her Majesty's steamer *Spiteful*. Under the circumstances, the United States maintained that Great Britain had failed to discharge her neutral obligations.

The British Case and Counter Case.

The British Case stated that on the first visit of the *Nashville* to Bermuda the authorities refused a request of her commander for leave to draw a supply of coals from Her Majesty's dockyard, and that she secured a supply from a private yard. When she arrived at Southampton directions were sent from the foreign office that she should not be allowed to equip herself more completely as a vessel of war, or to take in guns or munitions of

war. Representations made by Mr. Adams were duly attended to, and the vessel was watched. The repairs which she received did not in any way fit her more completely as a vessel of war. In July 1862 the United States steamer *Tuscarora* was at Southampton for about three weeks undergoing repairs. In both cases Her Majesty's government observed the duties and limitations of neutrality.

In the British Counter Case it was observed that the decision of Her Majesty's government, in respect of the formation of coal depots at Bermuda, did not prohibit the taking of coal by the cruisers of either belligerent from private sources, and did not prevent United States ships of war from subsequently obtaining there, on two or three occasions, like supplies when necessary. As to the departure of the *Nashville* under the alleged "escort" of Her Majesty's steamer *Spiteful*, it was stated that this was only a measure of precaution adopted by the admiral on the station, as when the *Nashville* sailed there were several vessels in sight, some of which might have been American, and the admiral thought it advisable to send the *Spiteful* outside to insure respect being paid by the *Nashville* to the British territorial limits.

It was shown that the first supply of coal obtained by the *Nashville* at Bermuda was about 450 tons.

Opinion of Viscount d'Itajubá.

Viscount d'Itajubá expressed a formal opinion to the effect that Great Britain had not failed in any neutral duty in respect of the *Nashville*.

Opinion of Mr. Adams.

Mr. Adams in his opinion referred to the fact, which had been pointed out in the American case, that the *Nashville* in order to get speedily out of Charleston Harbor had been compelled to go light, in consequence of which she stood in need of considerable supplies of coal at Bermuda to enable her to effect her contemplated passage to Southampton. But, said Mr. Adams, in order to bring the vessel within the purview of the second rule of the Treaty of Washington it was necessary to consider the question of intent on the part of the British authorities, as well as that of negligence. He could not gather sufficient material to enable him to decide against Her Majesty's government on either of these points. At the outset of the struggle and before the receipt of clear directions to regulate their conduct, it might very well happen that the authorities in the

remote dependencies of the empire would make mistakes of judgment in permitting supplies, without meaning to be partial to one side or the other. He had no reason to suspect that the same measure would not at that time have been granted to any vessel of the United States. A few tons more or less of coal could scarcely be called convincing proof of malicious intent, and from his observations of the general course of Governor Ord, of Bermuda, he had failed to gather any clear traces of a disposition to be otherwise than impartial.

With respect to the stay of the *Nashville* at Southampton and the supplies obtained there, Mr. Adams said that he did not find that the case was essentially different from that of the United States steamer *Tuscarora*, which was at that port at the same time. Last of all, he entertained serious doubts whether the *Nashville* was ever intended by those who fitted her out, for the purpose of cruising as a depredator on the ocean. The governor of St. Georges seemed to have been convinced that the object of the ship was connected with the establishment of diplomatic relations in Europe and procuring naval supplies and stores. At one time the vessel was intended to bring out Messrs. Mason and Slidell, and she actually did have on board Colonel Peyton, supposed to be charged with a mission of the same kind. The two captures which she made seemed to have been of vessels she chanced to meet with on her straight course to Southampton and back, without the slightest deviation from her track. On the whole, Mr. Adams said that he failed to find solid ground upon which to base any charge either of intention or negligence against Her Majesty's government in the case of the *Nashville*.

Award. The tribunal of arbitration unanimously found that Great Britain had not failed, in respect of the *Nashville*, by any act or omission, to fulfill any of the duties prescribed by the three rules of Article VI. of the Treaty of Washington, or by the principles of international law not inconsistent therewith.

c. The Florida, and her tenders the Clarence, the Tacony, and the Archer.

(For the full record of the arbitration in the case of the *Florida*, see Papers relating to the Treaty of Washington, as follows: American Case, I. 99, 100, 101, 133; British Case, id. 274; American Counter Case, id. 437; British Counter Case,

II. 299, 350; American Argument, III. 57; British Argument, id. 274, 283; Argument of Sir Roundell Palmer, id. 541; Argument of American Counsel, id. 546; Opinion of Count Sclopis, IV. 90; Opinion of Viscount d' Itajubá, id. 98; Opinion of Mr. Steampfli, id. 108; Opinion of Mr. Adams, id. 150; Opinion of Sir Alexander Cockburn, id. 367; Award, id. 51.)

Case of the United States.

The American Case set forth that the *Florida*, originally known as the the *Oreto*, was a bark-rigged, iron-screw gunboat, of about 700 tons burden, constructed at Liverpool under a contract made with Fawcett, Preston & Co., by Captain Bullock, the agent in Europe of the Confederate navy. It was pretended that she was constructed for the Italian Government, but the Italian consul at Liverpool disclaimed any knowledge concerning her.

By February 4, 1862, said the Case of the United States, the *Oreto* was taking in coal, and appearances indicated that she would soon leave without her armament. February 17 she made her trial trip, and by the 1st of March had taken in a large quantity of provisions. Gun carriages were taken on board, in pieces, some in a rough state, and were put in the hold Although apparently ready to sail, she lingered about Liverpool till the 22d of March; on the 11th of that month she was visited in the Mersey by Captain Bullock and four other insurgent naval officers, who were entertained on board. Simultaneously with these proceedings, cannon, rifles, shot, shells, and other munitions of war, intended for the vessel, were shipped from Hartlepool by the steamer *Bahama* for Nassau.

On February 28, and again on March 25, 1862, said the Case of the United States, Mr. Adams, who was informed by the United States consul at Liverpool of what was taking place, called Earl Russell's attention to the character and destination of the vessel. The British commissioners of customs at Liverpool reported, however, that while the *Oreto* was a vessel of war, pierced for four guns, they believed that her destination was Palermo, and that she was intended for the Italian Government. They subsequently reported that she was registered on the 3d of March in the name of Henry Thomas, of Liverpool, as sole owner, and that she cleared on the following day for Palermo and Jamaica in ballast, but did not sail till March 22, when she had a crew of fifty-two men, all British, except three or four, only one of whom was an American.

Such an examination and report could not, said the American Case, be regarded as an exercise of the due diligence called for by the rules of the Treaty of Washington; and the neglect to prevent her departure from Liverpool, where she was fitted out and equipped for war, lacking only her armament to enable her to do battle, constituted a failure to use the due diligence required by the second clause of that treaty.

The *Oreto*, continued the American Case, arrived at Nassau on April 28, 1862, and was taken in charge by Heyliger, a recognized Confederate agent. A few days later the *Bahama* arrived, and the two branches of the hostile expedition, which had left Great Britain in detachments, were thus united in British waters. The United States consul at Nassau called the attention of the governor to the character of the vessel, but at first the latter declined to interfere. On the 7th of June, however, the *Oreto* and the *Bahama* were both arrested and brought to an anchorage in the harbor of Nassau. On the following day Captain Semmes and his officers from the *Sumter* arrived as passengers in a mail steamer from England, and the *Florida* was released, her agents having assured the governor that it was their intention to clear in ballast for Havana. The consul of the United States then appealed to Captain Hickley, of Her Majesty's ship *Greyhound*, who, after making an investigation and drawing up an opinion that the *Oreto*, as she then stood, could, by going out with another vessel alongside, be equipped in twenty-four hours for battle, sent a file of marines on board and took her into custody.

A trial under the foreign enlistment act, begun on July 4, 1862, was, declared the Case of the United States, conducted as a formality, and without any effort to elicit the truth. The court ruled out all evidence as to what took place before the arrival of the vessel at Nassau, and she was released. In the meantime one of the Confederate officers had enlisted a crew at Nassau, and on the 8th of August the *Oreto* was cleared, ostensibly for St. Johns, New Brunswick. On the following day a schooner sailed from Nassau with cannon, shot, shells, and provisions, and laid her course for Green Cay, one of the British Bahamas, about sixty miles distant. The *Oreto*, then lying outside with a hawser attached to one of Her Majesty's ships of war, cast off and took the schooner in tow. The arms, munitions, and stores were soon transferred, and the schooner returned to Nassau unmolested. The *Oreto*, now called the

Florida, made for the coast of Cuba. The tribunal was asked to find that these proceedings at Nassau and in the Bahamas constituted a violation of neutral duty.

At Cardenas, in Cuba, said the American Case, the *Florida* attempted to ship men, but was prevented by the authorities from doing so. On the 4th of September she ran through the blockading squadron at Mobile, pretending to be a British man-of-war, and flying British colors. She remained at Mobile till the 16th of January 1863, when she made her escape.

On the 26th of January 1863, said the Case of the United States, the *Florida* reentered the port of Nassau, having destroyed three vessels. She was cordially received, and was permitted to remain thirty-six hours, during which time she took in coal and provisions to last for three months, with the permission of the authorities, in violation of the instructions of January 31, 1862, which commanded (with certain exceptions) the departure of belligerent vessels within twenty-four hours, denied supplies beyond what might be necessary for immediate use, and forbade the taking of more coal than would carry the vessel to the nearest home port, or some nearer destination, or the taking of coal in British waters more than once in three months, unless by special permission. These rules were, said the Case, rigidly enforced against the United States, and their relaxation in favor of the Confederacy, so that British territory was made a base of hostile operations, constituted a breach of neutrality.

The *Florida* left Nassau January 27, 1863. On February 24 she obtained at Barbados about a hundred tons of coal, in violation of the instructions of January 31, 1862. On the 26th of February she sailed again from Nassau, and in a short time had captured or destroyed fourteen vessels, so that on April 25, 1863, her commander was able to boast that "six million dollars will not make good the devastation this steamer has committed."

On the 16th of July 1863 the *Florida*, said the American Case, arrived at Bermuda, where she remained nine days, was thoroughly repaired, and took in a full supply of coal which had been brought to her from Halifax, notwithstanding the general order that neither belligerent should be permitted to make coal depots in British colonial ports. This constituted a fresh violation of neutral duty. From Bermuda she sailed for Brest, and on the way destroyed two vessels. In

June 1864 she again appeared at Bermuda and made application to be permitted to repair. She was accorded permission to remain five days for that purpose, but actually remained nine. When she sailed on the 27th of June she took with her 135 tons of coal and large quantities of ship's stores. Subsequently she destroyed five merchant vessels of the United States, her career as a cruiser ending at Bahia on the 7th of October 1864.

During the cruise of the *Florida*, said the Case of the United States, three tenders were fitted out and manned from her officers and crew—the *Clarence*, the *Tacony*, and the *Archer*. The *Clarence* was destroyed when the *Tacony* was fitted out, and the *Tacony* was in turn destroyed when the *Archer* was fitted out. Each of these vessels made captures; the *Archer* destroyed the U. S. revenue cutter *Caleb Cushing*.

The Case of the United States asked the tribunal, if it should exercise the power to award a sum in gross for the *Florida* and her tenders, to take into account the losses of individuals in the destruction of their vessels and cargoes, and the expenses to which the United States were put in the pursuit of each of the offending vessels.

The British Case.

According to the British Case, the *Florida* was ordered of her constructors for and on account of a resident of Liverpool, who was a partner in a mercantile house at Palermo, and on her completion was registered in the name of this person, on his own declaration. Though her fittings and arrangements were suitable to a ship of war, she was unarmed and had on board no guns or warlike stores. No facts proving, or tending to prove, that she was intended to cruise or carry on war against the United States were communicated to Her Majesty's government before the ship's departure; and it was certain that, if she had been seized, a court of law would have ordered her restoration, for want of evidence to support a forfeiture.

The vessel sailed from Liverpool, said the British Case, with a clearance for Palermo and Jamaica, unarmed and with no warlike stores of any kind, under the command of a master belonging to the British mercantile marine, and manned by a crew who were not enlisted for the Confederate service and had no thought or intention of engaging in it, and who afterward left the ship as soon as they conceived a suspicion that she might be employed in that service. When she arrived at Nassau,

though no warning had been sent to the authorities in regard to her, she was watched by order of the governor; a ship of war was placed near her; she was finally seized by order of the governor, and proceedings were instituted against her in the proper colonial court. The assumption on which the judge appeared to have proceeded, that evidence of acts done before the arrival of the *Oreto* could not be received, unless for the purpose of explaining acts done after her arrival, was perhaps erroneous. Her Majesty's government believed that in a proceeding *in rem* against a ship under the foreign enlistment act to enforce a forfeiture, a court, wherever situate within the dominions of the Crown, might lawfully receive and adjudicate upon the evidence of such infringement, wherever the act or acts constituting it might have been committed; yet the decision of the court at Nassau was the judgment of a court of competent jurisdiction, and was, as such, binding on the executive authorities of the colony. Nor could proof of acts done out of the limits of the colony have altered the decision of the court, unless it had supplied evidence of an unlawful intention.

On being released at Nassau the *Oreto*, continued the British Case, sailed unarmed, with a clearance for New Brunswick. Before committing any hostilities against the vessels of the citizens of the United States she sailed for and entered the Confederate port of Mobile, where she remained during more than four months and was put in condition for war, and enlisted a crew, and from whence she was finally sent out to cruise. She was commissioned as a ship of war of the Confederate States, and was commanded by an officer commissioned by the government of those States. She was received on the footing of a public ship of war in the ports of neutral nations—Spain, France, and Brazil. No advantage was conceded to the *Florida* either at Nassau or at Barbados which had not before been granted to the cruisers of the United States. It appeared that both the United States ship *San Jacinto* and the *Florida* had been permitted to obtain coal at Barbados in less than three months after they had respectively coaled at another British colony, the commander of each vessel having alleged that his supply of coal had been exhausted by stress of weather; and in consequence on July 16, 1863, the colonial secretary expressed a dispatch to the governor of Barbados, and similar instructions were sent to governors of other colonies in the West Indies. directing that no special permission be given for the taking of a second supply of coal within

three months from the last, unless it appeared that, owing to real necessities arising from stress of weather, the coal originally given had been prematurely exhausted before it was possible that the vessel could, under existing circumstances, have reached the destination for which she coaled, or if she had not since taking coal been *bona fide* occupied in seeking her alleged destination, but had consumed her coal in cruising. At Brest, on the contrary, the *Florida* was permitted to remain nearly six months, from August 23, 1863, till February 9, 1864, during which time she effected repairs, refitted, had her small arms mended, and enlisted a large number of sailors in place of those whose terms of service expired.

The United States men-of-war blockading the port of Mobile, said the British Case, failed to capture the *Florida* when she entered it, under circumstances which made the capture so easy of accomplishment that the officer to whose incapacity the failure was due was dismissed the service. They again failed to capture her when she left the port to commence her cruise; nor was any serious endeavor to capture her made by the United States. Her Majesty's government could not admit that, in respect of the *Florida*, it was chargeable with any failure of duty.

It appeared by the British evidence that an inquiry made of the Italian Government before the *Oreto* left Liverpool elicited the response that the government knew nothing of the vessel.

The American and British Counter Cases brought out nothing beyond some minor corrections of statements of facts.

Effect of the Entry into Mobile.

The question as to the legal effect of the *Florida's* entrance into the port of Mobile was made the subject of special argument by counsel on both sides.

Argument of Sir Roundell Palmer.

Sir Roundell Palmer, on behalf of Her Majesty's government, argued that even if the antecedent facts were such as to show a want of due diligence in respect of the vessel, it did not follow that such want of diligence involved, as its legitimate consequence, responsibility for her acts, since she never cruised or committed any act of hostility against the United States until after she had been for a long interval of time in a Confederate port, and had then issued as a duly commissioned Confederate cruiser, and in an altered condition as to her capacity for war. The *Florida* did not enter the port of Mobile merely *in transitu*, or as a point of immediate departure for a subsequent cruise, for

which the necessary preparation had already been made in British territory; but she remained there for more than four months, and there engaged the crew which enabled her to go to sea and commit hostilities. Treating the transaction as one of a breach of blockade, or as the conveyance of contraband, the direct agents in conveying the *Florida* into Mobile would not have been under any continuing responsibility under international law after leaving her there and returning to their own country. Ought then such a continuing responsibility to attach to a nation from whose territory she was sent out merely for want of due diligence to prevent the transaction? The legitimate inference was that any responsibility previously incurred came to its natural end when, no act of war having previously been committed, the *Florida* was once at home at Mobile, and became *bona fide* incorporated, within their own territory, into the naval force of the Confederate States. This principle was, said Sir Roundell Palmer, a legitimate inference from the opinion of Chief Justice Marshall in the case of the *Gran Para*, 7 Wheaton, 471.

Views of American Counsel.

Messrs. Cushing, Evarts, and Waite, counsel for the United States, maintained that the analogy sought to be created by Sir Roundell Palmer to the case of contraband trade was but a subtle form of the general argument that the outfit of the *Florida* was but a dealing in contraband of war, and was to carry no other consequence of responsibility than the law of nations affixed to such dealing. This argument had, however, been suppressed by the rules of the treaty, and the case of the *Gran Para* was a direct authority for continuing responsibility. The British argument amounted to the proposition that the seamen enlisted at Mobile became thereafter the effective maritime war power of the *Florida*, and that the cruiser and her warlike qualities became of secondary importance. In fact, the evidence of what occurred at Mobile by no means showed that the crew with which the *Florida* left that port consisted of original enlistments there, or of more than in many cases the mere reenlistment of her former crew.

Opinion of Count Sclopis.

Count Sclopis held that Great Britain was responsible for the acts of the *Florida*. When, he said, the vessel arrived at Nassau, she was, as shown by the report of Captain Hickley, possessed of a complete warlike equipment, and all that was wanting on board

of her was a supply of munitions of war. The situation at Nassau increased the responsibility of England, since the port was one from which hostile operations might conveniently be carried on, either by the Confederacy or by the United States. Under these circumstances was it not the imperative duty of England to take care that all the duties of the most scrupulous neutrality were fulfilled? The decision of the vice-admiralty court, acquitting the vessel, did not release the English Government from responsibility under the rules of the Treaty of Washington, though it might have been conclusive as between the British Government and those who claimed the vessel. In respect of the United States it was *res inter alios acta*. The conduct of the vessel within British jurisdiction after her release more than justified all the suspicions that had been entertained as to the true character of her voyage.

As to the application of the second rule of the Treaty of Washington, touching the use of neutral ports or waters as the base of naval operations, Count Sclopis thought it sufficiently proved that the facility with which the *Florida* was allowed to supply herself with coal in the colonial ports was not in conformity with the strict neutrality which should have been observed in those latitudes, to say nothing of the question whether there was not a too easy compliance with the wishes of the commander of the vessel in regard to repairing and refitting.

As to the stay of the *Florida* in the port of Mobile, and the consequences resulting therefrom, Count Sclopis said that he adopted the views presented by Mr. Staempfli.

As to the tenders fitted out and forming part of the forces of the *Florida*, Count Sclopis was of opinion that the responsibility of the British Government was the same as in respect of the principal vessel.

Opinion of Viscount d'Itajubá.

Viscount d'Itajubá expressed the opinion that, in view of all the facts relating to the building of the vessel and her departure from Liverpool, her stay at Nassau, her armament at Green Cay, and, in spite of her known infractions of the British neutrality, her subsequent reception in colonial ports, the British Government was responsible under the rules of the Treaty of Washington for the acts of the *Florida* and her tenders, notwithstanding her entrance and stay in the port of Mobile.

Opinion of Mr. Staempfli.

Mr. Staempfli held that there was a lack of "due diligence" in the fulfillment of neutral duty (1) in regard to the construction, fitting out, and equipment of the *Oreto* at Liverpool and her departure from that port, and the departure of the *Bahama*, laden with arms for the *Oreto*, particularly as the British authorities did not communicate with or send instructions to the colonial authorities with respect to the vessels; (2) in regard to what took place at Nassau—the absence of all initiative to ascertain the truth, the defective nature of the judicial proceedings, the omission of all measures to prevent her arming and equipping in British waters, and the failure subsequently to take proceedings against her on charges of violation of British neutrality when opportunity offered; and (3) in regard to her being allowed to supply herself with coal in such quantities that each time she was enabled to undertake a fresh cruise.

As to the effect of the entrance of the *Florida* into the port of Mobile through the blockade, Mr. Staempfli held that, even if the charge of negligence against the officers maintaining the blockade had been proved, this fact would not have released Great Britain from responsibility for her own negligence, which was the primary cause of the vessel's hostile career.

In respect of the tenders of the *Florida*, Mr. Staempfli held that the same rules applied as in the case of the principal vessel.

Opinion of Mr. Adams.

Mr. Adams, in his opinion on the case of the *Florida*, maintained that the information in the possession of Her Majesty's government, before the sailing of the *Oreto* from Liverpool, was such as ought to have shaken faith in the statements of the parties who alleged the innocent character of the vessel. If the information furnished by Mr. Dudley, the United States consul at Liverpool, had been followed up with diligence, it would certainly have ended in the detention of the *Oreto*, which detention, at that critical moment, would probably have had the effect of putting a stop to all similar enterprises. But the government did not seem to have been, at that moment at least, conscious of any obligation to originate investigations at all. An inquiry made of the Italian Government twenty days before the escape of the *Oreto* had elicited a response which, if not absolutely decisive as to the destination of the vessel, certainly tended to throw the gravest possible doubt upon it. Yet it did not appear that the attention of the

parties concerned in misstating the destination of the vessel was called to their misstatement, though the motive of it, in view of the existence of a state of peace in every quarter of the civilized world but one, was scarcely open to doubt. It did not appear that the movements of the vessel were even watched by the authorities at Liverpool. It did not seem to have occurred to those authorities to ask themselves why, if the dispatch of the steamer was a legitimate act, there was need of the falsehood about the Italian Government, and the further falsehood as to the ownership of the vessel; nor did it seem to have occurred to Her Majesty's government to consider whether they had not been cheated by their own officers. The diligence manifested by the British authorities in the case was not such as was contemplated by the language of the treaty, because it was not in any sense a spontaneous movement. It did not get beyond the mere examination of representations made by the agent of the United States, and if these representations were explained satisfactorily to the British authorities they presumed that their obligations were fully performed. At a later stage of the difficulties this policy appeared to have been partially changed; but there was no trace of such a change in the case of the *Florida*.

The authorities at Nassau, following the example given in the mother country, did not, said Mr. Adams, consider it incumbent upon them to initiate any measures of a preventive nature. Their course amounted to holding that it was not until a vessel should have succeeded in an undertaking of an illegal nature, which would necessarily imply her escape from the jurisdiction, that the proper time would have come for proceeding with proof that she ought to have been detained. In spite of the report made by Commander Hickley at Nassau, the colonial attorney-general gave the opinion that no case had been made out for seizure. This was the "passive policy," the example of which had been set at home. The evidence must come to the government—it was not for the government to come to the evidence. The governor, however, was not altogether satisfied with the passive policy recommended by the attorney-general, and decided in favor of the seizure of the vessel, with a view to the submission of the question to the local court of vice-admiralty.

As to the decision of the vice-admiralty judge, Mr. Adams declared that he was oppressed by the conviction that in no portion of the history of the proceeding was the responsibility

of Her Majesty's government for the subsequent career of the vessel more deeply implicated. It was clear by the evidence before the tribunal of arbitration that the judge was not sustained by the law officers of the crown at home in his view of the law, and it could only be assumed that there was some external bias which induced him to give credit to certain persons on the mere score of personal character, and to discredit the seamen, who clearly told the substantial truth. The judge seemed to have partaken so largely of the general sympathy admitted by the governor to have held sway over the entire population of the island as to render him incapable, in the case, of a perception of justice. As to the action of the attorney-general, said Mr. Adams, it seemed to have been influenced in the earlier stages of the struggle in America by the belief that the fate of the Union was settled. But, however this might be, the vessel was discharged and no serious attempt was made to prevent the full accomplishment of the purpose of her owners.

In respect of this transaction, Mr. Adams expressed the opinion that Great Britain had failed in her duty both under the first and the second rule of the Treaty of Washington, and consequently under the third.

As to the entrance of the *Florida* into the port of Mobile and her subsequent departure therefrom with an additional force of fifty-four men, Mr. Adams observed that the *Florida* immediately returned to the very spot where her flagrant violations of British neutrality had been perpetrated, and was immediately recognized as a legitimate belligerent. Coal and provisions were permitted to be taken in such quantities as to put the vessel in a condition to commence and continue for some time a predatory cruise. Subsequently, after a cruise of about a month, a further supply of coal was obtained at Barbados, the fact of her late supply at Nassau being suppressed. When information of these events was received at the colonial office in London, the liberty was checked, and orders were issued to be more cautious in the future. After a visit of four days to Pernambuco, the next British port entered by the *Florida* was Bermuda, on the 15th of July. An application for government coal was here for the first time refused; but a plentiful supply was obtained from other sources, and the commander transgressed the limit prescribed for his stay for repairs without censure. This enabled him to cross the ocean and reach Brest,

in France, on August 23, 1863. In this long cruise, from January 25 to August 23, nearly seven months, supplies of coal were received exclusively from British sources.

As to the question whether any change as to the original character in the vessel might be considered to have taken place by reason of her having succeeded in reaching a port of the belligerent power to which she claimed to belong, Mr. Adams said that he could not arrive at any conclusion which even implied an assent to the proposition "that *success sanctifies fraud.*" It was conclusively established that from the moment of inception to that of complete execution the building, equipping, and dispatching of the vessel were carried on by a resort to every species of falsehood and fraud, in order to baffle and defeat the legitimate purpose of Her Majesty's government to uphold the sanctity of its laws and make good its obligations to a foreign nation with which it was at peace. Her Majesty's government might well have seen fit to mark its disapprobation of the indignities thus heaped upon it by at least excluding the vessel from its ports. But it could not be supposed that the moral stain attached to a transaction of the character in question could be wiped out by the mere incident of visiting one place or another, without any material alteration of the constituent body inspiring its action. The *Florida* carried "the same indelible stamp of dishonor from her cradle to her grave."

For this reason, said Mr. Adams, he was of opinion in the case of the *Florida* that Great Britain, by reason of her omission to use due diligence to prevent the fitting out, arming, and equipping within her jurisdiction of that vessel, and further, of her omission to forbid the crew of the vessel from making use of her ports or waters as the base of operations against the United States, had failed to fulfill the duties set forth in each and all of the three rules of the Treaty of Washington.

Sir Alexander Cockburn's Opinion.

Sir Alexander Cockburn maintained that the British Government had incurred no responsibility in the case of the *Florida*. The information furnished to that government before her departure from Liverpool was not, he argued, such as would have warranted the condemnation of the vessel, and if she had been seized she must inevitably have been released. The allegation of the United States consul at Liverpool that gun carriages

had been conveyed on board of the vessel proved to have been a mistake. All that could under the circumstances be asked for was an inquiry. This Her Majesty's government at once instituted. The responses made by the authorities at Liverpool were of such a character that the government would have acted most improperly in directing a seizure. The answer of the Italian minister for foreign affairs as to the destination of the vessel, that he had no knowledge of it, was not conclusive, since the subject belonged to the department of marine, and no answer was received at London from that department until after the vessel had sailed. If the United States consul had possessed such positive information as he professed to have in regard to the character and destination of the gunboat, he should have communicated it to the legation at London for communication to Her Majesty's government. As to the clearing of the vessel for Palermo and Jamaica, Sir Alexander argued that even if the vessel was intended for the Italian Government, it was not impossible that it might also be intended that she should make a voyage to the West Indies before being parted with by the builders. In order to warrant the condemnation of the vessel it would have been necessary to show not only that she was equipped for war, as to which there would have been no difficulty, but also that she was intended to be used against a belligerent with whom Great Britain was at peace. On this subject there was no evidence beyond surmise, suspicion, and rumor. When the guns were shipped to Hartlepool to be loaded in the *Bahama*, even the United States consul at Liverpool did not himself suspect that they were intended for the *Oreto*. There was not in England, any more than in America, any system of espionage or secret police; and it could not be contended that the government ought to have abandoned principles and rules theretofore held sacred for the benefit of other nations embarked in quarrels and wars in which she herself had no concern, at all events before experience had shown that the existing law was insufficient. Such a proposition would really amount to saying that Great Britain was to be held responsible because her law ought to have been other than it was.

Sir Alexander Cockburn maintained similar views in regard to what took place at Nassau. He admitted that with the result of the trial he was anything but satisfied. The vessel ought, in his opinion, to have been condemned. The judge

made a mistake in holding that her equipment, in any part of the British dominions, for a purpose prohibited by the foreign enlistment act, would not, so long as the property in her remained in a British subject, form a sufficient ground for condemnation in any court of competent authority within whose jurisdiction the vessel might be found, though no part of such equipment might have taken place within such jurisdiction. That she was equipped, though not armed for war, not only when at the Bahamas, but also when she left Liverpool, was undoubted. The obstacle to her seizure at Liverpool was the absence of sufficient proof of her being intended for a belligerent, but the character of forfeiture, having once attached to her, remained permanently affixed, and might be enforced by proceedings *in rem* by any competent court within the jurisdiction of the Crown. At the same time Sir Alexander Cockburn repelled the imputation of improper motives to the local officials.

As to the arming of the *Oreto* at Green Cay, Sir Alexander argued that there was no proof of negligence on the part of the British authorities.

As to the question whether Great Britain, even if open to the imputation of not exercising due diligence in respect of the original equipment of the *Oreto*, or of her arming at Green Cay, could be held responsible for the acts of the ship after her entry into Mobile, Sir Alexander Cockburn, while granting that the right of a belligerent to redress for a breach of neutrality under international law would not be affected by a judicial proceeding under municipal law, yet contended that the original equipment of the *Oreto*, though an offense against the municipal law of Great Britain, was not, there being up to the time of her arrival at Nassau no present intention of war, an offense against international law, and that, by her acquittal at Nassau of the alleged offense against British municipal law, the original vice became purged and the matter was at an end. "It might indeed," said Sir Alexander, "be answered that a second offense was committed within the British jurisdiction by the arming at Green Cay, but here, again, there" was "no breach of neutrality according to international law, if, owing to the deficiency of the crew, there was no present intention of applying the ship to the purposes of war." The effect of this argument was to maintain that the illegal voyage of the *Florida*, on which any liability could be

asserted, came to an end with her arrival at Mobile, if not with her departure from the Bahamas; but Sir Alexander Cockburn also contended that Her Majesty's government had no right to seize the *Florida*, or any other cruiser, after she was commissioned by a belligerent as a ship of war.

Award. The tribunal of arbitration, Sir Alexander Cockburn dissenting, rendered, in respect of the *Florida*, the following award:

"And whereas, with respect to the vessel called the *Florida*, it results from all the facts relative to the construction of the *Oreto* in the port of Liverpool, and to its issue therefrom, which facts failed to induce the authorities in Great Britain to resort to measures adequate to prevent the violation of the neutrality of that nation, notwithstanding the warnings and repeated representations of the agents of the United States that Her Majesty's government had failed to use due diligence to fulfill the duties of neutrality;

"And whereas it likewise results from all the facts relative to the stay of the *Oreto* at Nassau, to her issue from that port, to her enlistment of men, to her supplies, and to her armament, with the cooperation of the British vessel, *Prince Alfred*, at Green Cay, that there was negligence on the part of the British colonial authorities;

"And whereas, notwithstanding the violation of the neutrality of Great Britain committed by the *Oreto*, this same vessel, later known as the Confederate cruiser *Florida*, was nevertheless on several occasions freely admitted into the ports of British colonies;

"And whereas the judicial acquittal of the *Oreto* at Nassau can not relieve Great Britain from the responsibility incurred by her under the principles of international law, nor can the fact of the entry of the *Florida* into the Confederate port of Mobile, and of its stay there during four months, extinguish the responsibility previously to that time incurred by Great Britain:

"For these reasons,

"The tribunal, by a majority of four voices to one, is of opinion—

"That Great Britain has in this case failed, by omission, to fulfil the duties prescribed in the first, in the second, and in the third of the rules established by Article VI. of the Treaty of Washington."

d. The Alabama, and her tender, the Tuscaloosa.

(For the full record of the arbitration in this case, see Papers relating to the Treaty of Washington, as follows: American Case, I. 99, 146; British Case, id. 308; American Counter Case,

id. 438; British Counter Case, II. 308, 358; American Argument III. 80; British Argument, id. 276, 283; Opinion of Count Sclopis, IV. 75; Opinion of Viscount d'Itajubá, id. 99; Opinion of Mr. Staempfli, id. 116; Opinion of Mr. Adams, id. 171; Opinion of Sir Alexander Cockburn, id. 446; Award, id. 51.)

Case of the United States.

The American Case set forth that the *Alabama* was a barkentine-rigged man-of-war, of about 900 tons burden, designed as a scourge of the enemy's commerce rather than for battle. Her armament consisted of eight guns. She was built for a Confederate vessel of war, under a contract signed probably in October 1861, between Captain Bullock, agent of the Confederate navy, on the one part, and Messrs. Laird & Co., shipbuilders of Liverpool, on the other part. During her construction Bullock went on board of her almost daily, and she was in fact constructed under his superintendence.

The vessel was launched May 15, 1862, under the name of the *290*. On June 23 Mr. Adams wrote to Earl Russell, and, recalling the case of the *Florida*, apprised his lordship that a new and more powerful war steamer was nearly ready to depart from Liverpool on the same errand, and that the parties engaged in the enterprise were persons well known in Liverpool to be agents and officers of the insurgents; and asked that such action might be taken as would tend either to stop the projected expedition, or to establish the fact that its purpose was not hostile to the United States.

On the 4th of July Earl Russell communicated to Mr. Adams a report from the customs authorities at Liverpool by which, while it was admitted that the vessel was evidently intended for a ship of war, it was suggested that the proper course would be for the United States consul at Liverpool, Mr. Dudley, to submit to the collector of the port such evidence as he possessed tending to show that the vessel was intended for the use of the Confederacy, in order that measures might be taken under the foreign enlistment act. The report closed by saying that the officers at Liverpool would keep a strict watch on the vessel.

On July 9 Mr. Dudley, in obedience to the suggestion of the authorities, submitted a statement to the collector at Liverpool, but the latter pronounced it insufficient, in point of law, to warrant the detention of the ship, and said that it must be substantiated by evidence. Mr. Dudley then caused a copy

of the statement to be laid before Mr. Collier, an eminent barrister, who subsequently became the principal law adviser of the crown. Mr. Collier advised that the principal officer of the customs at Liverpool be applied to to seize the vessel with a view to her condemnation, and at the same time to communicate the fact to the secretary of state for foreign affairs, with the request that Her Majesty's government would direct the vessel to be seized, or to ratify the seizure if it had been made.

The collector, continued the Case of the United States, refused to seize the vessel, and Mr. Dudley proceeded to obtain direct proof as to her character. On July 21 he laid it, in the form of affidavits, before the collector at Liverpool, in accordance with an intimation which Mr. Adams had received from Earl Russell. These affidavits were transmitted on the same day to the board of customs at London, with a request for telegraphic instructions, as the ship appeared to be ready for sea and might sail at any time. On July 23 Mr. Dudley went to London and laid the affidavits before Mr. Collier, who gave it as his opinion that it would be difficult to make out a stronger case of infringement of the foreign enlistment act, and that it deserved consideration whether, if the vessel should be allowed to escape, the Government of the United States would not have serious grounds for remonstrance. As time was important, Mr. Dudley laid Mr. Collier's last opinion before the under secretary of state for foreign affairs, who was not disposed to discuss the matter, and before the secretary of the board of customs, who said that the board could take no action without orders from the treasury lords.

The affidavits and the opinion of Mr. Collier were, said the Case of the United States, also communicated to Her Majesty's government through the regular diplomatic channels, some of the affidavits being sent by Mr. Adams to Earl Russell on July 22 and the rest on the 24th. The papers were not considered by the law officers of the crown till July 28. On the evening of that day they agreed on their report and it was in Earl Russell's hands early on the 29th. Orders were then immediately sent to Liverpool to stop the vessel. She left the port that morning. In an interview on the 31st of July Earl Russell told Mr. Adams that the delay in determining upon the case of the *290* had most unexpectedly been caused by the sudden development of a malady of the Queen's advocate, Sir John D. Harding, totally incapacitating him for business. Earl Rus-

sell said that he would, however, send directions to have the vessel stopped if she went, as was probable, to Nassau.

The departure of the vessel from Birkenhead was, declared the Case of the United States, hastened by the receipt of illicit intelligence of the probable intention of the government to detain her. She steamed slowly down to Moelfra Bay, on the coast of Anglesey, where she remained a day and two nights, no effort being made to seize her. During this time a tug (the *Hercules*) was permitted by the authorities, though they were notified of the circumstances, to take to the vessel from Liverpool about forty men, who, with those already on board, raised the number of the crew to about ninety. After the vessel left Moelfra Bay she ran around the north coast of Ireland and then made for Terceira, one of the Azores, which she reached on August 10. A few days later the bark *Agrippina*, of London, arrived with her armament, coal, and stores, and on August 20 the steamer *Bahama*, the same that had taken the armament to the *Florida*, arrived with Captain Semmes and other officers of the *Sumter* and two 32-pounders and some stores. On August 24 the Confederate flag was hoisted, and the vessel, now under the name of the *Alabama*, sailed away.

When the *Alabama* left Liverpool she was, said the American Case, even more completely fitted out as a man-of-war than the *Florida* at the time of her departure. Earl Russell, in an official note to Mr. Adams, stated that it was "undoubtedly true that the *Alabama* was partly fitted out in a British port." From Terceira she crossed to the West Indies, again taking coal from the *Agrippina*, which had been sent from England to Martinique for that purpose. She thence passed into the Gulf of Mexico, destroying merchant vessels of the United States and the United States war steamer *Hatteras*. January 18, 1863, she arrived at Jamaica and was granted permission to repair. After having been refitted and furnished with supplies she sailed to Bahia, in Brazil, and thence to the Cape of Good Hope, where, on her arrival in Table Bay, she announced that the *Tuscaloosa*, a wool-laden prize which she had captured off the coast of Brazil, would soon arrive as a tender. In due time the *Tuscaloosa* arrived, with the original cargo of wool on board, and anchored in Simons Bay. Rear-Admiral Sir Baldwin Walker informed the governor that she was not sufficiently armed for any services other than

those of slight defense, and intimated that she was styled a tender merely for the purpose of evading the prohibition against the entrance of prizes and of enabling her to dispose of her valuable cargo. The governor, acting upon the advice of the attorney-general, held a different view. The wool was disposed of to a Cape Town merchant, and was landed, for the purpose of transshipment to Europe, at a place outside of British jurisdiction.

The proceedings of the colonial authorities in this instance were, said the Case of the United States, apparently disapproved by the home government. But when, on the *Tuscaloosa's* coming into port again, after a cruise on the coast of Brazil, she was seized and the fact reported to London, Her Majesty's government ordered her to be restored to the Confederate agents.

From Cape Town the *Alabama* passed into the Indian Ocean. December 23, 1863, she coaled at Singapore, and on March 21, 1864, less than three months after obtaining that supply, she returned to Cape Town and began taking in coal again.

The United States asked the tribunal of arbitration, as to the *Alabama* and her tender, to hold the British Government responsible for the destruction of vessels and their cargoes, and for the expenses to which the United States was put in the pursuit of either of the cruisers.

Specifically, the grounds on which this award was asked were as follows:

1. That the *Alabama* was constructed, fitted out, and equipped within British jurisdiction with intent to cruise and carry on war against the United States, and that Great Britain, having reasonable ground to believe that such was the intent of the vessel, did not use due diligence to prevent such construction, fitting out, or equipping.

2. That, as the construction of the vessel and the construction of the arms, and the dispatch of the vessel and the dispatch of the arms, all took place at one British port, the authorities having had such notice that they must be assumed to have known the facts, the whole must be regarded as one armed hostile expedition from a British port against the United States.

3. That the *Alabama*, having been specially adapted to warlike use at Liverpool, and being intended to carry on war against the United States, Great Britain did not use due dili-

gence to prevent her departure either from Liverpool or from the colonial ports which she subsequently visited.

4. That Great Britain did not, as Earl Russell had promised, send out orders for her detention.

5. That the *Alabama* received excessive hospitalities at Cape Town on her last visit, in being allowed to coal in less than three months after coaling at Singapore.

6. That the responsibility for the acts of the *Alabama* carried with it responsibility for the acts of her tender.

The British Case.

The facts relating to the construction of the *Alabama* as stated in the British Case, did not, substantially vary from the facts stated in the American Case. It had been stated in the case of the *Florida* that one of the members of the firm by which the *Alabama* was constructed was a member of the House of Commons. The British Case said that this allegation, if true, would be immaterial; but Her Majesty's government was informed that Mr. John Laird, who was a member of Parliament for Birkenhead, and had formerly been a partner in the business, had ceased to be so before the building of the *Alabama*. The building of ships of war for foreign governments had, however, said the British Case, formed a part of the ordinary business of the firm. The vessel in question appeared to have been completed by the builders for delivery in the port of Liverpool and to have been delivered accordingly; and there was no reason to doubt that the whole transaction was performed in the ordinary course of business, though the firm probably knew of the employment for which she was intended by the person or persons by whose order she was built.

Competent evidence tending to prove the existence of an unlawful intent was, said the British Case, first obtained by the customs officials at Liverpool on the 21st of July 1862, and came into the possession of Her Majesty's government on the following day. This evidence was very scanty. Further testimony was obtained on July 23 and July 25. On the evidence so received it was the right and duty of Her Majesty's government to consult its officials and legal advisers. The illness of one of these legal advisers occasioned some delay. On July 29 the government was informed that the evidence was sufficient to justify seizure. On that day the *Alabama* put to sea. She had not been registered, no application for a clearance was made, and the intention to carry her to sea was concealed

an artifice. Orders for arresting her were, however, sent by the government to various places at which she might probably touch after leaving Liverpool for Nassau. She sailed from England unarmed and with a crew hired to work the ship and not enlisted for the Confederate service. She received the armament at a distance of more than a thousand miles from England, either in Portuguese waters or on the high seas. The guns and ammunition had been exported from England in an ordinary merchant steamer, which loaded them as cargo, and sailed with a regular clearance for Nassau.

The *Alabama*, said the British Case, was commissioned by the Confederate Government, and commanded and officered by American citizens. A considerable part of her crew were British subjects who were induced by promises of reward to take service in her while she was off Terceira. After she was commissioned she was admitted in the character of a ship of war into the ports of all the countries visited by her; and she was so received in several British colonies without favor or partiality. On May 11, 1863, she arrived at Bahia in Brazil, having previously touched at the Brazilian island of Fernando de Noronha. About the same time the *Florida* and the *Georgia* also were in Brazilian ports, where they were permitted to purchase coal and provisions and to refit. The minister of the United States at Rio de Janeiro warmly contended that the three vessels were piratical and should be treated as such, affirmed that the *Alabama* while at Fernando de Noronha had violated the neutrality of Brazil by making prize of American vessels within the territorial waters of the empire, and insisted that it was the duty of the Emperor's government to capture her. In reply the Brazilian Government adhered to the position which it had assumed in its circular of August 1, 1861, in which it refused to consider the Confederate vessels as privateers or to deny them belligerent rights, though it deprived the governor of the Island of Fernando de Noronha of his office because he had taken no steps to prevent the *Alabama* from making prizes within territorial waters. The *Alabama* remained at Bahia for eight or nine days. No serious endeavor to capture her appeared to have been made by the Government of the United States. During her whole cruise of more than two years she was only twice encountered by United States ships—once in the Gulf of Mexico, when she sank her opponent, and again when she eluded the pursuit of the *San Jacinto* at Martinique.

American Counter Case.

The American Counter Case called attention to the fact disclosed by the British Case, that, although the commissioners of customs knew on July 29 that the *Alabama* had escaped on that day, it was not till August 1 that the collectors at Holyhead and Beaumaris received instructions to detain her. On August 2 the collector at Beaumaris reported that the *Alabama* had left Point Lynas on the morning of July 31. If, therefore, the instructions given on August 1 had been given July 29 the *Alabama* might have been detained at Point Lynas. The American Counter Case averred that the evidence showed that a large portion of the original crew of the *Alabama* knew quite well whither they were going. It was also averred that the United States made great efforts and incurred great expenses to capture the *Alabama*.

British Counter Case.

The British Counter Case stated that Her Majesty's government did not dispute that at the time the *Alabama* sailed from England she was, as regarded the general character of her construction, specially adapted for warlike use, and that the question for the arbitrators was whether the British Government had, according to the fair and just sense of the words, reasonable ground to believe that she was intended to carry on war against the United States, and, having such ground, failed to use due diligence to prevent her equipment or her departure.

The British Counter Case contended that it had not been shown by the United States that, prior to the time when Mr. Adams laid his representations before Earl Russell, any circumstances tending to prove that the ship was intended for the Confederate States were notorious at Liverpool, or ought to have been known to the British Government or its officers. The assertion that the British Government, throughout the war, would originate nothing for themselves, and would listen to no representations from the officials of the United States which did not furnish technical evidence for a criminal prosecution was, declared the British Counter Case, opposed to facts disclosed in the Case of the United States as well as in the Case of Great Britain. It was, however, doubtless true that neutral governments ordinarily expected to receive information from the ministers or consuls of belligerent powers touching violations of neutrality, since those officials had the keenest incitement to vigilance in such matters, and were likely to be the first recipients of intelligence. This had been the general

practice of neutral governments, and it had been followed by the United States.

As to the alleged promise of Earl Russell to send orders to Nassau for the seizure of the *Alabama*, the British Counter Case said that such orders were sent, but that the contingency contemplated in them did not occur, since the *Alabama*, instead of going to Nassau, went to Terceira; and when she first appeared in British waters she was commissioned as a ship of war and had been received as such at Martinique, a French port. As to what took place at Cape Town, the British Counter Case maintained that the *Alabama* did not begin coaling at Table Bay till the 21st or the 22d of March 1864, exactly three months after she had last coaled at Singapore.

Argument of the United States.

The Argument of the United States called attention to the fact that no evidence whatever had been produced to show that any officer of the British Government ever propounded to the builders of the *Alabama*, or to any other person, a direct question as to the destination of the vessel, and insisted upon an answer or a refusal to answer, although, long before her departure, the law officers of the crown had given an opinion that she must be intended for warlike purposes, and one of the builders of the vessel, on being inquired of by one of the officers of the government, did not appear to be disposed to reply to any question with reference to the destination of the vessel after she left Liverpool. In April 1862 the builders stated to a visitor that the vessel was intended for the Spanish Government; but inquiries made by the consul of the United States at Liverpool, through the Spanish consul at that port, elicited an assurance from the Spanish minister that the statement was not true. No steps were taken by the authorities at Liverpool to ascertain the truth of the statements submitted by the United States consul at that port. Earl Russell admitted that the cases of the *Alabama* and *Oreto* were "a scandal and in some degree a reproach" to the British laws; but the fault, said the American Argument, was not in the law, but in its execution. The Argument of the United States also pointed out that after the conclusion, by the Brazilian Government, of its investigation of what the *Alabama* did at the Island of Fernando de Noronha, an order was made that the vessel should not again be admitted into any port of the empire.

British Argument.

In the British Argument the ground was taken that the charge of the United States in respect of the *Alabama* reduced itself to the contention that between the 21st and 29th of July 1862 the British Government took a little more time to satisfy itself that there were grounds sufficient to warrant the seizure than the United States thought was necessary. This contention made no allowance for reasonable doubts, for deliberation on difficult questions of law, or for the casual impediments which were liable to occur in matters of administration. Even if it should appear that, through the fault or mistake of any subordinate official of the government, a possibility of detaining the vessel was let slip without the knowledge of the government, this could not be held to afford a foundation for charging Great Britain with a failure of duty and a grave international injury. It had not been and could not be shown, in the case of the *Alabama*, that the British Government, having reasonable ground to believe that she was intended to cruise and carry on war against the United States, failed to use due diligence to prevent her from being fitted out, armed, or equipped for that purpose within British territory, or from departing thence after having been specially adapted to warlike use.

Opinion of Count Sclopis.

Count Sclopis, in his opinion, referred to the fact that the builders did not attempt to disguise the circumstance that the *Alabama* was intended for a ship of war; to the promise of the British Government to keep a special watch upon her, and to the system adopted by the customs officials of taking no initiative, but of always requiring of the United States such formal proof as was admissible before an English court of law. The circumstances of the illness of the Queen's advocate could not, said Count Sclopis, be accepted as an excuse for the long delay in acting upon the evidence submitted to the British Government, since there were other counsel, and any delay was perilous. The British Government had represented the United States as assuming that that government, with its various departments, and with its necessarily more or less complicated methods of action, should act at all times with a mechanical precision which was not applicable to the practical business of life. But the circumstances in which the British Government was placed did not represent the ordinary course of life. Great interests were at stake; but the measures

taken for the preservation of English neutrality were neither very complicated nor overarduous. The case of the *290* was not an ordinary case. When the departure of the vessel was ascertained, Earl Russell, foreseeing that it might not be possible to arrest her in the waters on the coast of England, where a search was being made for her, said that he would give orders for her arrest at Nassau. When she quitted Moelfra Bay she had a crew of eighty men. She kept for some time along the Irish Sea, then rounded the north coast of Ireland, and steered for Terceira, where she arrived on the 10th of August. Here she was joined by two vessels, which had also started from English ports, and which brought a supply of cannon, munitions, and stores. The combined action of these vessels entailed a joint responsibility. Sir Robert Peel, in the House of Commons, April 28, 1830, said: "Was it then to be contended that no expedition was a military expedition, except the troops had their arms on board the same vessel with them? If they were on board one vessel and their arms in another, did that make any difference? Was such a pretense to be tolerated by common sense?" When the *Alabama* arrived at Jamaica she was not arrested, though there were three English men-of-war in the port; but she was supplied with the means of repairing her damages, and seven days afterward she steered for the coast of Brazil. The conduct of the English authorities on this occasion was approved by Earl Russell. She was also permitted to repair at Cape Town. The *Tuscaloosa* was also treated at that port as a ship of war, when in reality she was a prize. In conclusion Count Sclopis expressed the opinion that the neutrality of Great Britain was gravely compromised by the *Alabama*, and that that government was responsible for her acts, as well as for those of her tender, the *Tuscaloosa*.

Opinion of Viscount d'Itajubá.

Viscount d'Itajubá held that from all the facts relating to the building of the *290* at Liverpool, it was evident that Great Britain had neglected to use due diligence for the fulfillment of its neutral duties, since, notwithstanding the repeated warnings and representations of the diplomatic and consular authorities of the United States while the *290* was in course of construction, no suitable measures were taken, and those that were at length adopted were too late to be executed; that after the escape of the vessel the measures for arresting her were so in-

complete that they could not be considered sufficient to free England from responsibility; that in spite of the flagrant infractions of neutrality committed by the *290*, this vessel, then known as a Confederate cruiser under the name of the *Alabama*, was again admitted on several occasions into the ports of British colonies, whereas she ought to have been proceeded against in the first British port in which she might have been found; that Great Britain had thus failed to fulfill the duties prescribed in the rules laid down in Article VI. of the Treaty of Washington, and was consequently responsible for the acts of the *Alabama* and of her tender, the *Tuscaloosa*.

Mr. Staempfli's Opinion.

Mr. Staempfli said it was beyond doubt that the *Alabama* was fitted out in British ports as a vessel of war of the insurgent States; that the example of the *Oreto* made it the duty of the British authorities to be on their guard against acts of that kind; that they did not in any way take the initiative in inquiring into the true state of affairs, even after representations were made by Messrs. Adams and Dudley; that, after sufficient evidence was furnished, the examination of it was so delayed, and the measures taken to arrest the vessel were so defective, that she was enabled to escape just before the order for her seizure was given; that the orders to pursue and arrest the vessel were not given until forty-eight hours afterward, and were sent only to a few ports close at hand; that no instructions to arrest her were sent to any ports out of England except that of Nassau; that no vessels, even, were sent in pursuit into the neighboring British waters; that no proceedings were instituted against the persons who had enlisted the crew, or against those who had conveyed her armament on board, or against those who had ordered or who had built her; that the disciplinary penalties inflicted on some of her seamen on their return to England could not be looked upon as a serious prosecution; that in view of the illegal and fraudulent origin of the vessel, and the complicity of the insurgent government and its agents, it was the duty of the British authorities to seize the vessel in whatever British port she might be found, and that the British Government had admitted this duty so far as the port of Nassau was concerned.

As to the defensive argument of the British Government, that the arming and equipping of the vessel took place in waters beyond the British jurisdiction, Mr. Staempfli said that,

according to the first rule of the Treaty of Washington, and according to international law, even a partial equipment for warlike purposes was not allowable, and that this was admitted by the law officers of the crown in their opinion of July 29, 1862. But, in fact, the armament and original equipment of the *Alabama* were prepared within British jurisdiction, and the division of the operation did not do away with the offense. Mr. Staempfli also held that the fact of the *Alabama* having been commissioned as a cruiser of the Confederate States did not relieve the British Government from the duty of arresting her when she subsequently entered a British port. As to the question of responsibility for the negligence of subordinate officials, Mr. Staempfli said that while Great Britain could not be held responsible for indiscretions which might have been committed by some unknown subordinate, and while an act of imprudence or negligence on the part of subordinate authorities did not necessarily entail responsibility for the extreme consequences of such act, yet, when a series of acts of neglect was in question, each of them became important and must be taken into consideration. The alleged failure of the United States to use diligence in pursuing the *Alabama*, if such failure were established, would not, he held, excuse acts of negligence on the part of the British authorities.

Mr. Adams's Opinion.

Mr. Adams, in his opinion, referred to the representations made by him to the British Government in June 1862, and to the report of the law officers of the crown to the effect that if his representations were in accordance with the facts, steps ought to be taken to put the foreign enlistment act in force *and prevent the Alabama from going to sea*. This was, said Mr. Adams, a great step in advance of anything that had been done in the case of the *Oreto*, since it recognized the duty of prevention, and recommended that proper steps be taken by the authorities at Liverpool to ascertain the truth, and, if evidence could be obtained to warrant them in so doing, to proceed at once under the statute. If this direction had been carried out in its spirit, the policy recognized by it doubtless would have been effective. But it was more than doubtful whether it produced the smallest effect upon the parties concerned. Three weeks after the direction was given to the customs authorities at Liverpool to ascertain the truth, not a syllable had been returned to them except of a negative character. The entire labor of obtaining evidence

rested upon the agents of the United States. The reports made by the collector of customs at Liverpool tended to show that he was in sympathy with the designs of the insurgents and not unwilling to accord to them all the indirect aid which could be supplied by a purely passive policy on his part. As to the causes alleged for the delay of the law officers of the crown in rendering an opinion on the evidence submitted toward the end of July, Mr. Adams said it was sufficient to say that the omission to act in season was due to causes wholly within the province of Her Majesty's government to control, and that the failure was one which must entail responsibility for the great injuries that ensued, not upon the innocent parties whom it was the admitted duty of that government to protect, but upon those through whom the injuries became possible.

The vessels that took out the *Alabama's* armament, said Mr. Adams, were also British, and the great fraud reached its full accomplishment under the British flag.

Passing over the minor details of the mode in which supplies of coal were obtained from British sources, Mr. Adams referred to the fact that Captain Semmes, after sinking the U. S. gunboat *Hatteras*, was compelled to take the prisoners on board, and that, although it was at a considerable distance from his actual position, he decided that his best chance of a favorable reception would be in a port of the kingdom whose laws had been so dexterously defied. He accordingly made his way, not without great difficulty, to Port Royal, in Her Majesty's island of Jamaica. The prisoners were landed and repairs were permitted to be made. Approbation of these acts was granted by a letter from Mr. Hammond, on behalf of Earl Russell, though not without reluctance, for it was followed by an injunction to get rid of the vessel as soon as possible. Nevertheless, the evil was done, and Her Majesty's government appeared practically to have given their formal assent to the principle that *success sanctifies a fraud.* Though orders were freely given for the detention of the vessel at any of the colonial ports at which she might arrive, the first time she actually appeared she was received with all the honors due to the marine of a recognized belligerent power, without the smallest manifestation of dissatisfaction with the gross violation of laws that had entailed upon Her Majesty's government a grave responsibility to a power with which she was at peace. Her Majesty's government thus failed to fulfill the duties set forth in the Treaty of Washington.

As to the *Tuscaloosa*, Mr. Adams held that the British Government was responsible for her acts.

Sir Alexander Cockburn's Opinion.

Sir Alexander Cockburn said that the pretension put forward by Mr. Dudley, that as soon as the agent of a foreign state declared his conviction that a vessel was being built for another belligerent, it became the duty of the neutral government to call on the parties engaged in building her to show that her destination was lawful, and, if they did not, to seize her, was one which could not be admitted. But, it was a very different thing, he admitted, to say that, when persons capable of giving evidence were expressly named, and sources of information were pointed out from which the truth might be ascertained, the authorities were to sit with arms folded and do nothing toward satisfying themselves whether the vessel was one the unlawful purpose of which it was their duty to frustrate by seizure. Although the British Government had no power to compel shipbuilders to explain the destination of a particular vessel, it might, in a case of suspicion, apply to them to relieve the government from its embarrassment by stating for whom the vessel was being built, and, if an answer were given, its truth could generally be tested. If all explanation were refused, or if that which was given turned out to be untrue, the evidence against the vessel would be strongly confirmed. But no official inquiry was ever addressed to the Messrs. Laird; nor was any attempt made to utilize the references to persons specified by Mr. Dudley. The evidence obtained by Mr. Dudley established a strong case against the vessel and, if it could be relied on, afforded sufficient reason for seizing her. Yet the authorities at Liverpool took no action upon it. There was abundant evidence to make out a *prima facie* case, and of that opinion were the law officers of the crown, as shown by their report of July 29. Unfortunately, the report of the law officers came too late.

Upon these facts, said Sir Alexander Cockburn, it appeared to him impossible to say that in respect of the *Alabama* there was not an absence of due diligence on the part of the British authorities. The delay which occurred in the furnishing of the last report of the law officers was no doubt to be attributed to the illness of the Queen's advocate, and the delay arising from such an accident could not properly be attributed to a want of "due diligence" in the government. A want of due

diligence was, in his opinion, to be found further back. He entirely agreed with Sir Robert Collier that it was the duty of the collector of customs at Liverpool to have detained the vessel as early as the 20th of July. The course which ought to have been taken was plain and unmistakable, but unfortunately it was not pursued.

The vessel having escaped through want of due diligence in that department of the government to which it specially appertained to seize her, the entire British Government, and through them the British people, said Sir Alexander Cockburn, became, by necessary consequence, involved in a common liability; though, as the escape was, in the event, practically speaking, the result of an unfortunate and unforeseen accident, when the British Government was desirous of doing its duty, it might deserve serious consideration whether the tribunal should award to the United States damages to the full extent demanded, as if the result had arisen from negligence alone.

The want of diligence, however, said Sir Alexander, did not stop with the fact of the *Alabama's* escape from Liverpool. The delay in communicating the report of the law officers of July 29 to the commissioners of customs till the afternoon of July 31, by which time the *Alabama* was beyond the reach of British jurisdiction, and the course of the collector of customs at Liverpool, in spite of the evidence which had passed through his hands, in permitting the tug *Hercules* to take out the crew, gave further ground for the complaint of the United States of a want of official activity.

As to the arming of the *Alabama* at Terceira, Sir Alexander thought it fairly open to contention that, under the circumstances, the whole transaction should be regarded as one armed hostile expedition issuing from a British port, or, at all events, that the ulterior purpose of arming, though out of British jurisdiction, gave to the equipment of the vessel within that jurisdiction the character of an equipment with intent to carry on war. On the whole, said Sir Alexander Cockburn, he agreed with the rest of the tribunal in thinking that, in respect of the *Alabama*, the want of due diligence was established by the facts.

As to the reception of the *Alabama* at Jamaica, the same question, said Sir Alexander, arose as in the case of the *Florida*, whether her commission as a ship of war of the Confederate States gave her an immunity from seizure for a prior

violation of British law. But, this question, he declared, it was not necessary to consider in the case of the *Alabama*, since the arbitrators were all agreed that the British Government was liable by reason of the want of due diligence in not preventing her departure. The *Alabama* was, however, since she had been commissioned as a ship of war by a belligerent, properly received as such at Jamaica and afterward at Cape Town, and he did not suppose that the charge, which seemed to be founded on a miscalculation of dates, that the *Alabama* took coal at Cape Town two days less than three months after she had obtained a supply at Singapore, would be insisted upon by the United States.

As to the question of the *Alabama's* tender, Sir Alexander Cockburn said that on the whole he was disposed to think, though not without some doubt as to whether the damage was not too remote to found a legal liability, that, the mischief done by the *Tuscaloosa* being the direct consequence of the equipment of the *Alabama*, those who were answerable for the one must be answerable for the other. He therefore acquiesced in the decision of the tribunal in respect of the *Tuscaloosa*, as well as of the *Alabama*.

Award.

The award of the tribunal of arbitration was as follows:

"And whereas, with respect to the vessel called the *Alabama*, it clearly results from the facts relative to the construction of the ship at first designated by the number '290' in the port of Liverpool, and its equipment and armament in the vicinity of Terceira through the agency of the vessels called the *Agrippina* and the *Bahama*, dispatched from Great Britain to that end, that the British Government failed to use due diligence in the performance of its neutral obligations; and especially that it omitted, notwithstanding the warnings and official representations made by the diplomatic agents of the United States during the construction of the said number '290,' to take in due time any effective measures of prevention, and that those orders which it did give at last, for the detention of the vessel, were issued so late that their execution was not practicable;

"And whereas, after the escape of that vessel, the measures taken for its pursuit and arrest were so imperfect as to lead to no result, and therefore can not be considered sufficient to release Great Britain from the responsibility already incurred;

"And whereas, in spite of the violations of the neutrality of Great Britain committed by the '290,' this same vessel, later known as the Confederate cruiser *Alabama*, was on several occasions freely admitted into the ports of colonies of Great

Britain, instead of being proceeded against as it ought to have been in any and every port within British jurisdiction in which it might have been found;

"And whereas, the government of Her Britannic Majesty can not justify itself for a failure in due diligence on the plea of insufficiency of the legal means of action which it possessed:

"Four of the arbitrators, for the reasons above assigned, and the fifth, for reasons separately assigned by him,

"Are of opinion—

"That Great Britain has in this case failed, by omission, to fulfil the duties prescribed in the first and the third of the rules established by the VIth article of the Treaty of Washington."

e. The Retribution.

(For the full record of the arbitration in this case, see Papers relating to the Treaty of Washington, as follows: American Case, I. 156; British Counter Case, II. 341; American Argument, III. 140; Opinion of Viscount d'Itajubá, IV. 101; Opinion of Mr. Staempfli, id. 138; Opinion of Mr. Adams, id. 217; Opinion of Sir Alexander Cockburn, id. 531; Award, id. 52.)

Case of the United States.

The Case of the United States set forth that the *Retribution* was a steam propeller, which was seized by the insurgents in the Cape Fear River, which she had entered in stress of weather. Her machinery was taken out and she was converted into a schooner, and cruised about the Bahama Banks. On December 19, 1862, she captured near the Island of Santo Domingo the United States schooner *Hanover*. This prize she took to Long Cay, in the Bahamas, and there sold the cargo without previous judicial process. The colonial authorities claimed that they were deceived, and that they supposed that the person making the sale was the master of the vessel. The person who procured the entry of the *Hanover* and effected the sale of her cargo was one Vernon Locke, a Nova Scotian. He was indicted and admitted to bail in the sum of £200. The United States were not aware that he was ever brought to trial. On February 19, 1863, the *Retribution*, when off Castle Island, one of the Bahamas, captured the American brig *Emily Fisher*, freighted with sugar and molasses. This prize was also taken to Long Cay, and, notwithstanding the protests of the master, and in the presence of a British magistrate, was despoiled of her cargo, a portion of which was landed and the remainder destroyed. The *Retribution* then went to Nassau and, under the assumed name of the *Etta*, was sold. The United States asked for an

award in respect of the *Retribution*, especially on the ground that in the case of each of the vessels that were captured the acts complained of were done within Her Majesty's jurisdiction.

British Counter Case.

The British Counter Case observed that it was not alleged that the *Retribution* received any outfit or equipment in or from British territory. The claims made on account of the vessel were obviously of a different class from those "generally known as the *Alabama* claims," and could not properly be reckoned among them. Her Majesty's government, however, though it might on this ground refuse to enter into any discussion of the case, preferred to state the facts so far as it was acquainted with them. When the schooner *Hanover* arrived at Long Cay her papers were regular, and it was in the name of the master that the person who represented himself to be the master conducted all the transactions at that place. There was no circumstance to suggest a doubt as to his identity or the truth of his story. Some words casually let fall by a drunken seaman, after the supposed master had left the island, which he did by another vessel, leaving the *Hanover* under the command of the mate, first gave rise to a suspicion that he had been passing under a false name; but there was no reason to suspect that the vessel had been a prize. No intimation of the circumstances ever reached the colonial government till March 11, 1863. Locke was afterward twice arrested at Nassau for his offense. On the first occasion he forfeited his bail and left the island; on the second he was brought to trial, but was acquitted for want of evidence, efforts to secure the presence of some witnesses on board of the *Hanover* or of the *Retribution* at the time when the capture took place having failed. While Locke was in prison awaiting his trial, application was made by the United States for his extradition on a charge of piracy having no connection with the case of the *Hanover;* but it did not appear that the Government of the United States made any attempt to produce the evidence which was required by law to support the demand.

As to the case of the *Emily Fisher*, Her Majesty's government, said the British Counter Case, now heard of it for the first time. No complaint appeared to have been made to the colonial government about the vessel. It was possible that, on the facts stated, supposing them to be true, the own-

ers of the ship and cargo might have been entitled to legal redress against the persons concerned in defrauding them of their property. But Her Majesty's government denied that the facts, if proved, argued any failure of international duty on the part of Great Britain or furnished any evidence of such a failure.

Opinion of Viscount d'Itajubá.

Viscount d'Itajubá expresses a formal opinion to the effect that Great Britain had not failed to fulfill any duty of neutrality in respect of the *Retribution*, and that she was not responsible for the acts imputed to that vessel.

Mr. Staempfli's Opinion.

Mr. Staempfli held that, as to the *Retribution*, the British authorities were not responsible in the case of the *Hanover*, since they were deceived in regard to the entry and sale of the prize at Long Cay, and since, from the manner in which the fraud was committed, they could not be accused of culpable negligence. Nor could any responsibility be attached to the subsequent acquittal of Locke, inasmuch as it was not shown that there were any evident defects in the proceedings or the judgment.

As to the *Emily Fisher*, it appears, said Mr. Staempfli, that in British jurisdiction, by means of a conspiracy between the captain of the *Retribution* and some of the crew of certain wrecking vessels, exactions were practiced on the *Emily Fisher* after she had been captured and brought into the port of Long Cay, and that the authorities were aware of it, the affair having, so to speak, taken place before their eyes; that, notwithstanding these facts, the authorities did not take any steps either to afford efficient protection or to institute judicial proceedings or to report to their superiors what was taking place; that, moreover, and as a sequel to these acts, on April 10, 1863, seven weeks after the transactions respecting the *Emily Fisher* had occurred, the sale and change of name of the *Retribution* took place, and that these acts were registered by the authorities at Nassau. As to the objection that Great Britain was not made acquainted with what took place till ten years after it occurred, Mr. Staempfli thought that this was due to the neglect of the local authorities to interfere officially, or to report to their superiors.

Mr. Staempfli therefore held that Great Britain had incurred responsibility in respect of the *Emily Fisher*, but not in respect of the *Hanover*.

Mr. Adams's Opinion.

Mr. Adams pointed out that a day or two after the entry of the *Hanover* at Long Cay, the authorities, by reason of some words dropped by an intoxicated sailor, were led to suspect falsehood, and to examine the manifests of the cargo more closely, and that on inspection it became apparent that some of the signatures on the manifests were forged, and that the captain of the vessel had been falsely personated. It would seem to have been the duty of the local authorities to report this grave offense officially to the authorities at Nassau, whither both the *Retribution* and the *Hanover*, and the officers of the *Retribution*, including Locke himself, had gone. But not a whisper regarding the extraordinary transaction seemed to have been communicated to anybody in authority at Nassau; nor was it likely that anything would ever have been disclosed by the authorities at Long Cay if the agent of the underwriters of the *Hanover* had not, on April 20, addressed to the governor a remonstrance against the unlawful proceedings, and a desire for an investigation. The *Retribution* was then at Nassau, and had there been received and permitted to remain as a ship of war of the insurgent States, without a word of remonstrance or even of notice by the authorities, and in spite of instructions of Her Majesty's government that no ship of war or privateer belonging to either of the belligerents should be permitted to enter or remain in any port or water of the Bahama Islands, except by special leave of the lieutenant-governor, or in case of stress of weather. On the representations made in behalf of the underwriters, the attorney-general gave it as his deliberate opinion that none of the parties had rendered themselves criminally liable, though he had made no attempt to investigate the facts of the case. Nothing seemed to have been said to the collector at Long Cay as to his failure to perform his positive duty.

As to the case of the brig *Emily Fisher*, Mr. Adams observed that when she was seized by the *Retribution* at Castle Island several British wrecking schooners were lying at anchor under the land, and that Locke consulted with the captains of these wreckers, with the result that they took the brig and ran her on shore, and proceeded to unload her cargo of sugar. The master of the *Emily Fisher* applied to the authorities for assistance, but they declined to give him any till he had secured a release from the wreckers for salvage. The result was that by paying one-half of the value of the cargo and one-third of

the value of the vessel he obtained her restoration, divested of almost everything movable. All this time the brig was lying under the guns of the *Retribution*, and the authorities to whom the master appealed, while declaring themselves wholly unable to protect him, in fact gave the transaction their sanction, and apparently made no report of it. If it was alleged that the offenses in question were the offenses of irresponsible parties for which it was not customary to hold governments liable, the answer was that when the *Retribution* made her appearance in the port of Nassau, after having executed the outrages described, she was treated as a Confederate vessel of war, the collector declaring that she did not enter as a trader. She was dismantled and her hull was sold at public auction. It nowhere appeared to whom the proceeds were credited, nor did it appear that the governor took the smallest notice of so material a transaction. Nor was it likely that any more inquiries would have been made in any quarter if the case had not been brought by Mr. Seward, Secretary of State of the United States, to the attention of the British Government. In response to Mr. Seward's representations, the governor at Nassau reported that he was convinced that no suspicions were entertained by any official of the government as to the character of the *Retribution* or of her master till it was too late to act on them. Nevertheless, the report which he sent seemed to admit that he himself, the collector, and another person, entertained so great doubts of the truth of the statements made by Locke that it was their positive duty to have made an investigation. The unsatisfactory nature of the governor's report was plainly intimated by Mr. Seward when he received it, and was also signified to the governor by the Duke of Newcastle on behalf of the government at home. This stimulated the authorities to efforts to seize and prosecute the chief offenders, who were still hanging about the place. It was clear that they were British subjects guilty of something very like piracy, as well as of forgery and fraud. Of the judicial proceedings that followed, Mr. Adams said he desired to speak with the moderation due to the courts of a foreign nation. But the arbitrators "had a duty to the parties before the tribunal to state their convictions of the exact truth, without fear or favor." The fact was too plain that the population of Nassau and its vicinity had become so completely demoralized by familiarity with the fraudulent

transactions constantly passing before their eyes, as well as by the unusual profits accruing therefrom to themselves, that they were neither in a condition nor in a disposition to visit with harshness any crime, however flagrant, that could be associated, however remotely, with the operations of the insurgents in their waters, and that the spirit then prevailing utterly perverted the course of justice. Mr. Adams said that it appeared to him to be clear that the collector of Long Cay failed in due diligence, when he omitted to give any report whatever to the governor of the flagrant acts committed by Locke in forging the signature and attempting to represent the person of another man, as well as in conspiring, in defiance of the authorities, to obtain false salvage by force of arms of an innocent party; that the magistrate of Inagua failed in due diligence when he omitted to give immediate notice to the governor of the facts which he reported only when specially called upon by him three weeks afterward; that the governor failed in due diligence when he omitted to take notice of the presence in the port of a vessel of the insurgents, which was expressly prohibited to enter it by the instructions of the government at home; that he further failed in due diligence in informing himself of the reasons which had brought that vessel, as well as its prize, the *Hanover*, into the port; that the attorney-general failed in due diligence when he gave his first opinion, declining to act against the men whom he had reason to believe to be criminals, as well as in the subsequent proceedings which he instituted against them in court; and that, for these acts of omission and commission, the nation injured could look for reparation only to the government holding the supreme authority over the territory wherein the acts occurred. It was his conclusion that a liability was clearly imposed on Her Majesty's government in the case of the *Retribution*, under the terms of the Treaty of Washington.

Sir Alexander Cockburn's Opinion.

Sir Alexander Cockburn reviewed the case of the *Retribution* at length, and reached the conclusion that there was no ground whatever for saying that, either in respect of the *Hanover* or of the *Emily Fisher*, could any charge of a want of due diligence be sustained against the British authorities.

Award.

The tribunal of arbitration, by a majority of three to two, decided that, in respect of the *Retribution*, Great Britain had not failed, by any act or omission, to fulfill any of the duties prescribed by the

three rules of Article VI. of the Treaty of Washington, or by the principles of international law not inconsistent therewith.

f. The Georgia.

(For the full record of the arbitration of this case, see Papers relating to the Treaty of Washington, as follows: American Case, I. 105, 156; British Case, id. 354; American Counter Case, id. 439; British Counter Case, II. 321, 358; American Argument, III. 104; British Argument, id. 281, 283; Mr. Evarts's Special Argument, id. 458; Opinion of Viscount d'Itajubá, IV. 101; Opinion of Mr. Adams, id. 187; Opinion of Sir Alexander Cockburn, id. 477; Award, id. 52.)

Case of the United States.

As stated in the Case of the United States, the *Georgia* was a screw steamer of about 500 tons register. She was built for the Confederate government at Dumbarton, below Glasgow, on the Clyde. She was launched on the 10th of January 1863, and was christened by "a Miss North, daughter of Captain North, of one of the Confederate States, the *Virginia*." It was notorious that she was constructed for the Confederate service. On March 27 she left for Greenock, under the name of the *Japan*, on a pretended voyage to China.

The vessel was registered in the name of Thomas Bold, of Liverpool, a member of the house of Jones & Co., and a near connection of Maury, who afterward commanded her. Early in April she shipped seventy or eighty men who had been sent by Jones & Co. from Liverpool. On the 6th of April the vessel reached the coast of France, and on the following day sighted the steamer *Alar* with arms, ammunition, and supplies under the charge of a partner in the house of Jones & Co. By the night of April 10, nine breech-loading guns and various arms and munitions of war were put on board and the Confederate flag was hoisted. Maury, an officer of the Confederate States, produced his commission, and the *Japan* was changed into the *Georgia*. Fifteen sailors who refused to cruise in her were transferred to the *Alar*, and the *Georgia* continued her cruise. The *Alar* had cleared with her cargo from Newhaven.

April 8, 1863, Mr. Adams called Earl Russell's attention to the departure from the Clyde and Newhaven of this hostile expedition, and expressed a belief that the destination of the vessel was the Island of Alderney. Earl Russell promised an immediate inquiry and the adoption of the most effective measures of which the law admitted for defeating any attempt

to fit out a belligerent vessel from a British port. If men-of-war had been dispatched from Portsmouth and Plymouth on April 8, the vessel might, said the Case of the United States, have been seized, and Her Majesty's government would have exercised only the same powers as were used against General Saldanha's expedition, arrested at Terceira in 1827. This was not done, and the vessel escaped. From April 1 till June 23, 1863, the *Georgia*, while carrying on war against the United States, retained her British register.

On May 1, 1864, the *Georgia* reappeared at Liverpool. By this time Mr. Adams had furnished the British Government with papers which showed that Jones & Co. kept a regular enlistment office for the Confederacy at that port; and the *Georgia* had in the mean time been destroying merchant vessels of the United States and had called at various ports, including Cherbourg, where she arrived on October 28, 1863, and where it was said that she was furnished with a number of new seamen sent out by Jones & Co. Yet, when the *Georgia* returned to Liverpool she was allowed to remain there. Mr. Adams addressed an inquiry on the subject to Earl Russell and referred to the rules of January 31, 1862, limiting the stay of belligerent vessels; and later he informed Earl Russell that he was advised that a sale of the *Georgia* had been made by the agents of the Confederacy at Liverpool, and, on behalf of the Government of the United States, declined to recognize the validity of the sale. Meanwhile the vessel went into dock at Birkenhead and had her bottom cleaned and her engines overhauled. The Confederate agents went through the form of selling her to a person who was supposed to be in collusion with them. Mr. Adams reported these circumstances to Earl Russell, who said that the evidence failed to satisfy him that the *Georgia* would be used again for belligerent purposes, but that Her Majesty's government had given directions that in the future no ship of war of either belligerent should be allowed to be brought into any of Her Majesty's ports for the purpose of being dismantled or sold. A few days later the *Georgia*, having sailed from Liverpool, was captured by the United States man-of-war *Niagara*.

The British Case.

The British Case said that the *Georgia* was not, when she sailed from Greenock, either fitted out, armed, or equipped for war, or specially adapted to warlike use. Apparently she was in-

tended for a ship of commerce. She turned out to be unfit for a cruiser, and for this reason was dismantled and sold after having been at sea about nine months, exclusive of the time during which she remained at Cherbourg and Bordeaux.

When she sailed from British jurisdiction under the name of the *Japan*, she was cleared in the customary way for a port in the East Indies. She was advertised at the Sailors' Home in Liverpool as about to sail to Singapore, and her crew were hired for a voyage to that or some intermediate port; and they appeared to have been under the belief that that was her destination until they reached the coast of France. She was armed and equipped in French waters. The British Government had no knowledge or information whatever about her previous to the receipt of Mr. Adams's note of April 8, when she was in French jurisdiction. She was received as a ship of war of the Confederate States in the neutral ports visited by her, particularly in those of Brazil and France. After having been dismantled and sold in a British port, she was captured by a United States cruiser as having been a ship of the Confederate States, and incapable of being transferred during the war to a British subject. Her Majesty's government, while it saw no reason to doubt that the sale was *bona fide*, did not dispute the right of the United States to capture the vessel for the purpose of submitting the validity of the transfer to the judgment of a prize court.

Opinion of Mr. Adams.

Mr. Adams said that the vessel was constructed in such a manner as to excite very little suspicion of the purpose for which she was intended, and it was not until the 8th of April, six days after her departure from British jurisdiction, and three days after the evasion of the *Alar*, that he appeared to have had within his control the requisite means for making a remonstrance to Her Majesty's government. It was due to Her Majesty's government to say that all it could do under the peculiar circumstances it tried to do. Mr. Adams had pointed out the Island of Alderney as the place of meeting of the *Japan* and the *Alar*. On this suggestion Earl Russell took the then exceptional step, in the prosecution of preventive measures, of causing a ship of war to be ordered from Guernsey to Alderney with a view to prevent any attempt that might be made to execute the project of armament within the British jurisdiction. Had Her Majesty's government attempted to go further

it would have been of no use, as the vessel had proceeded to the jurisdiction of France.

It had been suggested in the Case of the United States, said Mr. Adams, that Her Majesty's government might have seized the vessel within the French jurisdiction, and the case of the Terceira expedition was cited as a precedent; but it seemed to him that the Government of the United States would scarcely be ready to concede the right of a foreign power to settle questions of justice within its jurisdiction without its knowledge or consent. Subsequently, the parties concerned in the enlistment of the crew at Liverpool were prosecuted and convicted.

Upon a careful review of the facts, Mr. Adams said he could not perceive that Her Majesty's government had made itself in any way liable for failing to use due diligence to prevent the fitting out and arming of the vessel.

As to the subsequent reception of the *Georgia* at Cape Town as a legitimate ship of war belonging to a recognized belligerent, Mr. Adams said he had already expressed his regret, in the case of the *Florida* and of the *Alabama*, that this mode of proceeding should have been adopted in regard to vessels which had been guilty of a flagrant violation of the laws of the kingdom. But, however this might be, Her Majesty's government had decided otherwise, and the *Georgia* was permitted to remain at Simon's Bay for a fortnight, repairing her decks and receiving supplies of provisions. It had been argued that on this ground Her Majesty's government had been made liable, under the second rule of the Treaty of Washington, for permitting one of its ports to be made a base of operations against the United States by a vessel which had issued from the kingdom in defiance of its laws as a hostile cruiser. In this view, however, he could not concur. The vessel had escaped from England under circumstances which involved no neglect or failure of duty on the part of the government. If, on arriving at an English port, furnished with a regular commission as a vessel of a recognized belligerent, Her Majesty's government determined to recognize her in that character, he could not call in question its right to do so on its responsibility as a sovereign power. This was a right he should not consent to have drawn in question in any case similarly decided by the United States. It appeared to him on the same footing as the original recognition of belligerency, a step which he also regretted to have been taken, but which he

never doubted the right of Her Majesty's government to take whenever it should think proper.

As to the course of the British Government in permitting the *Georgia* to be sold and turned into a merchant vessel at Liverpool, Mr. Adams said that he could not perceive the importance of the question, since the British Government recognized the right of the belligerent to dispute the validity of the operation.

In view of all the facts, Mr. Adams expressed the opinion that Her Majesty's government had not incurred any responsibility for damages in the case of the *Georgia*.

Award. Sir Alexander Cockburn reviewed the case at length and reached the same conclusion.

Count Sclopis, Viscount d'Itajubá, and Mr. Staempfli did not deliver opinions in this case.

The tribunal of arbitration unanimously held that, in respect of the *Georgia*, Great Britain had not failed by any act or omission to fulfill any of the duties prescribed by the three rules of Article VI. of the Treaty of Washington or by the principles of international law not inconsistent therewith.

g. The Tallahassee, or the Olustee.

(For the full record of the arbitration in this case see Papers relating to the Treaty of Washington, as follows: American Case, I. 163; British Counter Case, II. 339; American Argument, III. 143; Opinion of Viscount d'Itajubá, IV. 101; Opinion of Mr. Adams, id. 215; Opinion of Sir Alexander Cockburn, id. 530; Award, id. 52.)

Case of the United States. The Case of the United States set forth that the *Tallahassee* was a British steamer, fitted out from London, to play the part of a privateer out of Wilmington, North Carolina. Her original name was the *Atlanta*, under which she arrived at Bermuda from England on April 18, 1864. She made two trips as a blockade runner between Bermuda and Wilmington, and then went out for a cruise as a vessel of war. Her captures were principally made under the name of the *Tallahassee*. Some were made under the name of the *Olustee*. On August 19, 1864, she entered Halifax, after destroying several vessels near Cape Sable. The United States consul at Halifax reported her as an iron double-screw steamer of about 600 tons burden, and having about 120 men. Upon her arrival the commanding officer called

upon the admiral and the lieutenant-governor. He obtained about 120 tons of coal, which was less than he sought, and which was insufficient to enable him to make a contemplated cruise. The vessel was able to reach Wilmington, where she apparently remained for some months. January 13, 1865, she arrived in Bermuda again, under the name of the *Chameleon*. On the 19th she sailed with a cargo for Liverpool, where, at the close of the war, she was claimed by the United States. The United States asked for an award on the ground that the vessel was fitted out in London to be used as a privateer from Wilmington; that she went out from Wilmington with what purported to be a commission from the insurgent authorities, and that she preyed upon the commerce of the United States.

British Counter Case.

The British Counter Case stated that Her Majesty's government had little information respecting the earlier history of the *Tallahassee*, beyond what might be gathered from documents presented to the arbitrators by the United States. There was no pretension that the vessel was specially adapted within British territory for warlike use, nor had she any such special adaptation. In the summer of 1864, when the greater part of the Southern seacoast had fallen into the hands of the United States, the Confederate government appeared to have tried the experiment of putting guns into one or two blockade runners and sending them out to cruise. Subsequently, the *Tallahassee* was reconstructed into a ship of commerce, which it was competent for the government of either belligerent to do, and in that character she was suffered to enter and remain in British ports. But neutral powers could not be called upon to exclude a merchant vessel from their ports on account of her former employment, or to treat her otherwise than as a ship of commerce, if there was no reason to doubt that she was no longer in commission and armed for war. Indeed, no specific failure of neutral duty was alleged against Her Majesty's government in respect to the *Tallahassee*.

In the Argument of the United States it was stated that, the United States having had reason to believe that the *Tallahassee* had been armed at Bermuda, made a complaint to the British Government on the subject.

Decision.

Viscount d'Itajubá expressed a formal opinion to the effect that Great Britain had not, in respect of the *Tallahassee*, or *Olustee*, failed to fulfill any of the duties of neutrality.

Mr. Adams expressed an opinion similar to that of Viscount d'Itajubá.

Sir Alexander Cockburn, after reviewing the facts, said that the claim ought never to have been presented to the tribunal.

The tribunal of arbitration unanimously held that Great Britain had not, in respect of the *Tallahassee*, failed by act or omission to fulfill any of the duties of neutrality.

h. The Chickamauga.

(For the full record of the arbitration in this case see Papers relating to the Treaty of Washington, as follows: American Case, I. 164; British Counter Case, II. 339–356; American Argument, III. 145; Opinion of Viscount d'Itajubá, IV. 101; Opinion of Mr. Adams, id. 214; Opinion of Sir Alexander Cockburn, id. 527; Award, id. 52.)

Case of the United States.

The Case of the United States set forth that the *Chickamauga*, like the *Tallahassee*, was built as a British blockade runner. Her original name was the *Edith*. She arrived at Bermuda from England on April 7, 1864. On the 23d of the following June she sailed for Wilmington, North Carolina, from which port she brought a cargo of cotton. She was owned by the insurgent authorities, and, being found to be fast, was put in commission as a man-of-war. After cruising in this character, and destroying a number of vessels under the flag of the United States, she returned to Bermuda. She was allowed to come into the harbor, and permission was given for a stay of five days for repairs and to take on board twenty-five tons of coal, although she had at that time one hundred tons in her bunkers. November 15, 1864, she sailed from Bermuda, and on the 19th arrived at Wilmington.

British Counter Case.

The British Counter Case took the same grounds in regard to the *Chickamauga* as it took in regard to the *Tallahassee*. As to her coaling and repairing at Bermuda, the British Counter Case stated that whatever was allowed was limited to actual needs, as ascertained by the report of two officers of the British navy. They found that she had about seventy-five tons on board and that her daily consumption was twenty-five tons, and they considered that twenty-five tons more would enable her to reach the nearest Confederate port. On this report she was refused permission to take more than twenty-five tons, and a revenue

officer was placed on board to see that she took no more. If she obtained more it must have been by illicit means. In this relation the British Counter Case entered into a detailed statement of the various occasions on which men-of-war of the United States were permitted to obtain repairs and coal at Bermuda.

Decision.

Viscount d'Itajubá expressed a formal opinion to the effect that Great Britain had not, in respect of the *Chickamauga*, failed to fulfill any of the duties of neutrality.

Mr. Adams expressed the same opinion.

Sir Alexander Cockburn pronounced the claim groundless and frivolous.

The tribunal of arbitration unanimously decided that Great Britain had not, in respect of the *Chickamauga*, failed by any act or omission to fulfill any of the duties of neutrality.

i. The Shenandoah.

(For the full record of the arbitration in this case, see Papers relating to the Treaty of Washington, as follows: American Case, I. 118, 165; British Case, id. 374; American Counter Case, id. 440; British Counter Case, II. 326; American Argument, III. 111; British Argument, id. 282, 283; Mr. Evarts's Special Argument, id. 458, 462; Sir Roundell Palmer's Argument, id. 520; Mr. Cushing's Argument, id. 552; Opinion of Count Sclopis, IV. 81; Opinion of Viscount d'Itajubá, id. 101; Opinion of Mr. Staempfli, id. 125; Opinion of Mr. Adams, id. 196; Opinion of Sir Alexander Cockburn, id. 484; Award, id. 52.)

Case of the United States.

The British steamer *Sea King* was, as stated in the Case of the United States, a vessel of about 790 tons register. She had belonged to the Bombay Company and had been employed in the East India trade, in which she had proved herself one of the fastest vessels afloat. September 20, 1864, she was sold in London to Richard Wright, a British subject, and the father in law of Mr. Prioleau, the managing partner of the house of Fraser, Trenholm & Co., the Confederate agents at Liverpool. The transfer was registered on the same day. On October 7 Wright gave a power of attorney to one Corbett to sell her. Corbett was the captain of a British blockade runner. The next day the *Sea King* cleared for Bombay with a crew of

forty-seven men and with enough coal and provisions for a year's cruise. Two 18-pounders were mounted on her decks. On the evening of the same day a steamer called the *Laurel* left Liverpool, clearing for Matamoras, via Nassau, with a number of men from the Confederate States and a cargo of cases marked as machinery, but in reality containing guns and gun carriages, such as are commonly used in vessels of war. Mr. Dudley, the United States consul at Liverpool, drew the correct conclusion that they were to be transferred to some other vessel.

The appointed place of meeting was Funchal, in Madeira. The *Sea King* arrived there on October 19; the *Laurel* two days in advance. The transfer of the cannon, munitions of war, and stores was soon effected. Corbett then announced the sale of the vessel, which had already taken place in London, and tried to induce the men who had enlisted to sail in the *Sea King* to continue in the *Shenandoah*, the new name assumed by the vessel. The contract of Corbett was so palpably a violation of the foreign enlistment act that the British consul at Funchal sent him home as a prisoner for trial Captain Waddell took command in place of Corbett. A large number of the seamen refused to continue with the vessel. When news of these transactions reached London, Mr. Adams brought them to the notice of Earl Russell.

The *Shenandoah* proceeded from Madeira to Melbourne, and in the course of a cruise of ninety days destroyed several merchant vessels of the United States. January 25, 1865, she dropped anchor off Sandridge, a small town two miles from Melbourne. The mails that had arrived there from England had brought reports that the *Sea King* had left Liverpool with the intention of becoming a Confederate cruiser, and suspicion was at once aroused that the newly arrived man-of-war was no other than that vessel. This suspicion was confirmed by statements of prisoners from the captured vessels and by the statements of other persons.

The consul of the United States brought the matter to the notice of the authorities, and maintained that the vessel was not entitled to belligerent rights. The authorities, however, decided that she was entitled to the belligerent character, and that she might be repaired. On one pretense or another she was permitted to remain till February 18. This time was consumed, apart from obtaining repairs and supplies, in the en-

listment of men. There was, declared the Case of the United States, no time during the stay of the *Shenandoah* at Melbourne when it was not notorious that she was procuring recruits. Her effective power as a man-of-war depended on her obtaining new men, and this was the purpose of her visit. But, although the consul of the United States presented evidence of her enlistments, no effective proceedings to prevent them were taken. The *Shenandoah* obtained at Melbourne about forty-five men. The fact that she had enlisted a large number was a matter of common notoriety, and was commented on in the newspapers. There was great negligence in not preventing these enlistments.

There was also, said the Case of the United States, in permitting the *Shenandoah* to take at Melbourne supplies of coal and provisions sufficient to enable her to make a long cruise in the Arctic seas and burn American whalers, long after the military resistance of the Confederacy to the United States had ceased, a violation of neutral duty. It was a still greater violation of that duty to permit repairs to her machinery when she was under no necessity of using steam. Her hull was sound and seaworthy, and she could at once have made her way to the insurgent ports. She continued her destruction of American vessels far into the summer of 1865. On the 6th of November in that year she returned to Liverpool, where she was subsequently turned over by the British Government to the United States.

The British Case.

As to the recruitment of men at Melbourne, the British Case said that four persons were prosecuted for having joined or attempted to join the *Shenandoah*, and that these were all that could be ascertained to have made such an attempt before she left Melbourne. The captain gave his word in writing that there were no persons on board except those whose names were on his shipping articles, and that no one had enlisted since his arrival; and the colonial government could not have searched the vessel without transgressing the rules of neutrality and the practice of nations.

The discovery having afterward been made that persons had been secretly put on board during the night preceding her departure, notice of the fact was sent to the governors of the other Australian colonies and of New Zealand, in order that further hospitalities might be denied her.

Opinion of Count Sclopis.

Count Sclopis said that, in his opinion, it was not absolutely proved that the repairs of the *Shenandoah* at Melbourne constituted in themselves a ground for a charge of violation of neutrality. It was proved that the repairs were necessary, and it was not shown that the replacement of the force of the vessel, by means of the repairs, surpassed the measure of its former condition.

It was, said Count Sclopis, difficult to ascertain the exact number of men who were on board the *Shenandoah* when she left Melbourne on her way to the Arctic seas. But there was no doubt that the neutrality of the colony was flagrantly violated by the enlistment of a large number of men. This fact was admitted by the British authorities, and it involved the responsibility of Great Britain. Moreover, the large supplies of coal with which the vessel was furnished could be regarded only as a preparation for a hostile expedition against the commerce of the United States, and they fell within the scope of the second rule of the Treaty of Washington.

Opinion of Viscount d'Itajubá.

Viscount d'Itajubá held that, in respect of the equipment and armament of the *Sea King*, Her Majesty's government could not be charged with any neglect of neutral duty. He took the same view as to what occurred at Melbourne. While it was, he said, true that some irregularities had occurred there, it was not shown that they were imputable to the neglect of the authorities. They were rather the consequence of the violation by the commander of the *Shenandoah* of his word of honor, and of the exceptional difficulties of surveillance which the conformation of the port presented. Moreover, the governor of the colony, as soon as he became aware of the unneutral acts of which the vessel had been guilty, resolved thenceforth to refuse hospitality to her, and wrote in this sense to the naval and civil authorities of Australia.

Mr. Staempfli's Opinion.

Mr. Staempfli expressed the opinion that there had been, in respect of the *Shenandoah*, a violation of the obligations of neutrality, and that Great Britain consequently was responsible for the American ships which the vessel destroyed.

Mr. Adams's Opinion.

Mr. Adams held that Her Majesty's government was not responsible, in respect of the *Shenandoah*, for what took place before her arrival at Melbourne. When she arrived at that port she was

not, by reason of a lack of men, in an efficient condition as a fighting vessel. But she was recognized as a man-of-war of a belligerent, the authorities deciding that it would be inexpedient even to require the commander to show his commission from the government of the Confederate States, and permission was given her to obtain repairs and a supply of coal. The delays which were contrived in respect of her departure were doubtless consumed in obtaining secret additions to the crew. Testimony showing this to be the case was laid before the authorities by the United States consul, and as early as February 13 they were apprised of the arrangements which the commander of the vessel had made for the shipment of men, and were in a situation to adopt measures of prevention if they had thought proper to do so. Yet the only effect these facts produced was to beget a desire to get rid of the vessel by supplying her with all that was asked for. Her need of coal was slight, and she had a fair supply on board, but she was permitted to take as much as she could carry; and she obtained a complement of her crew, without which she could have done nothing.

On all the facts, Mr. Adams reached the conclusion that from the time of the departure of the *Shenandoah* from Melbourne the Government of Great Britain, having failed in respect of what took place there to fulfill the obligations of the second rule of the Treaty of Washington, was liable for all the damages subsequently incurred by the United States.

Sir Alexander Cockburn's Opinion.

Sir Alexander Cockburn argued at length that Her Majesty's government had incurred no liability at any time on account of the *Shenandoah*.

Award.

The tribunal of arbitration in its award held, unanimously, that Her Majesty's government had not failed, by any act or omission, to fulfill any duty in respect of the *Shenandoah* prior to her entry into the port of Melbourne. But, by a majority of three to two, it held that, as a result of all the facts connected with the stay of the vessel at Melbourne, and especially with the augmentation of her force by the enlistment of men, Great Britain had failed to fulfill the duties prescribed by the second and third rules of the Treaty of Washington, and was therefore responsible for all the acts of the vessel after her departure from Melbourne on February 18, 1865.

CHAPTER LXIX.

LIMITATION AND PRESCRIPTION.

Performance of Treaty Obligation.

By Article II. of the treaty between the United States and Great Britain of July 3, 1815, it is provided that no "higher or other duties" shall be imposed on the "exportation of any articles" from the one country to the other "than such as are payable on the exportation of the like articles to any other foreign country." From the date of the treaty down to May 6, 1830, certain duties were levied by the British Government in violation of this stipulation, but the fact does not seem to have been understood either by the government or by shippers till December 27, 1825, when some American merchants discovered and called attention to it; and from the 20th of the following January they paid the duties in question under protest, or conditionally. On August 20, 1826, the committee of the privy council for trade decided that the duties were illegally exacted, but the board of customs refused to refund them, and obtained the passage of an act of limitations to the effect that duties thus assessed should not be refunded for a period extending back more than three years. For a number of years no further action was taken, but on December 3, 1845, the board of customs ordered the duties to be refunded back to January 26, 1823. The claims for the refund of duties from July 3, 1815, to January 26, 1823, remained unadjusted, and were submitted to the commission under the convention between the United States and Great Britain of February 8, 1853. A question arose, but seems to have been but little pressed, as to whether the claims were internationally barred by lapse of time, or rather by the act of limitations above referred to. On this subject the commission said:

"The first question arising for the consideration of the commission is, whether any legal bar on account of lapse of time exists against sustaining the claim for a return of duties.

"This seems now hardly to be contended for. Where a treaty is made between two independent powers, its stipulations can

not be deferred, modified, or impaired by the action of one party without the assent of the other. If the parties, by their joint act, have established no barrier in point of time to the prosecution of any claims under a treaty made by them, then neither country can interpose such limit. The case admits of no other judicial construction. The legal advisers of the crown concur in this view, and the commissioners have no doubt on the point.

"It is conceded, as a matter of fact, that an inequality in duties existed in violation of the provisions of the treaty; and, there being no bar to the recovery of the claim from lapse of time, such duties shall be refunded."

Upham, commissioner, delivering the opinion of the commission. (S. Ex. Doc. 103, 34 Cong. 1 sess. p. 309.)

A similar question arose in respect of duties held to have been improperly exacted by the United States, in violation of another stipulation of Article II. of the treaty of 1815, relating to duties on imports. The duties in question were imposed under the tariff act of June 30, 1824, and covered a period of several months subsequent to that date, but the treaty violation does not appear to have been discovered till 1842, when by the tariff act of August 30, 1842, another and similar infraction was committed. Attention having then been drawn to the subject, claims were made by British subjects not only for the duties improperly collected under the act of 1842, but also for those so collected under the act of 1824; and, on the grounds stated in the preceding case, the commissioners decided that those duties should still be refunded, saying "that no statutes of limitation can be pleaded in bar of claims arising under treaties."

(S. Ex. Doc. 103, 34 Cong. 1 sess. pp. 311-313.)

Mossman's Case: Delay in Presenting Claim.

Gardner Mossman, a citizen of the United States, claimed damages from Mexico under the following circumstances: According to his own statement he was in command of the brig *H. Kellock*, on a voyage from Barbados to Coatzacoalcos, when on January 28, 1854, he was driven ashore about twenty miles west of the bar of Coatzacoalcos. The arrival of the brig at that port, without having previously called at Vera Cruz or some other Mexican port of entry, would at that time have been a violation of the Mexican law, but of that fact Mossman seemed to be ignorant. But, however that may be, the Mexican authorities required him on January 30 to pro-

ceed to Minatitlan, where he was arrested, but released on bail, so that he might, for aught that appeared, have attended to the wreck of his vessel, if he had chosen to do so. February 7 he was, at his own request, given up by his bail to the authorities; but even then it did not appear that he was imprisoned, since on the 13th he went on board an American schooner with the intention of leaving for Vera Cruz, although he was considered by the authorities as being under arrest. From the schooner, however, he was taken on board a Mexican vessel of war, and he asserted that he was kept there for two days and a half, when he was sent ashore. Afterward, according to his own account, "he was obliged to find his way to Vera Cruz, from which place he sailed for New Orleans." There is no proof whatever that he was imprisoned at Vera Cruz. On the contrary, he seemed voluntarily to have abandoned the wreck of his vessel and to have found his way to Vera Cruz and thence to New Orleans as soon as possible.

Sir Edward Thornton said: "If all that the claimant complains of had been true, he might have procured evidence of his assertions from the United States consul at Minatitlan * * * as well as from other witnesses. Further, when he arrived at Vera Cruz, where, as he states, he signed a paper at the suggestion of the United States consul, there was no reason whatever why, if he felt himself aggrieved by inferior authorities at Minatitlan, he should not have appealed through his consul or otherwise to the Mexican Government. It seems unfair that the latter should be first informed of the alleged misconduct of its inferior authorities more than fifteen years after the date of the acts complained of. The umpire can not under this circumstance consider that the Mexican Government can be called upon to give compensation for a very doubtful injury, and he therefore awards that the claim be disallowed."

Thornton, umpire, February 18, 1875, *Gardner Mossman* v. *Mexico*, No. 15, convention of July 4, 1868, MS. Op. IV. 581. In the case of *Snow & Burgess* v. *Mexico*, No. 102, Dr. Lieber, as umpire, April 24, 1871, awarded indemnity to the owners of the brig on the ground that "the Mexican authorities seized upon the stranded vessel, and appropriated it, it would seem, without any legal process." (MS. Op. II. 275.)

Williams's Case.

"It appears from the papers transmitted us that in 1841 John H. Williams, a merchant in New York, sold and delivered in that city to an agent of the Venezuelan Government certain mirrors with

mountings for the government house at Caracas for $2,489.11, which were duly forwarded and received.

"On the 24th day of April 1868, Mr. Williams presented the account against that government before the former commission for these articles as of the date of November 9, 1841, and verified it under oath, claiming an award, including interest at 7 per cent, of $7,019.11. The account had before been sent to the United States legation at Caracas for collection, but how long before does not appear. It had not, previous to 1868, been brought to the attention of the Venezuelan authorities from any source, so far as shown, and no reason or explanation is given for delay in presentation.

"Venezuela claims the goods were paid for at the time of purchase. On the issue of fact thus made she was (1868) and is placed at a disadvantage by the long lapse of time as to the matter of personal testimony, some, if not all, her witnesses to the transaction having before then died.

"The question with some collateral ones is thus presented whether time, figuratively stated, testifies in these adjudications. This case could perhaps be disposed of upon other grounds and in comparatively few words; but as the same question with like resulting ones is involved in other cases argued and submitted, we have concluded to treat it with some fullness and dispose of the case from this standpoint, in view of the fact that the general question appears to be a somewhat mooted one with each government.

Prescription.

"It thus appears then the claim was not brought to the attention of the Venezuelan Government until twenty-six years after its inception. Its ownership, nature, and amount were such as would have made a delay in presentation to the debtor for a single three months a matter of surprise. By lapse of time the means of defense have been impaired, and there is total want of excuse for the long delay by claimant. Under such circumstances what does the law require at our hands?

"It is a well-settled principle in common law jurisdictions, and a recognized one in civil law countries, that obligations are to be enforced according to the *lex loci fori* which here is the treaty and the public law. Beyond the requirement that its decisions must be according to justice, the treaty furnishes no guide to the commission respecting the operation of the lapse of time in extinguishing obligations. It is left to the direc-

tion of international law on the subject. Does that recognize the doctrine of such extinguishment as between states in controversies like these? The question has been argued with exceptional force and ability by counsel for the respective governments.

"It will, perhaps, not be amiss to group extracts from the deliverances (italics ours) of some of the leading authorities upon the general doctrine of prescription and pertinent principles. We present them as they have been consulted, and without reference to any special order. It may be well preliminarily to note that, while individual interests are involved, these controversies, as elsewhere seen, are between states in some sense, and stand much as if so originating; and, further, that while the texts will be seen largely to relate to territorial acquisitions the principles announced comprehend the acquisition and loss of personal property, and pertain to other rights as well.

"Says Wheaton:

"'The writers on natural law have questioned how far that peculiar species of presumption, arising from the lapse of time, which is called prescription, is justly applicable as between nation and nation; but the constant and approved practice of nations shows that by whatever name it is called the uninterrupted possession of territory *or other property* for a certain length of time by one state excludes the claim of every other; *in the same manner as by the law of nature, and the municipal code of every civilized nation, a similar possession of one individual excludes the claim of every other person to the article of property in question.* This rule is founded upon the supposition, confirmed by constant experience, that every person will naturally seek to enjoy that which belongs to him; and the inference fairly to be drawn from his silence and neglect of the original defect of his title, or his intention to relinquish it.' (Elements Int. L. 6th ed. 218.)

"Vattel:

"'It is asked whether usucaption and prescription take place between independent nations and states. * * * Now, to decide the question we have proposed we must first see whether usucaption and prescription are derived from the law of nature. Many illustrious authors have asserted and proven them to be so. * * * It is impossible to determine by the law of nature the number of years required to found a prescription; this depends on the nature of the property disputed and the circumstances of the case.

* * * * * * *

"'After having shown that usucaption and prescription are founded in the law of nature, it is easy to prove that they are equally a part of the law of nations and ought to take place between different states. For the law of nations is but the law of nature applied to nations in a manner suitable to the parties concerned. And so far is the nature of the parties from affording them an exemption in the case, that usucaption and prescription are much more necessary between sovereign states than between individuals.' (Law of Nations, Book 2, ch. 11.)

"'Prescription,' this author defines in the same connection, 'is the exclusion of all pretensions to right—an exclusion founded on the length of time during which that right has been neglected'."

"Phillimore:

"'This [prescription of public law] is in principle very much the same as the prescription of the private law, which indeed may be said to be modeled upon the usage of the public law, *and which usage grew out of the reason of the thing.* * * * Does there arise between nations, *as* between individuals, and *as* between the state and individuals, a presumption from long possession of a territory, *or of a right*, which must be considered as a legitimate source of international acquisition? * * * The effect of the lapse of time upon the property *and right* of one nation relative to another is the real subject for our consideration. And if this be borne steadily in mind it will be found on the one hand, in the highest degree, irrational to deny that prescription is a legitimate means of international acquisition; and it will, on the other hand, be found both inexpedient and impracticable to attempt to define the exact period within which it can be said to have become established, or, in other words, to settle the precise limitation of time which gives validity to the title of national possessions.' (Int. Law, 1, pp. 272–275.)

"Hall:

"'The principle upon which it [international prescription] rests is essentially the same as that of the doctrine of prescription which finds a place in every municipal law, although in its application to beings for whose disputes no tribunals are open some modifications are necessarily introduced.' (Int. Law, 100.)

"Polson:

"'How far prescription may be considered as operating upon nations jurists do not appear to have agreed; but the uniform practice of nations shows that they recognize the long and uninterrupted possession of a territory as excluding the claims of all other nations, *and that this principle*, whose exposition fills

so large a head in municipal jurisprudence, *is equally recognized, as reason dictates it should be, in international law.*' (Law of Nations, 28.)

"Calvo:

"'May usucaption and prescription be considered in regard to peoples and states as regular and normal means of acquiring property? If it is admitted that these two ways of acquiring are legitimate and based on natural law, one is logically bound to admit that they are equally conformable to the principles of the law of nations, and are to be applied to nations. Usucaption and prescription are even more necessary between states than between individuals. In fact the differences between nations have a much greater importance than individual contentions; these may be settled by tribunals, whilst international conflicts frequently end in war.' (Droit International, vol. 1, § 171.)

"Vico:

"'The inert, the incautious, the negligent, the luxurious, are punished in the injury they do to themselves by the loss of their interests and their rights through usucapio and prescriptio?' (De Uno Universi Juris, etc. p. 331.)

"*Grotius*, while seeming to indorse Vasquius in denying usucaption a place both in public and private international law, except as established by municipal law, is at pains to point out its national recognition from the earliest times. Among other instances he tells that, to the demand of the King of the Ammonites for the restoration of certain lands between the Arnon and the Jabbok, and from the deserts of Arabia to the Jordan, the leader of Israel opposed a three hundred years' possession, and demanded to know of the king why he and his forefathers had been quiescent so long. Also, that 'the Lacedæmonians, according to Isocrates, laid it down as a most certain rule, acknowledged among all nations, that public possessions as well as private are so confirmed by length of time (*multo tempore*) that they can not be taken away. By which *natural law* (*quo jure*) they refused those who were seeking the recovery of Messina."[1] (De Jure Belli ac Pacis, Lib. 2, cap. 4.)

[1] The passage to which the learned commissioner refers is in Grotius's chapter "De derelictione præsumpta, et eam secuta occupatione, et quid ab usucapione et præscriptione differat." (De Jure Belli ac Pacis, Lib. II, cap. 4.) But immediately after referring with a certain doubtful approval to Vasquius, Grotius says: "Yet if we admit this, there seems to follow this very inconvenient conclusion, that controversies concerning kingdoms and their boundaries are not extinguished by any lapse of time;

"Taparelli:

"'Hence the law of prescription—a necessary and just law—by means of which society stops, through certain limitations, all inquisitions of ancient rights.

* * * * * * *

"'Most reasonable is, therefore, the law of prescription in the natural order, although nature itself does not overtly establish its strict necessity nor fix its proper limitations. This is to be performed by society as it grows more and more perfect; and it is as much the more its office as it is therefrom and therein that the social complaint requiring such a remedy takes its rise.' (Natural Law, vol. 2, 979.)

"Sala:

"'1. By using anything with just title and good faith the right of possessing it is likewise acquired; but this manner of acquiring is considered to be civil, because of its being at first view resisted by natural reason that does not allow anybody to be deprived of his possession without his fault or consent, although it does not cease to have great equity, as it is grounded on the requisitions of public good; so that we have no great objections to say that it can also be referred to the secondary law of nations.

"'2. To this manner of acquiring the Roman laws gave the name of usucaption or prescription, * * * and it is but acquisition of *dominium* by continued possession during the time determined "by the law." Its introduction was made necessary from public utility and the tranquillity of the republic, because, in default of it, possessors of things would be subject to unlimited disputes, which their long possession, even though acquired by sale or any other legitimate title, would not be enough to prevent. Any one would be enabled to claim that the thing belonged to his ancestors, and never to him who sold it, and possession would keep uncertain and the state subject to the grievances that may be easily conceived. With reason did Cicero call it the end of solicitude and disputes.' (Illustration of Spanish Law, vol. 1, book 2, title 2.)

"The Supreme Court of the United States, in Rhode Island *v.* Massachusetts (4th Howard, 639) said:

"'No human transactions are unaffected by time. Its influence is seen over all things subject to change. And this is

which not only tends to disturb the minds of many and to perpetuate wars, but is also repugnant to the common sense of mankind." Further on in the same chapter (section 9) Grotius, referring to the same subject, says: "And perhaps we may say that this is not merely a matter of presumption, but that this law is established by the voluntary law of nations, that a possession beyond memory, not interrupted, nor disturbed by appealing to an arbitrator, absolutely transfers dominion. It is credible that nations have agreed on this, since such a rule is most conducive to the public peace."

peculiarly the case in regard to matters which rest in memory and which consequently fade with the lapse of time and fall with the lives of individuals. For the security of rights, *whether of states or of individuals*, long possession under the claim of title is protected.'

"And again, in Wood *v.* Carpenter (101 U. S. 139), although the question was as to a statutory bar, the observations of the court apply as well to the grounds of prescription. Said Mr. Justice Swayne:

"'Statutes of limitation are vital to the welfare of society and are favored in the law. They are found and approved in all systems of enlightened jurisprudence. They promote repose by giving security and stability to human affairs. An important public policy lies at their foundation. They stimulate activity and punish negligence. *While time is constantly destroying the evidence of rights, they supply its place by a presumption which renders proof unnecessary.* Mere delay extending to the limit prescribed is itself a conclusive bar. The law and the antidote go together.'

"Lord Coke, while declaring limitation of actions to be by force of statutes, wrote:

"'But they have said that there is also another title by prescription that was at the common law before any estatute of limitations, and inasmuch as such title by prescription was at the common law, *ergo* it *abideth* as it was at the common law.'

"Bracton, who wrote long before the first English progressive limitations act (1540) and before Parliament named events as bounds of limitation even, said:

"'We must see also in what manner an obligation is got rid of; and it is known it is likewise got rid of sometimes by an exception in various ways, as if a person should claim and another should show he has discharged it. * * * Likewise, by an exception of a prescription on account of defect of proof because, as time is a mode of bringing in an obligation, so it is a mode of getting rid of it through dissimulation and negligence, which is limited under certain times, for *time runs against the indolent and those who are careless of their right.*' (Twiss's Bracton, vol. 2, p. 123.)

"Sir Henry Maine:

"'It was a positive rule of the old Roman law—a rule older than the Twelve Tables—that commodities which had become uninterruptedly possessed for a certain period become the property of the possessor.' (Ancient Law, 280.)

"Brocher declares:

"'Prescription is as much a necessity to society as is inheritance to a family. We can not conceive of the second without

the first. Without such a sanction, nothing would be secure.' (Droit Int. Priv. 321.)

"Domat:

"'The use of prescription is wholly natural in the state and condition we are in. * * *

"'*The same reason which makes that long possession acquires the property and strips the ancient proprietor, makes likewise that all sorts of rights and acquisitions are acquired and lost by the effect of time.* Thus a creditor who has omitted to demand what is due to him within the time regulated by law, has lost his debt and the debtor is discharged from it. * * * And, in general, *all sorts of pretensions and rights of all kinds whatsoever are acquired and lost by prescription*, unless they be such as the laws have particularly excepted. Thus we have two effects of prescription, or rather two sorts of prescription. One which acquires to the possessor the property of what he possesses, and which divests the proprietor of his right because of his not possessing; and the other by which all other kinds of rights are acquired or lost; whether there be any possession of them—as in the case of the enjoyment of a service, or whether there be no possession of them at all—*as in the loss of a debt* for not demanding it.

"'All sorts of prescription by which rights are acquired or lost are grounded upon this presumption, that he who enjoys a right is supposed to have some just title to it, without which he had not been suffered to enjoy it so long; that he who ceases to exercise a right has been divested of it for some just cause; *and that he who has tarried so long a time without demanding his debt, has either received payment of it, or been convinced that nothing was due him.*

"'We must distinguish two sorts of rules relating to prescription. Those which concern the different manners in which the laws have regulated the times of prescribing, and those which respect the nature of prescriptions. * * * These are the natural rules of equity, but those which make the time of prescription only arbitrary laws. For nature does not fix what time is necessary for prescribing.' (Civil and Public Law, Strahan's Ed. (1732) 483–484.)

"Burke:

"'If it were permitted to argue with power, might not one ask these gentlemen whether it would not be more natural, instead of wantonly mooting these questions concerning their property, as if it were an exercise in law, to found it on the solid rock of prescription—the soundest, the most general, the most recognized title between man and man that is known in municipal or in *public* jurisprudence; a title in which not arbitrary institutions, but the eternal order of things gives judgment; a title which is not the creature but the master of positive law; a title which, though not fixed in its term, is rooted

in its principles in the law of nature itself, and is indeed the original ground of all known property; for all property in soil will always be traced back to that source, and will rest there. * * * These gentlemen know as well as I that in England we have always had a prescription or limitation, *as all nations have against each other.*' (Letter to Son: Works, vol. 6, p. 412. See also speech on English Constitution, vol. 7, p. 94.)

"We add expressions on the subject from two of the great departments of the United States Government, that of State and that of Justice. Mr. Bayard, Secretary of State, in a note to Mr. Muruaga, December 3, 1886, said:

"'The same presumption may be almost as strongly drawn from the delay in making application to this Department for redress. Time, said a great modern jurist, following therein a still greater ancient moralist, while he carries in one hand a scythe by which he mows down vouchers by which unjust claims can be disproved, carries in the other hand an hourglass which determines the period after which, for the sake of peace and in conformity with sound political philosophy, no claims whatever are permitted to be pressed. *The rule is sound in morals as well as in law.*' (Wharton, Int. L. Appendix, vol. iii. See Crallé *infra.*)

"The Government of the United States was indebted to Reside upon a judgment. The Secretary of the Treasury in 1858 undertook to withhold a part of it, because of an alleged indebtedness of Reside to the government of twenty-three years' standing. The question of his right to do so was referred to Attorney-General Black, and the following is a part of his answer to the President under date July 21, 1858:

"'It is a decisive answer to say that the claim is based on transactions which are twenty-three years old. It is a rule of common sense and reason as well as law that when a party has lain by with a claim until the evidence concerning it has ceased to exist, and then produces it, the other party is not bound to explain it. It is presumed that he could explain it if his witnesses were alive and his papers preserved, and that presumption shall stand in place of all the proof which might have been demanded when the matter was fresh.

"'I admit that the statutes of limitation can not be pleaded against the Government as a technical bar. I do not speak of that conclusive *legal* presumption which would be created in six years against an individual; but the Government is bound, like anybody else, by the rules of evidence and by the *natural* presumptions arising from the facts of the case. In some countries there are no statutes of limitation; in all countries

there are large classes of cases to which such statutes do not apply. But it is one of the rules of every civilized code that a certain length of time, generally about twenty years, shall be regarded as evidence that a claim is either unjust or satisfied, and such lapse of time proves that fact as fully as if it had been attested by credible witnesses.

"'The experience of all mankind has shown that the evidence thus furnished by time is true and reliable. The judge who disregards it would decide against the original honesty of the case ninety-nine times in a hundred. * * * When time testifies against the sovereign it is heard with as much respect as any other witness would be.'

"This is to be read in the light of the principles recognized in the case of The United States *v.* R. R. Co., 118 U. S. 120, with which, it is believed, properly considered, it does not conflict.

"It is pertinent to note, in this connection, that the late Dr. Wharton, quoting Mr. Crallé, formerly Assistant Secretary of State, in the first edition of his Digest of International Law (1886), issued from the United States State Department, employed this language (§ 239):

"'There is no statute of limitation as to international claims, nor is there any presumption of payment or settlement from the lapse of twenty years. Governments are presumed to be always ready to do justice, and whether a claim be a day or a century old, so that it is well founded, every principle of natural equity, of sound morals, requires it to be paid.'

"While in his second edition, issued therefrom a year after, are found these remarks (Appendix to 3d vol.):

"'While international proceedings for redress are not bound by the letter of specific statutes of limitations, they are subject to the same presumptions as to payment or abandonment as those on which statutes of limitations are based. A government can not any more rightfully press against a foreign government a stale claim, which the party holding declined to press when the evidence was fresh, than it can permit such claims to be the subject of perpetual litigation among its own citizens. It must be remembered that statutes of limitations are simply formal expressions of a great principle of peace which is at the foundation not only of our own common law but of all other systems of civilized jurisprudence.'

"The opposition (perhaps as strenuous now as at any former period) to international prescription among modern writers (instance Pomeroy's Int. L. 126) seems to us to arise in good measure from confusion of terms, and to be therefore largely apparent, rather than real. In other words, the difference

between the two schools, as we conceive, partly at least, 'lies in the terms.' Prescription is confounded with limitation; not strangely either, considering the history of the terms carrying the two ideas, the common purpose to be attained, and the consequent extent of their indiscriminate use. As the distinction is to be sharply marked in reaching a correct conclusion on the question under consideration, we briefly note that history and some distinguishing features between the two.

"Under the Theodosian code, which required certain actions to be brought within a stated period after the cause of action arose, a plea that the action was begun too late was called 'præscriptio' by the Roman lawyers, just as it is now called by the English a plea of the statute of limitation. Title and rights by this means—enjoyment for the defined period—were secured or maintained.

"Usucapio indicated ownership acquired by enjoyment through long though undefined lapse of time.

"Subsequently, under Justinian's code, usucapio was dropped and præscriptio used to express both ideas; and thus the latter term has come down to us, its derivative carrying the two meanings with modifications engrafted on it, in the course of the centuries. In the changes wrought prescription seems to have yielded its own meaning to that of the disused word, and found expression in some nations for its old signification in a distinct term.

"Mr. Markby, from whose lectures on the Elements of Law we have freely drawn, says:

"'In France and Italy, whether a man claims that ownership is transferred to him by possession, or whether he defends himself on the ground that the action is brought too late, he calls it prescription.

"'In Germany the acquisition of ownership by possession is called "Ersitzung," and the bar to the action "Verjahrung." We use in England the terms prescription and limitation. And inasmuch as the two things are really different it is better to have the two names. In England the word "prescription" (as defined by Lord Coke) signifies the acquisition of title by length of time and enjoyment. This would serve as a general description of usucapio.' (Elements of Law, ch. 13.)

"While statutes of limitation are doubtless in good part aimed to be, as they are often alluded to as, expressions of prescription, they are, nevertheless, inaccurate expressions, because, for one thing, of their rigidity and want of adaptation to varying conditions and circumstances.

"It would be a bold assertion to say they are correct embodiments of true presumptive evidence, when, for instance, in the States of this Union the statutory periods within which actions of ejectment may be brought range all the way from five to forty years, and those upon promissory notes from two to twenty years.

"A conclusive legal 'presumption,' such as is said to arise under these statutes, is *not* a rule of inference, but one attaching itself to a given state of facts upon grounds of public policy. (Greenleaf, Ev. § 32.) It does not postulate the truth of the facts, except in a general sense, or the furtherance of justice in *every* instance. For example:

"'It does not assume,' says Greenleaf, 'that all simple contract debts of six years' standing are paid, nor that every man quietly occupying land twenty years as his own has a valid title by grant; but it deems it expedient that claims, opposed by such evidence as the lapse of those periods, should not be countenanced, and that society is more benefited by a refusal to entertain such claims than by suffering them to be made good by proof.'

"On the contrary, prescription *is* a 'rule' of inference; not necessarily perhaps that debts have been paid or titles granted, or other particular thing done, but that *something* at least has transpired which, in the *natural order*, as the Civilians say, forms a basis and demand for its operation. It is no more the creature of legislative will than is any other induction. That the lapse of time, variant according to circumstances, needed to raise a rational presumption of a past occurrence happens to coincide in a particular case with the statutory period in that behalf does not make prescription and statutory limitation one. They are always distinct. The former relates to substance, is the same in all jurisdictions, and aims at justice in every case, while the latter pertains to process, varies as a rule in all jurisdictions, and from time to time often arbitrarily in the same one, and admits occasional individual injustice. Lord Coke, as seen, thought prescription 'abideth' at common law notwithstanding the 'estatute.'

"The supreme court of California mark the distinction thus:

"'They [statutes of limitation] essentially differ from the civil law doctrine of prescription, as they act simply upon and defeat the remedy, while the latter defeats the right also.'

"And again in a later case:

"'No presumption is to be raised either as to payment or otherwise from the mere lapse of the *statutory* period, any more than would naturally arise as to any other stale demand.'

"And such is the generally accepted modern view.

"Prescription has been denied a place in the public law because it has 'no definite fixed limit' (Pomeroy, *supra*), which is very like objecting to it because it is not limitation.

"As before seen, prescription was recognized when limitation was yet unknown. Bracton knew of it at common law before the English statutes on the subject. Courts of equity, where limitation acts do not apply, have invariably given lapse of time due weight in adjudications. They have always refused to enforce stale demands without undertaking to fix precise times for imparting the infirmity. Each case is left, under general principles, to be adjudged, as to time, according to its own character and circumstances. And the doctrine has been applied to the state acting for its citizens. In The United States *v.* Beebee, McCreary, J., in a suit where the United States Government sought (in the interest of certain patentees) to recover land adversely held for a long period under color of title, held:

"'Although the general rule is that statutes of limitation do not run against the state, yet when the state resorts to equity for relief it must come on the same condition with other suitors, and a stale claim by the state may be rejected for that reason, as it might when presented by an individual.' (17 C. L. J. 77.)

"On appeal the Supreme Court of the United States (127 U. S., 346), while disavowing imputation of *laches* to government for negligence of officers in matters of state concern, affirmed the judgment, and said:

"'Courts of equity "refuse to interfere to give relief where there has been negligence in prosecuting the claim, or where the lapse of time has been so long as to afford a clear presumption that the witnesses to the original transaction are dead, and the other means of proof have disappeared."'

"One had as well essay to bound memory, or the occurrences that constitute negligence, by exact limits of duration, as to attempt to define just what shall be time's efflux to establish true prescriptive rights. Parties, subject-matter, habits, conditions, circumstances, enter into the problem. It is one thing

to forget or be able to show how one came by a farm, and another how one came by some animal on the farm. The fact that a nation obtained a particular territory by devastating war will be treasured in memory long after every vestige of the transactions by which the implements of war were procured shall have been obliterated, and long after the titles of its bountied soldiers shall have been lost in oblivion.

"To withhold causelessly a demand for goods sold until the witnesses to the transaction and other usual means of ascertaining the facts have, in ordinary course, passed away, is negligent conduct; while to withhold a bond issued by public authority and of which presumptively a public register is kept for a like time after maturity may not be. It is true experience teaches that such and such things are apt to occur ordinarily in about such and such times in the affairs of men, but it also recognizes the impossibility of prescribing exact periods for the occurrences, as well as the certainty of occasional departures from the general rule.

"If to-day A have a watch of B procured ten years ago, and both, in the multiplicity of their mutual dealings and exchanges, have forgotten the circumstances of such procurement, and all means of determining the true ownership are lost, whose watch does it become? A's. His title arises out of the necessity of the situation, or as Pothier says of prescription, it is founded in the ordinary course of things. If in less complex transactions a like situation should arise only at the end of twenty years the result would then be the same. All know that continued possession by A and disregard or neglect of his property by B will ultimately so terminate. But no earthly power can prescribe just what lapse of time will be necessary to create that situation. To decree when such a condition shall be *deemed* to exist is another thing. That can be done by legislation or by treaty stipulation, and when done constitutes limitation—not prescription.

"It is this prescription which underlies, varies from, antedates, and, as Phillimore says, forms the model for municipal limitation regulations that the writers asserting the existence of the doctrine in the international law refer to and treat of.

"On careful consideration of the authorities on the subject, much of whose discussion is only remotely applicable to the question as it is presented to us, we are of opinion that by their decided weight—we might say by very necessity—pre-

scription has a place in the international system, and is to be regarded in these adjudications.

"True, but few of them make reference to individual claims or to debts by one state on account of transactions with citizens of another state. But the principles recognized are general. Founded in nature, their application is imperative and broad as human transactions. They reach to debts necessarily, as Domat shows.

"If an article be paid for when bought and the money left as a special deposit with the purchaser, time, under the doctrine, will run against a claim for it. *A fortiori* does it run, where the money is not segregated from, but left with the common fund of the buyer. Besides, the right to defend against is as substantial as the right to assert a demand. Its impairment is an injury. One whose act or negligence results in such injury must be charged in justice with its consequences. The causeless withholding of a claim against a state until, in the natural order of things, the witnesses to the transaction are dead, vouchers lost, and thereby the means of defense essentially curtailed, is in effect an impairment of the right to defend. The public law in such cases, where the facts constituting the claim are disputed and disputable, presumes a defense. But where there is valid reason for the withholding the case is different. The presumption is referable to some fault of the claimant. Incapacity, disability, want of legal agencies, prevention by war, well-grounded fear, and the like are not faults. Abandoned or neglected property or rights only are prescriptible.

"Vattel says:

"'As prescription can not be grounded on any but an absolute or lawful presumption, it has no foundation if the proprietor has not really neglected his right.'

"Again:

"After showing that 'immemorial prescription' confers an indefeasible title because it is founded upon a possession the origin of which is lost in oblivion, he adds:

"'In cases of ordinary prescription the same argument can not be used against a claimant who alleges just reasons for his silence, as the impossibility of speaking, or a well-founded fear, etc., because there is then no longer any room for a presumption that he has abandoned his right. It is not his fault if people have thought themselves authorized to form such a

presumption, nor ought he to suffer in consequence. He can not, therefore, be debarred the liberty of clearly proving his property.'

"It is 'ordinary prescription' subject to be rebutted, with which we are especially concerned. How is one in practice to know in a given case when it arises, it may be inquired, since it has no fixed periods, and no analogies to guide one arising from limitation acts, such as obtain in courts of equity. A definitive answer it would be difficult to frame. But in general we should say, where, all the evidence considered, it appears from long lapse of time and as a result thereof ordinarily to have been apprehended, that material facts including means of ascertainment pertaining to support or defense are lost, or so obscured as to leave the mind, intent on ascertaining the truth, reasonably in doubt about them, or in 'danger of mistaking the truth,' a basis for the presumption exists. If such situation be fairly imputable to a claimant's *laches* in withholding his demand, or, in Vattel's phrase, 'when by his own fault he has suffered matters to proceed to such a state that there would be danger of mistaking the truth,' prescription operates and resolves such facts against him; but if not so imputable, what the finding must be becomes a question of the preponderence of testimony merely, leaving each party to the misfortune time may have wrought for him in the support or in the defense of the claim.

"While prescription names and can name no particular periods, since Sir Matthew Hale's enunciation to that effect twenty years have been looked upon as about the time, in the ordinary run of affairs, required to give rise to the presumption. And the general acceptance of that time is evidence of its reasonable foundation. Still it must be said the constantly increasing multiplicity of business transactions and intercourse tends to suggest a shorter period.

"In this case it is not shown when the claim was first brought to the attention of the United States; and we have not sought to ascertain, for, in the view we take, it is immaterial. Whenever so brought, it came *cum onere*. It has been held that statutes of limitation can be pleaded against the state in an action upon an assigned claim. (United States *v.* Buford, 3 Peters, 30.) The principle applies here, and continues to operate until time ceases to run against the claim, so to speak. When does it so cease to run?

"It has been urged with plausibility that this occurs on the claimant invoking the aid of his government, because then he ceases to have control of his claim. But notice to the plaintiff state is of itself no protection to the defendant state. The latter's means of defense may be dissipated while the claim lies in the archives of the former, and thus its right to defend impaired in the sense above indicated. If it be said the plaintiff state is an interested party and time should not begin to run against it till its discovery of the injury, it may be answered that where one of two states is liable to be placed at a disadvantage by the conduct of a citizen it should be that one whose citizen he is. We think the due notification to the debtor government marks the proper date. This puts that government on notice, and enables it to collect and preserve its evidence and prepare its defense.

"Of course time's work of obscuration, effacement, and destruction goes constantly on under all circumstances. 'Time and tide wait for no man.' And all, we apprehend, is meant by its failing or its ceasing to run against a claim is that in such event that work is not to be imputed to the *laches* of the claimant. Delays are therefore harmful. Honest claims and honest defenses suffer by them; only dishonest ones profit. And so it is a delayed demand naturally excites criticism, even where it escapes the ban of suspicion, and the greater the delay the stronger the tendency in this direction.

"In a recent case, the claim of Carlos, Butterfield & Co., of New York, against the Government of Denmark, Sir Edmund Monson, the British minister in Athens, the arbitrator under a treaty (1888) between the United States and Denmark, where it appeared that a lapse of less than six years intervened between the occurrences (1854–55) complained of (being acts of the public authorities of the Island of St. Thomas in regard to claimants' ships, and of which the government at Washington had prompt notice) and the official notification of the claim to the Danish Government, said, while denying the insistence of Denmark that such delay constituted a conclusive objection to the validity of the claim, that neither claimants nor the United States Government used due diligence, '*and have thereby exposed themselves to the legitimate criticism of the Danish Government on their dilatory action.*'

"It is said there are old claims about which there is and can be no dispute as to the facts. It is enough to say as to

such, that the present holding does not stand in their way. The statement of Mr. Crallé, Acting Secretary of State, to which our attention has been directed, namely, 'Governments are presumed to be always ready to do justice; and whether a claim be a day or a century old, so that it is well founded, every principle of natural equity and of sound morals requires that it should be paid,' may not in itself perhaps be opposed to prescription. Conceded that a claim 'is well founded,' there would seem to be no occasion for prescriptive or other evidence in regard to it. The objection to the remark, in the connection in which it was employed, is, that it assumed the truth of the matter in controversy, to wit, the validity of the claim, for the ascertainment of which the principle was invoked. As to any admitted or indisputable fact, the public law, not resting 'upon the niceties of a narrow jurisprudence, but upon the enlarged and solid principles of state morality,' we are inclined to think, would not oppose the lapse of time, except for the protection of intervening rights, should there be such, even where municipal prescription might.

"The contention urged with force, we should have before observed, that the plaintiff government conclusively adjudges the question of *laches* on the part of claimants as against the defendant government is not, we think, tenable. It is only another form of denying prescription. If both governments are not bound by the principle, it is not the law. If it be the law, as we hold, neither can determine the occasion of its application for the other. By the same title the United States decides a claim is not, Venezuela may declare it is, barred. Of course, in their diplomatic discussions each government must determine the law for itself.

"And the decisions of each, we may remark on the other hand, on such questions are entitled to high respect. Such decisions are not to be taken, as has been suggested, as persuasive arguments in support of or against claims in the ordinary acceptation. The state or foreign affairs department of a government always commands the services of the most learned, able, and experienced statesmen and jurisconsults the country affords. From every consideration affecting it, its purpose must always be to conform its decisions to the public law in international matters. It is, of course, apparent that such decisions are sometimes not the law, since they are occasionally in conflict as between two countries. They are, nevertheless, one of its important sources.

"In some of the cases argued long periods have intervened after due notifications of claims by the United States Government to that of Venezuela, in which no official mention of them is made by either government. It is urged that such lapses should, on general principles, be held to operate peculiarly against claimants. Though the question is not involved in this case, we have considered it, and have thought it worth while here to say we are unable to find authority or a satisfactory footing for this insistence as a general proposition. There are so many things that may induce one government not to press pending demands against another, disconnected with the demands themselves, consideration for the condition and welfare of the debtor state itself being prominent among them, that we are disposed to think the true and, so far as we are advised, the usual way is to regard time in such cases, in the absence of circumstances evincing abandonment, as no respecter of persons.

"Upon these principles, too lengthily discussed, without awaiting further proof called for in defense from Venezuela, we disallow claim No. 36. It was withheld too long. The claimants' verification of the old urgent account of 1841, twenty-six years after its date, without cause for the delay, supposing it to be competent testimony, is not sufficient under the circumstances of the case to overcome the presumption of settlement."

Little, commissioner, for the commission, *John H. Williams* v. *Venezuela*, No. 36, United States and Venezuelan Commission, convention of December 5, 1885.

Case of Ann Eulogia Garcia Cadiz.

In the case of *Ann Eulogia Garcia Cadiz, now known as Loretta G. Barberie*, v. *Venezuela*, No. 47, Mr. Findlay delivering the opinion of the same commission, said:

"At the threshold of this case there is a jurisdictional question which might give rise to serious difficulty if the claim was well founded in other respects. By the terms of the treaty we are only at liberty to pass upon such claims as were presented to the Government of the United States or to its legation at Caracas *before* the 1st day of August 1868. The papers in this case were submitted by the legation to the old commission *on* the 1st of August 1868, but there is no positive proof that they had been presented to the legation prior to that date, and by the strict terms of the language above quoted would be excluded. It appears, however, that they were mailed from New York on the 22d of June 1868 to D. M. Talmage, the commissioner of the United States, then engaged in the discharge of his official duty at Caracas, and in due course ought to have reached him in time to have been filed with the legation before the 1st of the following August. Had they been transmitted to the legation instead

of Mr. Talmage we might have been willing to presume that they were received in time to come within the terms of the present submission; but, sent as they were, there is no presumption to be made in favor of their timely receipt. The question, however, is not a very important one, because on examining the papers and proofs submitted we must reject the claim upon other grounds which go to its merits. The petition alleges that José Felix Garcia Cadiz was a citizen of the United States, and that he acted as agent for an agent of the Government of Venezuela to purchase arms for her forces then engaged in the war for independence, and that in the performance of this service he was caused to suffer a pecuniary loss which is variously stated, and in such a loose and unsatisfactory manner that we can neither discern the precise nature of his injury nor the extent of his losses. The contract under which it is claimed he was acting is not among the papers, nor do they supply the evidence by which we can ascertain its terms. It appears, however, to adopt the language of the petition, 'that during the years 1810, 1811, 1812, *and thereabouts*, the said Cadiz was the agent of the Venezuelan Government in the United States, acting by request and under the direction of Don Juan Vicente Bolivar, then agent of Venezuela in the United States of America, and as such purchased arms, in the *neighborhood* of five thousand muskets, for the Venezuelan Government, at twelve (12) dollars each, for which he was obliged to pay in part, and on which he advanced considerable of his own money, and for which the said Bolivar as agent for the said Venezuelan Government agreed that he should be paid.'

"Reference is then made to a petition of his brother, Don Ramon Garcia, dated July 28, 1811, and the papers thereto annexed, as supplying the evidence which supports the averments of fact as above quoted. An examination of these papers shows that they consist of a letter addressed to some one as 'Most Puissant Sir,' and who, from the context, would appear to have been a person in high authority in Venezuela, particularly as the writer expects a great deal from the equity of this individual, whom, in the closing paragraph, he styles 'Your Highness.' This letter is dated 'Caracas, *July 28, 1811*,' and, although apparently written by Don Ramon Garcia, is not signed by anybody. This is the foundation of the claim, and it rests, therefore, upon an unsigned letter addressed to nobody. The claim, in fact, like an air plant, seems to draw sustenance from every source except its roots. On examining it, however, we find that the case made does not accord fully with the facts as alleged in the petition. The case as presented by the letter represents Joseph Cadiz as being exposed to an action by the manufacturers for breach of contract, and as certain to suffer in credit by the failure of Venezuela to take all the muskets ordered, besides suffering a direct pecuniary loss by the advance of $3,000 on account of muskets and the payment of as much more on account of Bolivar, who had agreed to advance it, but failed.

"There is no mention made of any loss suffered by the claimant in consequence of the difference between the price paid for the muskets and the proceeds of the sales of coffee for which they were bartered.

"Appended to this letter, however, is a statement of account, under date of *July 12, 1823*, purporting to have been made by Joseph Cadiz, and which is entitled 'A statement of the debt and its interests of Don Juan Vicente Bolivar, agent of Venezuela in the United States of America,

during the year 1811.' In this account Cadiz charges for $10,851, with eleven years' interest on the same, $6,161, as a sum of money due him on 3,617 muskets at $12.50 apiece, explaining the item as follows: 'These muskets were bartered for coffee at the rate of 100 lbs. of coffee for each musket; and, the coffee having been sold in Philadelphia at $9 per 100 lbs. to meet the manufacturers' claims,' etc., there was a difference as above stated against the accountant of the principal sum of $10,851.

"Here, then, is a claimant who, through his brother and agent in 1811, is alleged to have complained to some anonymous body in Venezuela that he had been injured by the refusal of the agent of that government in the United States to carry out a contract with respect to the purchase of muskets, and yet who fails to mention what in eleven years afterwards, according to an account then made up by him, becomes one of the principal items of his loss. Not only so, but the claimant himself, in making up this account, does it so loosely that he makes an error of $1,808.50 in the 3,617 muskets item, charging for them $43,404, at $12.50 per musket, which at that rate would yield $45,212.50. It is true this error is against him, but as an evidence of the looseness with which the account is stated it matters not on which side of the column it occurs. A man with a *bona fide* claim and a reasonable expectation of having it paid does not usually fall into such errors. There is another thing to be noticed in connection with this account. The lot of 583 muskets complete with bayonets is mentioned as having been 'taken along with him;' that is, Bolivar. The other lot of 3,617 is called 'the remainder received from the manufacturers,' and would appear to have been paid for in coffee, which fell short of the agreed price by $10,851. Were these muskets received by Venezuela or not? The letter of Don Ramon Garcia before referred to, under date of July 28, 1811, and which constitutes the first presentation of the claimant's case, in its general tenor would seem to very pointedly indicate that the 5,000 muskets bargained for in some way by Cadiz and Bolivar had not been delivered. The language of Don Ramon is as follows: 'But on asking of the above-mentioned agent, Don Juan Vicente Bolivar, the amount which was to be paid as first installment, the agent refused to pay it, and Don José Felix (meaning Cadiz) was left to pay the debt' (that is, as we understood it, the first installment). The writer then goes on to say: 'And as about that time Don Telesforo Orea succeeded Mr. Bolivar in the agency and authority of the same, when the time for the fulfillment of the contract for the 5,000 muskets was up Don José Felix (that is, Cadiz) called on Bolivar, who told him to see Orea about the matter. He did so, but Orea sent him back to Bolivar; *therefore* (italics ours) the brother of the undersigned (although, as we have before stated, the letter is signed by nobody) is greatly exposed to be ruined *if, as it seems natural, the manufacturers sue him and take possession of his goods'* (italics again ours).

"From this statement it would appear that the muskets were not delivered, and that what excited the fraternal solicitude of Don Ramon was the fear that his brother would be sued for a breach of contract. Besides, it may be accepted as a fact which requires no proof that the manufacturers would not have parted with their property until they were either paid or secured. But, again, the letter goes on to say 'the undersigned can not forbear regretting, in the first place, the detriment caused to this province and its confederates *by not having secured* the considerable number

of arms which were bargained at such a good price, considering that the Government of the United States pay 50 cents more for each musket.' If this language has any significance at all, it can only mean that Don Ramon, in 1811, in the possession of letters recently received, as he states in this same letter before quoted, from his brother in the United States, complaining of the course of Bolivar, understood the cause of grievance to be that the claimant had made a bargain for muskets which he was not able to fulfill, and that his liability to a suit for breach of contract, together with certain money he had advanced in part payment for the muskets, constituted his claim. In 1823 the claimant, as we have shown, appears to have enlarged his claim, and it then appears as if the muskets had been delivered, but he failed to realize in full what was agreed to be paid for them, by reason of the coffee which was taken in exchange not bringing as much per pound as had been anticipated.

"There is not the slightest evidence in the papers that this anonymous letter and this account, neither of them sworn to, and constituting the grounds of claim, were ever presented by anybody to anybody. There is a minute at the bottom of the letter, also unsigned, which reads as follows: 'The executive power ordered Don Telesforo Orea to fulfill the contract, provided that its terms were not very unreasonable. This was substantially the decision, and the order was sent to him thereupon.' From this it would appear, however, that the contract had not been fulfilled, and the muskets not delivered, and the relief desired and obtained by the claimant was the escape from liability for a breach of the contract.

"The claimant appears to have left the United States shortly after these occurrences and taken up his abode in different parts of South America, not returning, however, to Venezuela. He finally settled in Santiago de Chile, from which place it would seem from an indorsement on the account before mentioned, he communicated with his brother Don Ramon, then in Caracas, concerning his claim. He accordingly sent this account, together with all the papers in his case, to this brother, with full power of attorney, under date of the 3d of May 1823, to collect and receive 'all the amounts due to him *in the Republic of Colombia*, and specially that he may demand and collect the amount specified in the documents attached to this power of attorney.' What was done with the claim, and under this power, appears from the affidavit of the present claimant, a daughter of Mr. Cadiz, made in New York on February 28, 1890, in which she says 'that according to deponent's best knowledge, information, and belief, the family of Ramon, from 1823 to about 1866, all of which time they had charge and possession of the papers on which this claim is founded, never collected nor received anything on account of the claim in question, and *never endeavored or undertook to collect the said claim.*' * * * So it slumbered for more than forty years, until the papers were sent to Mr. Talmage in the summer of 1868, as before described, and having been disallowed by the commission of which he was a member, because it 'was not filed with the United States legation previous to the organization of the commission,' it now comes before us, after the lapse of nearly eighty years from the origin of the claim. Both the original claimant and his brother Ramon, to whom the power of attorney was given, appear to have died in 1823, but while the power was thus revoked, there is no reason why the parties interested should not have presented the claim, either in

the tribunals of Venezuela or through the good offices of the United States, and not having done so when the circumstances in which it originated were comparatively recent, not even *endeavoring* or *undertaking* to collect it, but sleeping on their rights for nearly a half century, we are of opinion that the consideration of such a case, even if we could ascertain with reasonable certainty what it was, would do violence to every principle of sound policy and open the door for the admission of any claim, however stale and obscure. It is true that this commission is an international tribunal and in some sense is not fettered by the narrow rules and strict procedures obtaining in municipal courts, but there are certain principles, having their origin in public policy, founded in the nature and necessity of things, which are equally obligatory upon every tribunal seeking to administer justice. Great lapse of time is known to produce certain inevitable results, among which are the destruction or the obscuration of evidence, by which the equality of the parties is disturbed or destroyed, and, as a consequence, renders the accomplishment of exact or even approximate justice impossible. *Time itself is an unwritten statute of repose.* Courts of equity constantly act upon this principle, which belongs to no code or system of municipal judicature, but is as wide and universal in its operation as the range of human controversy. A stale claim does not become any the less so because it happens to be an international one, and this tribunal in dealing with it can not escape the obligation of an universally recognized principle, simply because there happens to be no code of positive rules by which its action is to be governed. The treaty under which it is sitting requires that its decisions shall be made in conformity with justice, without defining what is meant by that term. We are clearly of the opinion that in no sense in which the term is used would it be just for us to make an award which would require the levying of a tax on the whole present population of Venezuela to pay a claim which originated before nearly all of the oldest of them were born, and which is presented at a time when it is impossible to say whether it is well founded or not, the delay being without excuse or justification; and we accordingly reject the claim and dismiss the petition."



CHAPTER LXX.

MEASURE OF DAMAGES.

Case of the "Betsy:" Question of Profits: Opinion of Mr. Pinkney.

"The last question which occurred at the board in this case respected the rule of compensation to be applied to it in relation to the cargo. The majority were of opinion that the claimants were entitled not only to the value of their merchandise, but the net profits which could have been made of it at the port of destination, if the voyage had not been interrupted.

"This opinion proceeded upon the supposition that the voyage was *wrongfully* interrupted, and upon that supposition would seem to be free of exception. It has been questioned, however, and I shall of course assign my reasons for adopting it.

"There can be no doubt that the illegal capture and condemnation of this vessel and cargo have given to the claimants a title to receive from the British Government the value of the things of which they were deprived; but the question is, whether they have not also a title to receive the *profits* that might and would have arisen from them.

"The right of the claimants to the cargo was a perfect one; and for that reason they are authorized to demand compensation for its value; but *this* right was in no respect better or more perfect than their right to proceed upon their voyage and to make such profit of the goods as the situation of the destined market would, at the time of the vessel's arrival, enable them under all circumstances to make.

"When the claimants show (and a majority of the board have determined that they have *shown* it) that the cargo belonged to them; that the voyage which the vessel (also the property of one of them) had commenced was a lawful one; that there was no ground upon which she could justifiably be seized or detained—they prove a complete right to prosecute that voyage without molestation, and to acquire such advan-

tages therefrom as in the course of trade might fairly be calculated on.

"According to a written opinion filed by one of the board on this occasion, no compensation is due for the violation of this latter right, for it states 'that to reimburse the claimants the original cost of their property, and all the expenses they have actually incurred, together with interest on the whole amount, would be a just and adequate compensation.' But what substantial reason can be assigned why one of the claimants' rights shall be selected as a proper object of compensation, while another of their rights, equally indisputable and equally violated, shall be left without any compensation at all? No compensation for an injury can be *just and adequate* which does not repair that injury; but he who wrongfully deprives me of a lawful profit, which I am employed in making, can not be said to afford me reparation until he has given me an equivalent for the advantages of which he has deprived me, to which advantages my right was as unquestionable as the right I had in the things from which they were to arise.

"1 Ruth. Inst. Natl. Law, p. 405, sec. 5: 'In estimating the damages which anyone has sustained, where such things as he has a perfect right to are unjustly taken from him, or withholden or intercepted, we are to consider not only the value of the thing itself, but the value, likewise, of *the fruits or profits that might have arisen from it.* He who is the owner of the thing, is likewise the owner of such fruits or profits, so that it is as properly a damage to be deprived of them as it is to be deprived of the thing itself.' But it is to be considered whether he could have received those profits without any labor or expense, because if he could not, then in settling the damages for which reparation is to be made the profits are not to be rated at their full worth, but an allowance is to be made for the labor or expense of collecting or receiving them, and when the labor or expense is deducted from their full worth, the remainder is all that he has lost, and consequently is all that he has any title to demand.

"Id. p. 406: 'In rating the damages which a man has sustained we are to estimate something more than the present advantage which he has lost, for the hope or expectation of future advantage is worth something; and if such hope or expectation is cut off by the injury the value of it is to be allowed him. We must, however, in estimating this hope be

careful not to estimate it as if the advantage were in actual possession. Proper deductions are to be made for the accidents which might have happened to disappoint his expectations, and in proportion as these accidents are greater or more in number or more likely to happen a greater abatement is to be made in consideration of them, etc.'

"Id. p. 409, sec. 8: 'Not only the damages which a man sustains from an unlawful act are chargeable upon them who do the act, but those damages are likewise to be made amends for which are the consequences of such act.'

"The foregoing quotations are supported by Grotius, B. 2, ch. 17, sec. 4 and 5; and also by Puffendorf.

"It is to be admitted that, in the case before the board, the claimants' prospect of profits (provided insurance had not been done upon both profits and cargo) was not entirely certain, for the cargo might have been damaged or lost; and, of course, in the language of Rutherforth, we should be careful not to estimate those profits as if they were in actual possession. But it is also evident that the *profits* were just as secure as the *cargo itself*, and were subject to no other risk than the cargo was exposed to. With a view to *prices* there was no risk at all, since we resort to the prices which are proved to have been those at which the cargo might have been sold if it had arrived. In that respect we have *facts* by which to regulate our estimate and not possibilities.

"If, then, the danger of loss of or injury to the cargo was the only circumstance which rendered the claimants' profits precarious, it is extremely easy to make an allowance for that hazard in the same manner as in ascertaining the value of the cargo itself. We have only to make a proper deduction for the sea risk, and for this the rate of insurance upon such a voyage as the vessel was engaged in will furnish us with the best possible rule. The rate of insurance is the value of the hazard, and it is that criterion upon which we may safely rely, since it is that value which is uniformly paid and received for the sea risk by those who are able from their pursuits and induced by their interests to calculate it accurately.

"Some objections were started at the board against the ascertainment of the probable profits by reference to the prices current at the port of destination.

"It was said to be better to give 10 per cent on the invoice price, and this was alleged to be and is the rule in the court

of admiralty in provision cases under the orders of April 1795. But it is obvious that this rule is an arbitrary one, suggested indeed by a good principle, but not acting upon it. It supposes (what is true) that a claimant is entitled to compensation for his profits as well as for his capital, and so far it adds weight to the foregoing remarks; but it can not pretend to ascertain what those profits would be.

"Ten per cent may be either more or less than a just compensation. It may be a good average rule among various claimants (though, if it is so, it can only be by accident); but surely it is no consolation to a claimant, who gets *less* than is due to him, that another, with whom he has no connection, has got *more*. Our province is to render justice to each individual complainant. It is not sufficient that our awards shall cover the aggregate losses of all the different parties injured, unless we distribute compensation in equitable proportions.

"It is supposed that there can be no certainty in estimating profits with a view to the prices current at the port of destination. I am satisfied of the contrary. To ascertain the current prices of the commodities composing the cargo at the destined market at any given time is neither impossible nor difficult. What those commodities were, together with their quality, may be shown by the ship's papers and other testimony. The deduction for risk is known at once by the rate of insurance and the expenses of freight, landing, storing, etc., and the amount of duties no person can be at a loss for.[1] The principal reason assigned for this uncertainty is the difficulty of fixing the precise influence which the arrival not only of the vessel in question, but of other American vessels detained by British cruisers, contrary to the law of nations, would have had upon the market, if they had been allowed to proceed upon their voyage.

"My answer to this is that any influence which can be attributed to the arrival of the particular vessel in question ought to be attended to, and that this is capable of a reasonably accurate calculation; but that the possible effect of the arrival of other captured vessels upon the market is manifestly improper for our consideration.

"The claimants had a right to make, and would have made,

[1] "These observations are confirmed by the experience we have had of the operation of the rule in the several cases to which it has been applied, since it was first adopted by the board. Its execution has appeared to be easy and its result certain."

such profits of their voyage as the actual (not the possible) state of the intended market would afford. The circumstances by which that state was produced (whether the wreck of other vessels bound to the same port, or their illegal detention by British or other cruisers) could neither make a change in their right nor extenuate the violation of it. I can not, for my own part, perceive anything monstrous in this opinion, but I can see much room for objection to the opposite doctrine 'that although profit is the lawful object of a merchant, although he has a right to make such profit as the *real*, not the hypothetical, situation of the projected market holds out to him, yet that a belligerent, unjustly interfering with that right and wresting from him the effect of it, is not bound to grant him retribution commensurate with the actual damage, because if it were not for the unlawful conduct of that belligerent towards various other neutral merchants the actual damage *might have been less*.'

"If the prices of merchandise at the port of destination had been inflamed by the *act of God* (the wreck of many vessels bound to that port) it is not supposed that we ought to consider in the estimate of the neutral's probable profits the influence which the arrival of the vessels so wrecked might have had upon those prices. In such a case it is agreed that the neutral is to be compensated (if he is to be allowed any profits at all) with a view to the real state of the market, or at least that nothing is to be deducted for any change which that state might have undergone if the vessels had, instead of being wrecked, brought their cargoes to their intended ports; and yet one would think that the belligerent would be more at liberty to set up the act of God, to which he was no party, in extenuation of the retribution required of him, than acts of injustice theretofore committed by that very belligerent, or its commissioned cruisers, towards the fellow-citizens of the claimants. It does not appear to be very satisfactory argument to say that the rule adopted by the board is uncertain, although it acts *upon things as they are*, because a state of things not existing might have produced an incalculable variation; and the argument is the more especially unsatisfactory when it is considered that this alleged uncertainty, which a belligerent is made to urge as the means of evading reparation for a wrong to the actual extent of the loss resulting from it, has been confessedly produced by the illegal conduct of that belligerent or those acting under its authority. When it is recommended to

us to desert the sure ground of *facts* to employ ourselves in an impracticable calculation upon possibilities, we should have some stronger inducement to do so than merely to protect a belligerent from the obvious consequences of its own injustice or that of its commissioned subjects. When we are asked to reject the fair rule of measuring the compensation for an injury by ascertaining the complainant's right and the damage really sustained by the infringement of it, we ought to have a better reason for compliance than that the damage might have been less if the same wrongdoer had not previously committed similar injuries.

"If we are to abandon the criterion which the actual prices current offer to us, I do not know a substitute so inadmissible as that suggested. It rests upon the most exceptionable of all principles, that he who does wrong shall be at liberty to plead his own illegal conduct on other occasions as a partial excuse. It is said, indeed, that the British Government will be injured in the aggregate of compensations awarded if the possible influence of the total of illegal captures on the market is excluded from consideration. Doubtless, if it be true that these captures raised the price in the different markets (which I am not convinced of), and if each claimant is compensated with a view to that price, the aggregate amount of all the compensations will be more than the claimants would have collectively received as profits if every vessel so captured had arrived at her place of destination. But we are not rendering justice in the aggregate, nor is it possible to do so without producing particular injustice. Complainants do not come before us as a body with one case and upon one bottom, but as unconnected individuals setting up distinct rights and complaining of distinct losses. Each complainant's case is entitled to be determined according to the injury which that complainant has received, and it can be no reason for not indemnifying him to the extent of it that his loss would not have been so great if none others could complain of the like violence to their neutral rights.

"If a thousand illegal captures had preceded that of the *Betsey* and raised the price of the articles with which she was freighted, the only consequence would be that the claimants had an undoubted right to avail themselves of that raised price, and that Great Britain, having no possible right to prevent them, but choosing (or at least her cruisers choosing) to interfere with their title, must make reparation equal to the

damage *such as it was*, not such as it might have been under circumstances not existing.

"It is immaterial whether the prospect of profit was bettered by the same persons that wrongfully prevented it from being realized, or by other persons, or by mere accident. It is enough that the profit might lawfully be made, that the claimants were lawfully employed in making it, and that the British Government (or its commissioned captor) unlawfully interposed so as to defeat their efforts. The right existed, with a view to the profit *actually attainable*, without reference to the circumstances that made it attainable; and, the right being ascertained, the compensation is inadequate unless it is coextensive with it. We need not be apprehensive that any injury will be done to Great Britain by this mode; for it will not pay to any complainant more than a compensation for the *actual loss and damage* sustained by him, as expressly stipulated by the treaty.

"It is observed in the written opinion already quoted 'that the claimants appear to have forgot that if neutrals are to enjoy the benefits arising from a state of war, they must be content to bear part of its inconveniences, or, on the other hand, if they claim to be exonerated from all the risks and inconveniences of war, they must agree to forego its advantages. They are not to say, "Give to my commerce the security of a state of peace, but give me the profits of a state of war." The risk and the profit are the counterpoise to each other.'

"This may be admitted; if I understand what it means, every neutral trader does and must stand that *risk* which the *law of nations* annexes to the state of war. A neutral who trades in *contraband* hazards confiscation. A neutral who trades to a besieged or blockaded port with notice runs the same hazard. A neutral who carries enemies' goods runs the hazard of search, seizure, detention, etc.

"The Inconveniences to which the *status belli* subjects neutral commerce are that it can not be carried on so freely as in time of peace; that a neutral nation can not trade with either of the belligerents in certain articles, or at all to such ports of either as are in a state of siege or blockade; that it can not carry the goods of either without being subject to search and detention; and in short, that in the prosecution of its trade it must observe an impartial neutrality.

"These are the risks and inconveniences to which a neutral must submit because the law of nations imposes them on him.

"If any other risks or inconveniences (such as the risk or inconvenience of illegal seizure and confiscation) are intended by the above-cited observations, it need only be said that they are not such as the law of nations authorizes, however they may be arbitrarily imposed by one or all of the powers at war. Let us now compare the above-cited observation with the consequences deduced from it. 'To reimburse the claimants *the original cost of their property*, and all the *expenses* they have actually incurred, together *with interest on the whole amount*, would be a *just and adequate* compensation.' 'To add to the original cost of the property *a reasonable mercantile profit, such as is usually made in time of peace*, would amount even to a *very liberal* compensation.'

"According to this opinion, then, taken together, the neutral shall incur all the risks and inconveniences of the *status belli*, and yet shall have either *no profits at all*, or only the *peace profits*.

"The law of nations imposes restrictions upon neutral commerce during war which the belligerents may and do enforce. If the neutral attempts to carry on a trade which the state of war renders unlawful to him, his property, says the law of nations, shall be confiscated. Here (as in many other respects) the inconveniences of the state of war operate upon him. But, again, says the above opinion, if he is carrying on a lawful trade, and his property is seized and confiscated by one of the powers at war upon some illegal pretext, he is to receive as a compensation either no more than the invoice price of his goods, or that price and the peace profit. Where, then, are the war profits to be set against the war inconveniences? You enforce against the neutral the inconveniences and risks to which he is liable, and yet you do not permit him, in cases where his conduct is unexceptionable, to make or enjoy the profits which, it is admitted, are and ought to be their counterpoise.

"If, in one instance, a lawful neutral trade can be interrupted by a belligerent, on the terms of paying to the party aggrieved only the first cost of his merchandise, or that and the peace profit, it is evident this can be done in every instance. Who does not see that, if this doctrine be true, a state of war burdens neutral commerce with the restraints and disadvantages lawfully incident to that state, and yet that a neutral

can in no circumstances be entitled to the war profits, or, indeed, any profits at all, as a counterpoise to them, if either of the belligerents has the power and inclination to seize upon his property?

"What becomes of the admission that the war profits are the neutral's compensation for the inconveniences to which the law of nations subjects the commerce of his nation, if it is maintained that these war profits are rightfully at the mercy of such of the belligerents as shall be strong enough to defeat them?

"If I were to make the claimants speak upon this occasion, I would make them say, 'the trade of our nation is by the law of nations subject to certain restrictions resulting from the state of war in Europe, in consideration of which such of our citizens as do not violate these restrictions, and conform themselves to their neutral duties, are entitled to the war profits. We have not violated these restrictions; we have conformed ourselves to these duties, and were of course entitled to make the war profits. You have prevented us from obtaining them by an illegal seizure and confiscation of our vessel and cargo, and we now claim retribution *equal to the injury.*' What could be replied to this?

"We are told that the invoice price is the measure of compensation usually adopted by all belligerent nations, and accepted by all neutral nations. I understand that this is not even at present the case in this country. Where the property has been sold the *net proceeds* are given in ordinary cases, and in the provision cases the *invoice price and 10 per cent profit* was given. Mr. Gore has referred to an adjudged case to prove that in England the very rule adopted by the board has been heretofore in practice. But it is not likely that there is to be found any one rule which has been received and adhered to in the courts of admiralty of all countries or even of many countries.

"It is also said 'that the trade in which this vessel was engaged *was barely not unlawful*,' and this is suggested as proper to influence the quantum of compensation. But if the trade was *not unlawful* it was surely as lawful as any trade can be. I know of no mode by which the absolute legality of a trade can be proved, in reference to the law of nations, but by showing that this law does not prohibit it. Such, it is

admitted, was the trade in which the *Betsey* was employed, and I can not conceive how any trade can be said to be lawful in any other sense. If the trade was lawful at all, it was completely so, and of course was entitled to security as far as any trade could be so entitled. There is no medium between legality and illegality. It is true there are certain illegal acts more injurious and more wicked than others, and consequently requiring and justifying heavier punishment; but it is incomprehensible how an act confessedly legal can ever be the object of punishment, upon a loose idea that it was *barely not unlawful*.[1]

"It is said further that the treaty intended to substitute a new *mode*, not a new *measure*, of compensation. Upon the question of jurisdiction, I have understood it to be urged that a new *measure* of compensation was almost the only object of the treaty. We have been supposed to have the power of relieving in cases where the lords have given only the net proceeds, in consequence of the rule to that effect in the prize act—and in cases of seizure under the orders of council, where the lords are bound to refuse costs and damages against the captor. But it is in vain that we have power to entertain these cases, if we are not to introduce any new measure of compensation, however justice may require it. If we are to adopt the measure of redress applied by the lords, our jurisdiction in such cases is a ridiculous nonentity. But be this as it may the words 'adequate compensation' and 'full and complete compensation,' to be found in the seventh article of the treaty, do not warrant the above interpretation of it.

"I have thus stated the principal reasons which have governed my judgment in the case of the *Betsey*. I have not been able to avoid the discussion of such objections as have been insisted on against the opinions I have delivered on the several points that have occurred in the progress of this case. For such of the commissioners as differ from me I feel the best-founded respect; but I could not explicitly detail the grounds of my own decisions on this occasion without noticing topics that were believed to militate against them, and with that impression have been put upon our files."

Opinion of William Pinkney, commissioner, July 1, 1797, case of the *Betsey*, Furlong, master; Article VII., treaty between the United States and Great Britain of November 19, 1794.

[1] Vid. 1 Burlamaqui, 116.

Sir John Nicholl delivered the following minority opinion:

Minority Opinion of Sir John Nicholl.

"The claimants demand [compensation] not only for those [losses and damages] arising from the condemnation, but for all those in any degree resulting from the original capture.

"This demand depends upon the consideration whether or not there was probable cause of seizure and of bringing in the vessel and cargo for legal adjudication.

"And when the two regular tribunals of the belligerent state (which by the general law of nations are alone competent to decide on captures), and when two members out of five who compose this board, all acting under the most solemn obligations, have concurred in holding that the most considerable part of the property is even subject to confiscation, it seems to me (without entering into other reasons) that at least there was *probable cause* for putting the matter into a course of judicial inquiry, and that the demand of compensation for all losses and damages resulting from the time of capture is wholly unfounded.

"The last matter of any very material importance to be considered is the demand made, not only for loss and damage actually incurred and out of pocket, but also for the loss of the profit that might have been made if the cargo had arrived and been sold at its port of destination.

"The claimants, in making this demand, appear to me to have forgotten that, if neutrals are to enjoy the benefits arising from a state of war, they must be content to bear part of its inconveniences; or, on the other hand, if they claim to be exonerated from all the risks and inconveniences of war, they must agree to forego its advantages. They are not to say 'give to my commerce the security of the state of peace, but give me the profit of the state of war.' The risk and the profits are the counterpoise to each other.

"A claim is here made of a profit of near one hundred per cent. This is scarcely ever heard of in time of peace. If it existed at all, it existed only in consequence of the war and the risks that usually accompany it.

"To reimburse the claimants the original cost of their property, and all the expenses they have actually incurred, together with interest on the whole amount, would, I think, be a just and adequate compensation. This, I believe, is the measure of compensation usually made by all belligerent nations and accepted by all neutral nations for losses, costs, and damages occasioned by illegal captures.

"To add to the original cost of the property a reasonable mercantile profit, such as is usually made in time of peace, would, in my opinion, amount even to a very liberal compensation.

"But the demand that is set up of the profits that might possibly have been made if the cargo had arrived and been sold at its destined port, when it is recollected that the trade itself was barely not illegal, it being opened by the enemy to the neutral, in a great measure under the pressure of war; that the profits of this trade were highly inflamed by the war, the French West India colonies being under a necessity of selling their produce at a very low price to neutrals who conveyed it circuitously to Europe; and the prices in Europe, from the same causes, being very high; that the prices were further raised in America at the period in question by the general order that had existed to stop all American vessels engaged

in that trade; when it is further recollected that the prices at Baltimore were probably increased by the capture of several vessels detained in (*sic*) that port, and in some degree by the capture of this very vessel (for it would be almost monstrous to insist that in making compensation for these captures the inflamed price occasioned by the very captures themselves is to be paid); added to this the extreme difficulty of ascertaining the amount of these profits under all the risks with any degree of rational certainty; under all these circumstances, the demand, I say, of these war profits at the same time the British Government is about to compensate the citizens of America for all the actual losses resulting at this period from the state of war, and to indemnify them by a new and extraordinary mode of relief from these costs and damages, which other nations are content to seek only in the ordinary course of justice, appears to me highly unreasonable. It is a demand that, in my opinion, is not consistent with the true meaning of the treaty itself, which intended to substitute in this respect a new mode and not a new measure of compensation. It is a demand not supported by that reciprocality—by that maxim of taking advantage and disadvantage together—which is the very foundation and spirit of equity, justice, and the law of nations."

Decision of the Commission.

In the preceding case the commission held that the true rule of compensation was "the net value of the cargo at its port of destination at such time as the vessel would probably have arrived there."

Case of the "Neptune."

In the subsequent case of the *Neptune* the rule was again applied, but its application was resisted by Sir John Nicholl on grounds other than those on which he opposed it in the case of the *Betsey*. The *Neptune* was seized under an order in council, issued in April 1795. Though this order was not published, its purport, as collected from the evidence in the case, was assumed to be substantially the same as that of the additional instructions of June 8, 1793, by which commanders of British ships of war and privateers were directed to stop and detain all vessels laden wholly or in part with corn, flour, meal, and other articles of provisions therein specified, bound to any port in France, etc., and to send them to such ports as might be most convenient, in order that they might be purchased by the British Government. The *Neptune*, when seized, was laden partly with rice, and was on a voyage from Charleston to Bordeaux; and she was sent to London, where proceedings were taken against her in the high court of admiralty. The court of admiralty ordered the cargo to be sold to His Majesty's government and the proceeds to be brought into court; and subsequently, on a claim being made in the usual form, decreed restitution of the cargo or the value. The question of

value was then regularly referred to the registrar and merchants, who, according to the rule prescribed to them by the British Government and against the protest of the claimants, allowed only the invoice price and a mercantile profit of 10 per cent. The claimant demanded that the value should be determined to be what the cargo would have produced at the port of destination at the time of its probable arrival.

Before the board of commissioners it was urged, on behalf of the British Government, that the rule applied in the case of the *Betsey* should not be administered in such cases as that of the *Neptune*, on the ground (1) that the order in council in question was made when there was a prospect of bringing the enemy to terms by famine, and that in such a state of things provisions bound to the ports of the enemy became so far contraband of war as to justify Great Britain in seizing them on the terms of paying the invoice price, with a reasonable mercantile profit thereon, together with freight, demurrage, and expenses; and (2) that the order was justified by necessity, the British nation being at that time threatened with a scarcity of provisions.

The board, by a majority vote, refused to recognize these arguments as valid, and allowed damages in accordance with the rule acted on in the case of the *Betsey*. The opinions are given below:

Opinion of Mr. Gore.

"A further question has arisen at the board as to the rule of estimating the value of the thing, or rather, in the words of the article, of estimating the amount of a full and complete compensation for the loss and damage sustained by the capture.

"The board determined in the case of the *Betsey* (Furlong) to award the value of the article captured at the port to which the vessel was immediately destined at the time of capture, deducting all expenses and charges of transporting the articles to such place and of sale.

"This was considered a proper and just rule of estimating compensation for the loss and damage sustained by an illegal capture. In the class of cases of which the present is one the rule established by the British Government was the invoice price and 10 per cent thereon.

"This rule, and any rule settling a value by the same advance on the invoice price of all cargoes, may, without hesitation, be declared to be no rule for the consciences of those who

are bound honestly, diligently, impartially, and carefully to examine every complaint according to equity, justice, and the law of nations; and, if the complaint is supported, to award to the complainant full and complete compensation for the loss and damage sustained. It may safely be affirmed that awarding a certain per centum on the invoice price would frequently operate injustice to one of the parties. It might meet a few cases, but it is not in the nature of things that it should be just in all. If it affords more than a compensation for the loss, the government, which is one of the parties between whom we are impartially to decide, is injured; if less, the other party, viz, the complainant, is injured.

"The rule adopted by the board, after much reflection before its adoption, appeared to me conformable to justice, equity, and the law of nations.

"Since its adoption it has been censured by one member of the board as inconsistent with the true meaning of the treaty, as highly unreasonable, and contrary to what all belligerents usually make the measure of compensation to neutrals, and which is accepted by the latter for loss and damage occasioned by illegal captures.

"This unqualified censure of the rule, and the constant protest of His Majesty's agents against its fairness, led me to examine it more carefully. Such examination has confirmed me in the opinion I first entertained, viz, that the rule is prescribed by the law of nations, justice, and equity, consistent with the true meaning of the treaty, highly reasonable and conformable to the practice of the English courts, in estimating the damage sustained by an irregular capture, between the individual captor and claimant.

"The following authorities prove that the rule is conformable to what the law of nations prescribes in case of an illegal capture:

"'Reprisals are used between nation and nation to do justice to themselves when they can not otherwise obtain it. If a nation has taken possession of what belongs to another, if it refuses to pay a debt, to repair an injury, or to make a just satisfaction, the other may seize what belongs to it and apply it to its own advantage, till it has obtained what is due for *interest and damage*, or keep it as a pledge till a *full satisfaction* has been made.' (2 Vattel, 342.)

"'And now we are settling the notion of damage, we are

further to remark that it affects not only the thing itself, which being either our possession or our due, is hurt, destroyed, or intercepted, but likewise the fruits or profits accruing from the thing, whether they have been already received (though then, indeed, they may be valued as particular goods or things), or whether they are yet only in hope and prospect, if the owner had a right of receiving them, provided still a deduction be made of the expense he would have been put to in securing and gathering in such fruits, lest he enrich himself at the charge of the other party.

"'It is a clear point that all evils or mischiefs following by a natural consequence from any damage given ought to be adjudged parts of it.' (Puff. 3, B. 1, C. 3 sec.: Grotius de Jur. B. ac P. 2 Book, 17 C. 4 and 5 secs.)

"Vattel states the right of an injured nation, and the rule it ought to prescribe to itself in making reprisals; the injured nation may seize the property of the other and apply it to its own advantage, till it has obtained what is due for *interest* and *damage*, or keep it as a *pledge* till a *full satisfaction is made*.

"The question here is on the case of an illegal capture. What one nation has a right to exact it is the duty of the other to perform, and this passage shows us the respective right and obligation of states in such a case. Grotius and Puffendorf give us the just construction of the term damage. The rule adopted by the British Admiralty, in cases between their own subjects, is not less liberal to the claimant than this exposition of the law of nations authorizes, nor less liberal than the spirit and letter of the rule agreed to in the case of the *Betsey*. Among many cases that might be cited to demonstrate this position, I will state only one which is quoted in a common law court, to show the manner of estimating damages in such a case. It was on the capture of a vessel bound to Jersey, and will be found in Douglas's Reports, page 574.

"'In the case of the *Bee*, Sir James Marriot, on the 4th March 1779 condemned the captor in costs and damages, and referred the same to the registrar and merchants to make report thereon; the report contained allowances under different articles, viz, for the passage of passengers; for the sailors' wages from the time of their capture till their arrival in Jersey, for their expenses in the intermediate time, a particular sum to two of them who had been carried to France, and detained as

prisoners, at so much per month during their stay there; for the captain's expenses for sundry ship's materials missing; for repairs to the ship; for Robins' expenses; for the loss of part and damage done to the rest of the cargo, and *the diminution in the produce by the loss of the market;* for demurrage; for interest on two bills of exchange; for insurance on the ship, freight, and remaining part of the cargo from England to Jersey; for commission on the value of the ship and cargo, and for the expense of reference.'

"The board, in the rule complained of, deducted all charges and expenses of transporting the article to its destined port, and the premium for which the party might have obtained an assurance of the vessel and cargo in her port of destination. It did not 'enflame' the price of the article by adding to it any additional value—which was occasioned by this capture—no such consequence was ever shown, or any grounds for apprehending a rise of price in the value of the article by reason of this capture. If the seizure and detention did affect the price, it became the duty of those who claim the benefit of such a supposed difference to show that it existed.

"In my opinion the price of the article was not raised by this particular capture, nor by the general captures under the orders of the 6th November. The reason on which I founded that opinion, and which on reflection I think solid, is that the value of the cargo, which was principally coffee, did not depend on the demand for consumption in the United States, but on its price in Europe, where by far the greater part that arrived in the United States was transshipped for a market. And this is particularly evident from the following fact: The price of the article was much lower during sixty days when there was an embargo in the United States than either at the time of its commencement or after its cessation, and the embargo, it is well known, was occasioned by and posterior to the captures under those orders.

"By comparing the rule adopted by the board with the doctrines of Grotius, Puffendorf and Vattel, we shall find that it is conformable to justice, equity, and the law of nations as understood by those celebrated writers; and it is presumed that this is the rule prescribed to belligerents, and with which alone neutrals are under any moral obligation to be content. If there is any principle that authorizes a belligerent to seize on the property of a neutral, on condition of paying him the

original cost, and all expenses actually incurred, with interest, and which deems such to be a just and adequate compensation, it must arise from the voluntary or conventional law of nations. The law of nations, as derived from the general principles of justice and equity, states a different doctrine. If the former exists among any European nations, it is unknown to me. If there be such, it can have effect only on those who are parties to it, by an implied or express consent. It can have no influence on this board in defining their duty, for our two nations are not parties to such rule. The one they have adopted is very different. They have not stated that it shall be the first cost, with interest and expenses, with a reasonable mercantile profit thereon, such as is usually made in time of peace, but have expressly contracted that it shall be such as shall measure out to the party full and *complete compensation for the loss and damage sustained by reason of the capture.*

"No one will doubt that these terms establish a different rule of compensation than the first cost with a reasonable mercantile profit, as in times of peace, however liberal such compensation may be considered. In taking that rule you do not take the one that applies to the case—some circumstances are assumed which may or may not form a true measure, viz, a reasonable mercantile profit, and others are assumed, which are known not to be true, viz, that it was a time of peace. Now, it is well understood that the measure of *full* and *complete* compensation for the damage that results from the interception of a voyage in time of war can very seldom be the same as that for estimating a reasonable mercantile profit in time of peace. The positive and inevitable construction of these terms leaves no room to doubt that the parties intended that the compensation should be made on different principles than merely first cost and reasonable peace profits.

"That this was their intention is still more evident from consulting the eighteenth article of the treaty, where it will be found that in cases where the capture shall be perfectly legal, and where, by the existing law of nations, the property taken shall be liable to condemnation, it is contended that the belligerent shall pay to the neutral the full value of the articles with a reasonable mercantile profit theron. It is not said even here, where all right to compensation is forfeited, that it shall be stinted to the first cost, but shall be determined by the full value; nor to such a profit as is usually made in time of peace,

but to such a mercantile profit as might be deemed reasonable at the time of capture, all circumstances considered, of which that incident to a state of war is unquestionably great and important.

"It can not then be said to be highly unreasonable in the party complaining, under a promise to afford full and complete compensation for the loss and damage sustained by reason of an illegal or irregular capture, that he should demand the price at which he would have sold the article at the place where he was going, to which price he had a perfect right, and would doubtless have obtained, had he not been illegally captured; neither could any sum of money be considered liberal which did not afford him a compensation for what he was thus prevented from immediately acquiring. Hence it appears that the rule we have adopted coincides with the duty of one nation and the right of the other, in case of an illegal capture; that it is literally conformable to the rule prescribed by the law of nations in such cases; that it is consistent with the true meaning of the treaty and just to both parties, and not more liberal to the complainant than is warranted by the practice of British admiralty courts, in estimating the compensation to be made by one individual to another in case of an illegal capture.

"Another objection has been made, viz, that there is an extreme difficulty in ascertaining facts necessary to fix this value. The rule was agreed upon by all the board, except the gentleman whose observations have been considered, upon the idea that it was the only true mode of estimating the damages, and that any other would be a mere compromise and ought to be introduced only where the facts required to form the estimate could not be obtained. Many cases have been decided in which it was necessary to obtain the price of various merchandise from many parts of the United States, the West Indies, and Europe. Hitherto no difficulty has occurred. Whenever any arises from impracticability in obtaining the suitable testimony, the board will be compelled to resort to some other rule; but there is no reason for adopting one, confessedly uncertain in its operation, in cases where one can be applied that fixes the damage sustained without any uncertainty.

"It is evident from our practice under this rule, that if we had taken any rate of advance on the invoice price, the government would have paid more in some cases, and in others less than a compensation.

"This would not have been agreeable to the promise made

by the parties to this treaty, nor to the duty assigned to the commissioners, viz, to ascertain the amount of loss and damage sustained by the complainant, by an honest, diligent, impartial, and careful examination.

"It would seem from the opinion filed by Dr. Nicholl in the case of the *Betsey*, Furlong, that there had been a misconception on the part of those who differed from him as to the grounds of the opinion which he gave. I should have just cause of regret if, in any instance, I had committed such an error, or had taken loose observations from the printed cases or proceedings, or which had dropped from any member at the board, and had given them a weight they did not deserve.

"Those who will give themselves the trouble of recurring to my opinion in that case, and to the evidence of any fact therein stated, will find that no deductions are made but from what is manifest in those papers and expressly acknowledged by His Majesty's agents, and from the reasons given by the high court of appeals in their decree, and which have the same authenticity as the decree itself.

"No other authority was ever quoted at the board than that of Grotius, which was remarked upon to show that the property of George Patterson was liable to condemnation, and I trust it will not be forgotten that the distinction of general and special reprisals was then taken in the manner stated. If this had appeared to have been a loose observation, dropped in an unreserved discussion at the board, it would not have been the subject of remark; or, if it had been so declared at the time of delivering my opinion, I should cheerfully have erased any observations thereon. It was not then even hinted at, as I recollect. The sentiments of Dr. Nicholl were not read till some weeks after.

"If, therefore, gentlemen think the examination too minute, on the principles of law which they have been pleased to advance, they will impute it to the great respect I entertain for everything that comes from those who differ from me in opinion.

"I would most cheerfully dispense with placing any written opinion on the files of this board if I could dispense with the necessity that imposes it. That necessity is displayed in every step of our proceedings. Personal considerations might be waived. Those of public duty are not to be resisted.

"In every case that has yet been preferred, His Majesty's agent has denied that the powers given to the board permitted us to examine its merits. This construction of the powers of

the board is not made without the advice and direction of a very high and respectable officer of the crown. One of the members of the board has stated his opinion, in writing, that on such questions it may be doubtful how far our decision will be binding on the contracting parties; that the decision may be revised and the reasons of each member required to appear. In the present case a construction is put on the eighteenth article of the treaty, which submits many important commercial rights of the neutral to the will of the belligerent, and raises a doctrine relative to the seizure of provisions, always denied and resisted by the United States, which construction has been a great engine with the enemies of the treaty, not only against its adoption, but with a view to destroy all hopes of a friendly connection between the two countries.

"These things appear on our own files and forbid any hesitation as to the duty which demands an equal exposure of the grounds of our opinion in every case where such principles and such constructions are attempted and such consequences foretold."

Gore, commissioner, case of the *Neptune*, June 30, 1797; Article VII., treaty between the United States and Great Britain of November 19, 1794.

Opinion of Mr. Pinkney.

"The majority of the board were for applying the rule adopted in the case of the *Betsey*, Furlong, i. e., 'the nett value of the cargo at its port of destination at such time as the vessel would probably have arrived there.'

"One of the British commissioners objected to the application of that rule, not only upon the general grounds mentioned in his written opinion in the case of the *Betsey*, Furlong, which I have elsewhere fully considered, but upon grounds peculiar to cases arising under the provision order of 1795. [Mr. Pinkney here argues at length that this order was not warranted by the law of nations, and therefore afforded no ground for a limitation of the rule of compensation applied in the case of the *Betsey*. His opinion on this subject is printed in this Digest, under the head of Contraband.]

"There is one topic which the eighteenth article of the treaty has produced at the board * * * upon which I shall, of course bestow some slight consideration.

"That article says that the owners of the cargoes becoming contraband by the laws of nations and for that reason seized, shall be *speedily and completely indemnified.*

"It is argued that as the article goes on to express the understanding of the contracting parties as to the import of the terms, *completely indemnified*, by prescribing a rule for the attainment of complete indemnification, we have here a precise commentary upon the words 'full and complete compensation' used in the sixth article of the treaty.

"The rule is the value of the cargoes and a reasonable mercantile profit with freight, etc.

"I shall not trouble myself to enquire into the exact scope of this rule, nor shall I occupy myself with an enquiry whether the words *indemnification* and *compensation* are so far synonymous as that we should be justified in taking the sense of the contracting parties upon the import of the former as conclusive evidence of the import of the latter. For surely a rule which should completely indemnify or compensate the owner of goods become contraband and for that reason rightfully taken from him by the laws of nations, might still be wholly inadequate to the complete compensation of the owners of a cargo wrongfully captured or condemned.

"The term complete indemnification or compensation depends for its scope and for the rule which shall attain it, upon the nature of the case to be redressed. We are required by the VIth article in all case to grant 'complete compensation' where we grant anything. But do we apply the same rule in every case? Or do we not rather understand by complete compensation that retribution which is commensurate with the injury received?

"In short, it can never be satisfactory to abstract the words 'complete indemnification' in the eighteenth article from the subject to which they are applied, and then reasoning upon their abstract meaning to draw an inference from them that shall affect an entirely different subject. There is not a member of this board who has heretofore acted upon this idea; we have all agreed that in granting 'complete compensation' we are not always obliged to give freight or demurrage. But the rule in the eighteenth article gives freight and demurrage universally, and if that rule is proper for our government at all we must adopt it uniformly, for we are compelled to grant complete compensation in every instance in which it is proper for us to relieve. This absurdity would follow, that we should apply the same measure of redress to cases wholly different in principle, and, instead of suiting the compensation to the injury

under all its circumstances, should treat alike a claimant whose case was liable to no exception, and one whose case was attended with such facts as not only to warrant the original capture for the purpose of judicial investigation but to destroy the equitable claim to freight and all title to demurrage."

Pinkney, commissioner, June 25, 1797, case of the *Neptune*, Article VII, treaty between the United States and Great Britain of November 19, 1794.

Case of the brig "William."

The American brig *William*, John Hughes master, sailed from New Orleans June 11, 1829, for Vera Cruz, where she arrived on the 28th of that month. Having discharged her cargo, she was detained by successive embargoes until the 3d of the following August, when she was impressed into the service of the Mexican Government and employed in the transportation of troops and munitions of war from Vera Cruz to Jaculata. On a claim of the owner of the brig for damages the American commissioners allowed compensation (1) for the retention and enforced service of the brig, (2) for ship's stores consumed by the troops on the voyage, (3) for certain costs attending the presentation of the claim, and (4) for the loss of a cargo of passengers, which it was alleged that the brig when seized was on the point of transporting from Vera Cruz to Havana, in Cuba.

March 10, 1841, the umpire rendered the following "preparatory decision:"

"Before deciding the claim of Robinson Potter, it is necessary to inquire, as the undersigned has indicated in his preparatory judgment of the 23rd of February in the case of Mr. Baldwin, whether, according to the principles of Mexican law, the injured individual has the right to demand indemnity for the loss of the profit of which he has been deprived. It is also necessary to know what are the facts on which the witnesses, John Hughes and John Cross, found their opinion that the seizure of the brig *William* deprived her of a complete cargo of passengers, and by what calculation the witnesses arrived at the result of a profit which would have amounted to $4,000. It is necessary to ascertain whether the brig *William* could count with safety on the passengers, or whether there was room for conjecture."

July 31, 1841, the umpire rendered the following final award:

"The mixed commission appointed to adjust the claims of citizens of the United States against the republic of Mexico has not agreed on the claim of Robinson Potter. The American commissioners allow to the claimant the sum of $4,532,

with interest at 5 per cent from the 1st of September 1829, as indemnity for the detention of the brig *William* by the Mexican authorities, for her enforced employment in the service of Mexico, and for certain damages that resulted, as well as $4.25 without interest for expenses of translation; they say in that regard in a report made to the undersigned of the 14th of July 1841: 'The proposition we maintain is not specifically for the sum of $4,000, as the passage money which would have been received, if the brig had not been impressed, but a fair and reasonable compensation for the vessel, while she was illegally embargoed and forcibly employed in the public service of Mexico;' and further on: 'There is also indubitable proof of damages to the ship and of consumption of provisions to the amount of $532, which, added to the above sums, makes the total amount of the claim in this case, exclusive of interest, $4,532.'

"The Mexican commissioners, on the other hand, contest the right of the claimant to demand an indemnity for that which would have been earned by a cargo of passengers, if the seizure of the brig had not taken place, and deny besides that it is sufficiently proved. They are willing to allow him only $1,250 for the transportation of the troops and $200 for the damages caused by the soldiers, with interest at 5 per cent from August 11, 1829, on those two sums.

"The mixed commission having had recourse to the umpire for the decision in the name of His Majesty, the King of Prussia, on the points on which the mixed commission can not agree, the undersigned, after having examined and considered the demands and defenses, decides that the government of the Republic of Mexico is bound to pay to Robinson Potter the sum of $2,101, with interest from August 11, 1829, up to the day of actual payment, for the detention of the brig *William* by the Mexican authorities and for the enforced employment of the vessel in the Mexican service, as well as $4.25 without interest, for the expenses of translation; the undersigned rejects the rest of the demand."

Robinson Potter v. *Mexico:* Commission under the convention between the United States and Mexico of April 11, 1839.

Jethro Mitchell, in consequence of certain transactions, had at the City of Mexico in October 1822, the sum of $5,152.17 in specie. Wishing to send it to the United States by way of Vera Cruz, he employed two carriers for $265.17 to transport it to that port. This left the sum of $4,887, which was handed over to the carriers for transportation. Soon after they set out, the money was seized by the Mexican Government without cause and converted to its own use.

The Mexican commissioners admitted the validity of the claim, but differed from their American colleagues on two

points. The latter contended (1) that the principal of the award should be $5,152.17, as if the claimant was to be paid in specie at the City of Mexico, with the expenses of transportation yet to be defrayed; and (2) that, in view of the tortious character of the seizure, damages should be allowed in the nature of probable profits which might have been made by the use of the money, instead of interest at the ordinary rate *ex contractu*.

The umpire, however, awarded the sum of $4,887, with interest at 5 per cent from October 12, 1822, the probable date of the seizure, to the date of the award, and $50 costs of translation.

Mercy Mitchell, administratrix of Jethro Mitchell, v. Mexico: Commission under the convention between the United States and Mexico of April 11, 1839.

Case of the Ships "James Maury," "General Pike," and "Milo," and the Bark "Nile."

"In re ships *James Maury, General Pike, Milo,* and the bark *Nile.*[1]

"Where a vessel, captured and bonded in the Arctic Ocean, is obliged to convey to a port of refuge the crews of other vessels captured and burned, a sum is to be awarded to the owners as compensation for property and expenses incurred. Also a sum in lieu of catch in the enjoyment of which the ship's company shall have part, which sum shall include compensation for provisions consumed for the enforced use of the vessel, the compulsory service of officers and crew, and shall embrace the consideration that the vessels were left thirty days' sail at least from the point of departure, to which they had a right to claim to be returned.

"A statement of the case will be found in the opinion of the court.

"——— ——— for the complainants.

"Creswell & Hackett for the respondent.

"JEWELL, Judge, delivered the opinion of the court:

"These are all cases of whaling vessels captured near the close of the month of June, 1865, in the Arctic Ocean, by the Confederate cruiser *Shenandoah*. None of them were destroyed, nor does it appear that any property was taken from them by the cruiser, but that they were severally spared from the destruction which befell a large number of whalers at that time, and bonded by the cruiser, and ordered to take on board and carry to San Francisco or to Honolulu the officers and crews of the several vessels which had been burned.

[1] Davis's Report of the proceedings of the first Court of Commissioners of *Alabama* Claims, p. 47.

"The *James Maury* was captured June 28, 1865, a prize crew put on board of her, the master and mate ordered on board the *Shenandoah*, where they were detained until the master had executed a bond to the Confederate States for the assumed value of his vessel, and until the cruiser had placed on board of her the crews of eleven of the burned ships. Then the master was returned to his vessel with a safe-conduct from the commander of the cruiser, saving him from capture by any Confederate vessel on his passage to Honolulu, to which port he was directed to proceed and there land the men so placed on board.

"At the same time a large number of men were placed on board the bark *Nile*, which, being fitted out for only one season, had not sufficient provisions for the increased number of persons, and a portion of the provisions from the *Maury* was transferred to the *Nile* for use on her passage to Honolulu with the men so placed on board. The value of these provisions is shown to have been $1,205.90.

"The *James Maury*, with 150 men on board, was restored to her master—if that can be called restoration—June 30, 1865, and, according to the orders of the commander of the cruiser, the master made sail for Honolulu, where he arrived in safety on the 11th day of August, after a passage of forty-two days—or in forty-four days after his capture.

"At the time of the capture of the *Maury* she was actively engaged in the whale fishery, and had already taken some whales, and had all her supplies and materials on board for that purpose. On receiving this large number of men, who were in such excess over his own crew, the master was obliged to make such provision for their shelter and comfort as he could, or as humanity or their demands required. At that season, in that climate, it was necessary to furnish them a sleeping place between decks, and all the whaling apparatus, and extra rigging, and other similar articles found in the way between decks were thrown overboard; the lumber found there used for the fitting up of berths for the men, the spare sails and duck cut up for bedding, and generally such use made of everything on board as the necessities of the men required. Much property was lost, destroyed, or appropriated to the use of the men, with or without the consent of the master of the *Maury*, whose consent to the use of any article found on board which might subserve the comfort of his enforced passengers

would not, probably, have been asked. In fact all on board had been prisoners, and whatever was spared, whether ship or stores, was spared for the common use of all so far as was needful to the safe arrival at Honolulu. Some question was made by the counsel for the government whether the destruction of property on the passage was not consented to by the master of the *Maury*, and so its value could not be claimed here; but we must consider it is one of the necessary—in fact, an inevitable—result of the condition of things. Indeed nothing is more creditable to the character of the officers and men in all these vessels than the fact that there has not been shown in any case the least wanton destruction of property, or the least insubordination on the part of any man at any time. In every case the men placed on board were at least five times the number of the officers and crew of the ship on which they were placed, and at any time they could, if they pleased, have taken the vessel under their control. The *Maury* arrived at Honolulu August 11, was immediately refitted, and in the very short period of seventeen days was again at sea in pursuit of her calling. But at this late date—August 28—she could not hope to reach the Arctic Ocean, from which she came, until so late a period that the season, which closed about October 1 or a little later, would be past. She therefore sailed for the winter cruising ground.

"The facts in regard to the other vessels are substantially the same, except that they were ordered to San Francisco.

"The *General Pike* had 222 men placed on board of her, so that with her own crew she had for a time on board 252 men. Of these, urged by considerations of humanity alone, Captain Weeks, of the bark *Richmond*, took 52, and carried them to the Sandwich Islands, thereby incurring for himself and owners a loss from the abandonment of his season's employment for which this court has already expressed a regret that it could, under the circumstances, make no compensation.

"She arrived in San Francisco August 1, after a voyage of about thirty-two days. Here, all the crew, being advised by counsel that they could not be longer held, left the ship, as did all the officers, and she remained in San Francisco till her owners sent out a master to take charge of her and ship a new crew. But if the same dispatch had been used in this case as in the case of the *Maury* at Honolulu, or of the *Milo*, which went to San Francisco, the time of sailing would have been too late to proceed again to the Arctic Ocean.

"In this case, as in the case of the *Maury*, there was a considerable destruction of property by throwing it overboard and in fitting up bunks for the men.

"The *Milo* was captured June 22 and bonded, as in the case of the *Maury*, and 160 men of the crews of the whalers previously captured put on board of her, making, with her own officers and crew, 194 men on board. The master informed the captain of the cruiser that he had not sufficient provisions to make the voyage to San Francisco with so many men in safety, and he was directed to take, and did take, a quantity of provisions from a vessel just captured, and not yet burned.

"He sailed for San Francisco June 23, where he arrived July 20, in safety.

"The narrative of the facts of the capture of the *Milo*, given by the master, Capt. Jonathan C. Hawes, is as follows:

"'18th inst. Please now describe the circumstances of your capture.

"'Ans. About 11 o'clock on the 22d of June 1865 I saw a steamer approaching; I was boiling at the time. Supposing her to be a Russian telegraph vessel, with later news from San Francisco, I set my colors, and awaited his approach, hoping to get further news in regard to the assassination of Mr. Lincoln, whose death I had heard of the night before. He hailed my ship and ordered me on board. I asked him what ship it was. He said, "Never mind what ship it is; come on board and bring your papers, and bear a hand about it." I went on board; was met at the gangway by an officer in uniform, who ordered me to the captain's cabin. I was then told by the captain that I was on board the Confederate steamer *Shenandoah*, and that I and my vessel were prisoners. He put me under oath to state the value of the vessel. The value of the vessel and the oil on board was finally fixed at $46,000, in gold. He told me I must take 100 men that he had on board, and that if I would, and sign a bond, he would release my ship; otherwise he would burn her. I asked him what I should do with 100 men; he said he did not care what I did with the men, but would give an order and permit to take them to San Francisco. In order to save my vessel I then signed the bond, and he ordered me to get the 100 men out quick. I found that he had on board the officers and crews of the *Euphrates*, *Abigail*, and *Wm. Thompson*, all of New Bedford, which ships he had already captured and burned. I then went on board my ship and ordered my crew to go on board of him for the hundred men, and he proceeded to capture the *Sophia Thornton*, of New Bedford, which ship was about one-fourth mile off; after putting a prize crew on board of her, he ordered me to lay alongside of the *Sophia Thornton*, under the penalty of being blown out of water, while he

went in pursuit of another ship, the *Jireh Swift*, of New Bedford, which he captured and set on fire; he then came alongside of my ship, called me on board, told me he had two more ship's crews that he was going to put on board, to which I protested on the grounds of humanity, and I also said I had not provisions enough. He told me that he was going to put the other two crews on board, and that I must take what provisions I deemed necessary to get the men to San Francisco out of the *Sophia Thornton*, and that he would lay alongside of me until I did. He brought his guns to bear on me, and I went to work getting provisions out of the *Sophia Thornton*. While taking provisions, he went and captured and set on fire the *Susan* and *Abigail*, of San Francisco. Supposing he was coming to put another crew on board, we set sail and left, thinking it the most prudent to do so, when he sailed to the northeast, and I headed for San Francisco. This was the last I saw of him.

"'19th int. What flag was the *Shenandoah* flying?

"'Ans. The Russian flag.

"'20th int. What happened after you last saw the *Shenandoah*?

"'Ans. I gave orders to clear the ship for the reception of the men I had been compelled to take on board. We had 194 men, all told; 12 of these left at night to inform the fleet north of us of the presence of the *Shenandoah*. The first thing to do was to get a place for them to sleep. This we did by heaving overboard cask, 500 bbls., 30 bbls. of blubber, wood, etc., and everything that was in the way, for that purpose. We used our lumber, nails, spikes, and canvas, and some sails; one suit of sails to make berths for the men, and then they could not all sleep at one time. We made our way to San Francisco as best we could, and arrived there in 28 days, without much sickness.

"'21st int. Under whose command was the ship on the voyage to San Francisco?

"'Ans. Nominally mine; but of course I had no liberty to go anywhere else.

"'22d int. What was the contents of the permit you received from the captain of the *Shenandoah*?

"'Ans. The *Milo* was bonded and was ordered to San Francisco by Captain Waddell, and was not liable to seizure from Confederate cruisers while on that course.

"'23d int. Have you that permit now, or a copy of it?

"'Ans. I have not.

"'24th int. On your arrival at San Francisco, what happened?

"'Ans. My crew left, and most of my officers and my passengers, immediately.

"'25th int. In what state was the *Milo* left?

"'Ans. In very bad condition, except as to seaworthiness. The provisions were pretty well eaten up. The ship was well cleaned out every way and very dirty. The slops, tobacco, and all small stores were all cleaned out.

"'26th int. What did you next do?

"'Ans. I entered a protest first; and then, as I could get no telegraph home, I had to determine for myself what I would do. I concluded to refit, and I raised money on the oil and by drafts on the owner, and refitted for a cruise of six or seven months down to the islands. I shipped a new crew and officers, with a few exceptions. I tried to retain my old crew, but I found I could not do so, as they claimed the voyage was broken up.

"'27th int. Why did you not return to the whaling grounds in the Arctic?

"'Ans. I deemed it too late to get back for a season there, so I cruised along the coast and down to the islands.

"'28th int. When did you get away from San Francisco?

"'Ans. Near the middle of August 1865.

"'29th int. When does the season in the Arctic usually terminate?

"'Ans. The 1st of October.

"'35th int. If you had not been captured in the Arctic, what voyage would you have made in the usual course of whaling down to the 1st of April 1866?

"'(Objected to.)

"'Ans. I should have stayed in the Arctic till October 1, and then gone to the Sandwich Islands or San Francisco to refit. If I had gone to San Francisco I should have cruised down the coast after refitting and reached the Sandwich Islands about April 1, 1866, as I did. If I had gone from the Arctic to the Sandwich Islands, I should have refitted, then gone over on the coast between seasons, and then back to the Sandwich Islands, arriving April 1, 1866. The between-season whaling ground was the same, except that I had about six weeks more on the coast than I should have had if my season north had not been broken up.'

"The spoliation papers and the safe-conduct given by the commander of the cruiser is shown in the case of the *General Pike*.

"'Deposition of Hebron M. Crowell. Copy of permit produced by Hebron M. Crowell in answer to the 12th direct interrogatory.

"'THOMAS J. COBB, *Commissioner.*

"'This is to certify that register of the bark *General Pike* was this day retained by the C. S. steamer *Shenandoah*, said bark *General Pike* having been released under a ransom bond of forty-five thousand dollars.

"'J. I. WADDELL,

"'*Lt. Comdg., C. S. N., C. S. Steamer Shenandoah.*

"'JUNE 26, 1865.

"'This is to protect Master Crowell, of the bark *General Pike*, from capture on his way to San Francisco, Cal.

"'J. I. WADDELL,
"'*Lieutenant Commanding, C. S. N.*

"'26TH JUNE, 1865.'

"The *Nile* was captured June 28 and bonded in a similar manner. No one of her officers or crew was found to be examined, but the testimony of one of the masters who was put on board of her shows that her case was substantially like the others.

"His narrative is as follows:

"'Q. 4. What do you know of the capture of the bark *Nile*, of New London, by the *Shenandoah*?

"'A. I know she was captured the same day we were and under the same circumstances.

"'Q. 5. What became of the *Nile* after her capture?

"'A. The captain was ordered aboard of the *Shenandoah;* they told him they were going to burn his ship, but afterward they bonded her.

"'Q. 6. Do you know the reason why she was bonded?

"'A. For the reason there were so many of the officers and crews of the captured vessels had been put aboard of the *James Maury*, which had been captured, that we sent a master on board the *Shenandoah* and asked them to give us another ship, as there was not sufficient room on the *James Maury* for us to go to port. The captain of the *Shenandoah* then bonded the *Nile*, and a lot of us went on board of her.

"'Q. 7. What number of men went on board the *Nile*?

"'A. My memory is that there was about 170, all told.

"'Q. 8. What became of the *Nile* and her crew and passengers?

"'A. We made the best of our way to San Francisco. There was nothing else for us to do; we had to go either to there or to the Sandwich Islands.

"'Q. 9. Who had command of the vessel?

"'A. Asa W. Fish, the captain of the *Nile*, but he had to go to port. There was nothing else possible for him to do under the circumstances with all these men on board. We could not have taken a whale and got in the oil if we had had one alongside, there were so many persons on board. It was a matter of necessity for us to get to port as soon as possible.

"'Q. 10. What happened on the voyage to San Francisco?

"'A. Nothing particular, except that we made sail there as fast as we could.

"'Q. 11. On what did the officers and men live on their way down to San Francisco?

"'A. We lived on the stores of the *Nile*, whatever they had.

"'Q. 12. Where did you sleep?

"'A. Between decks and everywhere all over the ship, wherever they could get a chance to lie down.

"'Q. 13. How long were you in the vessel going down to San Francisco?

"'A. I don't recollect exactly, but I think it was about five weeks.

"'Q. 14. What, if any, damage do you remember was done to the ship *Nile*, her stores, and outfits?

"'A. I don't remember whether we threw anything overboard or not. We must have done considerable damage; we made room for ourselves, and made beds of sails or anything we could get. Many things might have been thrown overboard while I was below.'

"The *Nile* brought 121 captured officers and men, and arrived at San Francisco after a passage of thirty-five days. Her master, Captain Fish, left her in charge of the mate and came home overland, and rejoined her in the spring of 1866 in Honolulu. The vessel was taken in ballast by the mate to Honolulu, where she was refitted, and made a winter cruise in the winter of 1865–66.

"Such are the general oulines of these cases.

"Certain items of loss are the same in kind in all, differing in amount. These are the property on board which was destroyed or consumed on the passage and the expenses necessarily incurred by reason of going into port in San Francisco and Honolulu, respectively.

"These items in the case of the *James Maury* are as follows:

"Provisions taken from her to the *Nile*, in value	$1,205.90
"Property thrown overboard or destroyed, in value	2,597.28
"Provisions consumed on passage, in value	4,681.95
"Provisions destroyed or wasted	762.50
	9,247.63
"Expenses incurred or made necessary by the compulsory voyage (in Honolulu)	1,076.22
"The owners also claimed for the amount of the advances made to the crew, which were claimed to be substantially lost, as the crew deserted at Honolulu, amounting to	1,581.68
"Also, for new advances made at Honolulu, where a new crew was shipped, in all	413.80
"They also proved that in shipping a new crew they were obliged to give them a larger lay than had been given to the old crew, the expense of which increase they estimated at the sum of	3,500.00
	5,495.48

"These items of claim are here stated as being matters of damage, in which the crew of the vessel had no interest. The loss of them, if any, fell upon the owners alone.

"The other element of damage for which claim is made is one in which the crew as such (the whole *equipage*, as the ship's company is called in the French law, including officers and men) have a part.

"The shipping articles of a whaling vessel bind the ship to the men as much as the men to the ship. The men do not have wages; their compensation is given them in their *lay*, or aliquot part of the catch, and the owners cannot lawfully divert the vessel from the stipulated business. So, if the vessel is diverted from her ordinary business to engage in a salvage service, the whole ship's company have an equitable proportional claim upon or interest in the amount received or awarded as compensation.

"In like manner, if the vessel is taken forcible possession of, and compelled to perform a service entirely different from that in which she is engaged, as in these cases, and especially when the whole ship's crew must share in the labor and peril thereby imposed, they must have an interest in the compensation awarded for such service and duty. The amount so received must be put in the place of the fund out of which their lay would have been drawn, as they receive no wages as such.

"The principal question in all these cases is, what compensation shall be allowed to the owners and crews for this enforced employment of their vessels, respectively, and for this compulsory labor and peril of the men.

"The claimants ask for it under the name of *demurrage*.

"Demurrage, in its strict use, is the term employed in contracts of affreightment, to fix the sum to be paid for detaining a vessel in port beyond the stipulated lay-days.

"It is, however, employed in a less literal sense in admiralty courts to designate the damages to be paid for the loss of and use of a vessel by the owner in a case of unlawful capture or destruction, when the circumstances are such as to lead the court to award costs and damages against the captor.

"In these cases, damages are assessed at so much per day for the detention or delay.

"The term demurrage was used to designate this kind of loss or damage in some of the papers laid before the Geneva tribunal.

"We do not, however, arrive at the result we reach by fixing the value of the daily employment of these vessels.

"It was admitted by the counsel for the government that this enforced employment of these vessels and their crews was a subject of direct loss or damage, but it was claimed that the amount to be awarded was not to be made in any way dependent upon, or to be measured by, the value of the service in which they were engaged; that the fact of their being in the Arctic Ocean, upon the whaling-ground, engaged in what was generally a most lucrative employment, the fact that they thereby lost an entire season's business, should not be taken into the account in fixing the amount of this direct damage or loss.

"Evidence was offered tending to show that a fair price for the passage of men from the Aleutian Islands to San Francisco was about $85 per man, and it was claimed that this would be a fair compensation for the damage caused by this enforced service.

"With this view we can not agree.

"We had occasion to consider this question in the case of the *Baron de Castine.*

"That was a small vessel, worth from $5,800 to $8,000, engaged in the trade beeween Maine and Cardenas and New York. On the voyage in question she was under charter to carry a cargo of lumber from Maine to Cardenas, and bring thence to New York a cargo of sugar, for the round sum of $2,250, with demurrage at $35 per day.

"When she had made about one-third her voyage to Cardenas she was captured and bonded, and forty-four men put aboard of her; and she was ordered to land the men not south of New York. She did go into Boston after about a five-days' voyage, where she staid about seventeen days to get some repairs, when she sailed again to fulfill her charter. Her master thought she arrived at or near the point where she was captured within thirty days from the day of capture.

"The demurrage fixed in her charter for thirty days' detention would amount to $1,050, and we were urged by the counsel for the government to award no more than that sum.

"But this demurrage was the compensation fixed between the parties for delay in port. This vessel had been forcibly turned from her course in mid ocean. She had been compelled to perform an entirely different voyage, to encounter entirely new perils, and the court did not think the value of this com-

pulsory service should be measured by the demurrage fixed in the charter, and awarded as damages the sum of $2,000.

"What are the general facts in regard to this branch of the claim?

"These vessels were all fitted out in New Bedford or New London at a large expense, and then sent to the Pacific Ocean, to cruise for whales in the Arctic Ocean during the summer, from the 1st of June to the 1st of October, and to return to Honolulu between seasons to refit and ship home oil, and then make a cruise in the winter season on the western coast of North America.

"During the last days of June, while engaged in their business, nearly all having already taken one or more whales, and one while engaged in cutting in a whale, they were captured. All the captured vessels, except the four in question, were burned, and in nearly every case of such destruction we have found quite a large quantity of oil and bone on board, the result of their labor up to the time of capture. While engaged in this very lucrative employment these vessels were captured and compelled to abandon their employment, and go to a port nearly three thousand miles away, and so distant that, using all required diligence, they could not return to the Arctic Ocean till the season was just closing or already closed.

"What shall be held to be the rule of damage in these cases? What shall be given as compensation for this service and loss? That it was a direct damage—a loss directly incurred—is not and can not be denied.

"Here the property was taken from the possession of the owners, was forced into a service not contemplated by them, exposing their large ventures to new and unknown risks, and forcibly depriving them of its use in an employment for which it had been specially and at great expense prepared, and surrendered to the owners again at a point thirty or forty days' sail from the point of capture.

"In the schooner *Lively* (1 Gallison, 315), damage in the nature of demurrage was allowed against the captors who had made an unlawful seizure.

"Story, J., says: 'I shall allow demurrage, including therein wages and expenses of the ship, from *the time of capture until she could return to the place of capture.*'

"The English admiralty reports are full of cases in which vessels have been unlawfully captured or unlawfully detained

after capture, and under circumstances which led the courts not only to discharge the vessels, but to award the owners costs and damages for such unlawful detention. In all these cases the measure of damages had regard to the character and employment of the ship and had been measured by the time of the detention.

"In the Corrier Maritimo (1 C. Rob. 287), damages in the nature of demurrage were allowed for a period longer than the time of detention, and must have included a period enabling the vessel to return to the place of capture, as was allowed in the case of the schooner *Lively*.

"In cases of collision, the courts of England always (see the *Gazelle*, 2 W. Rob. 279), and the courts of this country since the case of Williamson *v.* Barrett (13 How. 101), have allowed damages in the nature of demurrage, and generally under the name of demurrage, as compensation for the loss of the use of a vessel during the period of necessary repairs.

"The courts have always held to a considerable strictness of proof in such cases that but for the injury the vessel would have had employment, and as to the value of such employment.

"We do not, however, consider these claims as within the doctrine of either of these two classes of cases.

"In them, damages were given for a detention during a period of entire inactivity.

"These vessels were not inactive; on the contrary, they were in the highest degree employed, forcibly taken from their ordinary avocations, one of them while in the act of cutting in a whale, and compelled to engage in a duty and to perform a service which, when performed, would leave them thirty or forty days' sail from the place whence they had departed.

"What shall be the sum awarded for this service, for compulsory service is a damage or loss as direct as the loss of property?

"It has been strenuously urged by the counsel of the United States that the fact that these vessels were engaged in a lucrative business should not, under the terms of the act giving us jurisdiction of these claims, be taken into consideration; that an inquiry into the employment of the vessels necessarily involved a consideration of prospective gains or profits, which we are forbidden to allow. But we are to give some damages, some compensation, for service rendered. In any case we must consider the character, situation, and employ-

ment of the vessel. The element of value and employment can not but enter into the calculation as readily as the question of time. What would be ample compensation to one vessel would be entirely inadequate to another.

"What was intended by prospective catch, prospective gains and profits, as connected with this class of cases, is somewhat shown by the character of the claims filed before the Geneva tribunal as well as before this court. In all the cases of whalers destroyed the owners claimed not only the value of their vessels and outfits but for the season's catch which was lost. So vessels driven from the fishing grounds by the presence of the cruisers presented claims for catch lost, or for prospective profits, gains, and advantages.

"Acting upon the view of the counsel for the United States, the experts called by the government have estimated the value of the service rendered by showing what is a fair and usual compensation paid for transporting passengers from the Aleutian Islands to San Francisco; and the counsel for the government claims that a fixed sum per man transported should be awarded, using the price of passage above referred to as a basis of computation.

"But with the exception of the consumption of provisions, the injury to the claimants caused by this enforced service in no way depended upon the number of men carried. One hundred men, as much as two hundred, took the vessel from its employment; indeed, fifty-two taken by Captain Weeks in the *Richmond* cost him his entire summer's employment as much and as truly as one hundred and fifty-one on the *James Maury*.

"We think a sum should be awarded in each case to the owners as such simply, which sum will compensate them for the property destroyed and expenses incurred, the elements for fixing which we have already indicated in the case of the *James Maury*.

"We think there should also be awarded to the owners, jointly, a sum to be received by them in lieu of catch, and in the enjoyment of which the ship's company shall have part, in the same manner as if the sum was the proceeds of oil and bone, which sum shall include compensation for the provisions consumed by the crew of the vessel in making the voyage, and for the enforced use of the vessel during the voyage, and the compulsory service of the officers and crew, and shall also embrace the consideration that the vessels were left at a point

thirty days' sail, at least, from their point of departure, to which point they had a right to claim to be returned, or to receive compensation for the failure so to be.

"Acting upon the principles and governed by the considerations before stated, we shall enter judgments in these several cases.

"In the case of the *James Maury*, we award to the owners alone, for the loss and destruction of their property, the sum of $10,324.25, which sum will be divided among them according to their respective interests in the vessel and outfits, the court having deducted the amounts severally received by the several parties from insurance in entering the judgments in their favor.

"And we award to all the owners, jointly, as compensation for the damage for the use of the vessel and for the compulsory service of the officers and crew, the sum of $16,925, which sum is to be received by the owners, and the same, with interest thereon at four per cent per annum from the date of capture, is to be held by them as and for and in lieu of catch of said vessel, and such sum, with such interest, is to be distributed among the said owners and the officers and crew of said vessel in their due proportions, and in accordance with their several and respective interests in the catch of said vessel.

In the case of the *General Pike*, we award to the owners alone, for the loss and destruction of their property, and to be divided among them according to their respective interests in the vessel and outfits, the sum of $8,921.66.

"And to the owners jointly, for the use of the vessel and the compulsory service of the officers and crew, to be received by the owners in lieu of catch, the sum of $18,730.

"In the case of the *Milo*, we award to the owners alone the sum of $9,157.84, and to the owners jointly, for the use of the vessel and the compulsory service of the officers and crew, to be received by the owners in lieu of catch, the sum of $16,585.

"In the case of the *Nile*, we award to the owners alone the sum of $8,250.65, and to the owners jointly, for the use of the vessel and the compulsory service of the officers and crew, to be received by the owners in lieu of catch, the sum of $14,375.

"There were several claims presented at the same time when these cases were heard, made by officers or men of these vessels, asking for compensation for loss of catch or of wages after capture.

"All these claims are embraced within the equity of the judgment to be made in these cases, and each of these men will receive out of the judgments herein made, in lieu of catch, all the compensation which we believe under the law we can award them. As to loss of wages after the arrival of the vessels at Honolulu or San Francisco, it need only be said that they voluntarily abandoned the enterprise, choosing to consider the voyage ended, when they might have, if they had so chosen, remained by these ships and continued their respective voyages. These claims will therefore be dismissed."

Case of the "Winged Racer."

"HENRY W. HUBBELL
v.
THE UNITED STATES. } No. 278.[1]

"CHAS. A. SHERMAN ET AL.
v.
THE UNITED STATES. } No. 279.

"EDW'D H. GILLILAN
v.
THE UNITED STATES. } No. 1131.

"The measure of damage for goods destroyed by the Confederate cruisers is the value of the goods at the place and time of shipment, with charges, and marine insurance actually paid, with interest on the aggregate so produced from the time of shipment till the date of destruction, at six per cent.

"The measure of damage for loss of freight in cases when freight has begun to be earned is the net freight, which is to be found by deducting from the gross freight the expenses of completing the voyage, and of discharging the cargo at the port of destination, including all inward port charges and disbursements, with a further deduction of a proper sum for the depreciation of the vessel while performing the remainder of her voyage, and of interest on the valuation of the vessel from the date of her destruction to the time of her probable arrival if the voyage had not been interrupted.

"In fixing the value of goods purchased with coin or currency other than the legal-tender currency of the United States, the value of coin in currency at the date of purchase will be taken, when payment was actually made in coin at that time; where payment was actually so made at a subsequent time, the value of coin at that time will be taken, if the payment was made according to the usual course of trade. If not made according to the usual course of trade, the value of coin will be computed at the lowest rate, whether at the time of purchase or at the time when payment would have been made in the usual course of business, or when the payment was actually made.

[1] Davis's Report of the proceedings of the first Court of Commissioners of *Alabama* Claims, p. 58.

"STATEMENT OF THE CASE.

"Henry W. Hubbell and Robert L. Taylor were the owners of seven twenty-fourths each of the ship *Winged Racer*, her outfits and freight—and each owned one undivided half part of the cargo. Edward H. Gillilan owned seven twenty-fourths of the vessel, outfits, and freight.

"In October 1867 Taylor failed in business and made a general assignment for the benefit of creditors to the claimants, Sherman & Irvin, and one John R. Gardner, since deceased.

"The *Winged Racer*, on the 8th October 1863, sailed from Manila for New York, and on the 16th November she, with her cargo, was destroyed by the *Alabama*, near the coast of Sumatra, in the Java Sea. The value of the vessel was claimed at $60,000. Her cargo consisted of 5,810 bales of Manila hemp, 9,607 bags of Manila sugars, 100 bales Manila hide-cuttings, 100 boxes China camphor. Its value was claimed. Indemnity was also claimed for loss of freight, stores, outfits, port dues, etc.

"Mr. Wm. Peet for the complainants Hubbell and Gillilan:

"1. Under the act this question is to be determined—

"*a*. According to the principles of law.

"*b*. By the provisions of the act.

"*c*. By the merits of each case.

"2. The principles of law applicable to the question are—

"*a*. Damages are more liberally awarded in cases '*ex delicto*' than in those '*ex contractu*.' (Sedgwick on Dam. pp. 79, 563, n. (1); Addison on Torts (3 ed.), 984; Shearman and R. on Negligence, sec. 894; Sharper *v*. Brice, 2 W. Bl. 942; Heard *v*. Holman, 19 C. B. N. S. 1.)

"*b*. Future profits are often expressly allowed, and if the amount of the damage sustained can not be accurately determined, the wrong-doer must bear the burden of such difficulty, and in cases of doubt pay enough to insure full compensation. (Shearman and R. on Neg. sec. 395; Leeds *v*. Amherst, 20 Bea. 239; Williamson *v*. Barrett, 13 How. 101; the *Rhode Island*, 2 Blatch. 113; the *Narragansett*, Olcott, 388; the *Lake*, 2 Wall. jr. p. 52.)

"*c*. Profits directly resulting from a wrong are often awarded as an element of damage when not remote, and not dependent upon some future event so as to be uncertain or contingent. (Shearman and Red. on Neg. sec. 599; Walker *v*. Post, 6 Duer, 363–373; Griffin *v*. Colver, 16 N. Y. 489; St. John *v*. N. Y., 6 Duer, 315; Lacour *v*. N. Y., 3 Duer, 406; Sewall's Fall Bridge

v. Fish, 3 Foster, 171; Shelbyville R. Co. *v.* Sewark, 3 Ind. 471; New Haven, &c. *v.* Vanderbilt, 16 Conn. 420.)

"3. The claim now made is not excluded by any provision of the act.[1]

"4. The measure of damages in accordance with these principles—

"*a.* For the loss of the ship is her value at the outset of her voyage. (Arnould on Insurance, 315; Stevens on Average, 190; Snell *v.* Delaware Insurance Co., 4 Dall. 430.)

"*b.* For loss of freight is the amount of freight which would have been earned but for the capture. (The *Gazelle*, 2 W. Rob. 229; Williamson *v.* Barrett, 13 How. 101; the *Ann Caroline*, 2 Wall. 536; Ralston *v.* The *State Rights*, Crabbe, 22; the *Rebecca*, Blatch. & H. 347; the *New Jersey*, Olcott, 444; Abbott on Shipping, pp. 601, 527, quoting the *Copenhagen*, 1 Rob. Ad. 28; the *Der Mohr*, 4 Rob. Ad. 314; the *Prosper*, Edw. Ad. 72–76; the *Fortuna*, Edw. Ad. 56, 57; the *Lively*, 1 Gall. 315; the *Narragansett*, 1 Blatch. 211.)

"*c.* The loss of outfit is the cost of the outfit at the outset of the voyage. If full freight is allowed, the measure of damages will be the value of the outfit on board at the time of destruction. Under this head premiums of insurance had should be allowed as damages. (Maly *v.* Shattuck, 3 Cranch. 458.)

"*d.* For loss of the cargo is the market value at the port of destination, either on the day of destruction or on the day when it would have arrived but for the capture. (Dusan *v.* Murgatroyd, 1 Wash. C. C. 13; the *Joshua Barker*, 1 Abb. Adm. 215; the *Gold Hunter*, 1 Blatch. & H. 300, 308; the *Rebecca*, 1 Blatch. & H. 347, 356; the *Colonel Ledyard*, Sprague, 530; Brown *v.* Ashley, 1 Lowell, 27; Bartlett *v.* Rudd, 1 Lowell, 223.)

"*e.* If the value of the goods at the port of shipment (Manila) is the measure of damage, the damages would be, pursuing the usual course of trade, the value in New York at maturity of a sterling bill on London payable six months after acceptance, and bought at Manila at the time of the purchase of the cargo with the silver dollars by which the purchase was made.

"Mr. Joseph H. Choate for the complainants C. A. Sherman *et al.*

[1] Davis's Report of the proceedings of the first *Alabama* Claims Court, p. 58.

"1. The claimants are entitled to actual and complete indemnity; *i. e.*, to the amount they could have realized for their property as it stood when destroyed, if such destruction had not taken place.

"2. The measure of damages under this principle is—

"*a.* For the loss of the ship, her value at the time of her destruction.

"*b.* For the loss of freight, an amount equal to the gross freight less the estimated cost of earning that amount had the voyage been completed.

"*c.* For stores, provisions, and outfit, the actual value of what was on board at the time of capture.

"*d.* For the cargo, its value at the port of destination at the time when, in the ordinary course of navigation, it would, but for the capture, have arrived at that port. (Abbott on Shipping, 8 ed. p. 504; 3 Kent's Com. 5 ed. 242; Tudor *v.* Macombe, 14 Pick. 34; Stevens & Benecké on Insurance, p. 208; Sedgwick on Dam. 6 ed. p. 424; Sturgis *v.* Bissell, 46 N. Y. 462; Sherman *v.* Wells, 28 Barb. 403; Spring *v.* Haskell, 4 Allen, 112; McGregor *v.* Kilgor, 6 Ohio, 352; Medbury *v.* N. Y. & E. R. R., 26 Barb. 564; Sedgwick, pp. 313, 372, 409, 576, 577, 76 *et seq.* chap. xiii; Williams *v.* Reynolds, 22 Q. B. 221; Bell *v.* Cunningham, 3 Peters, 59; Smith *v.* Condry, 1 How. (U. S.), 28; Heard *v.* Holman, 19 C. B. Rep. (N. S.), 1; Williamson *v.* Barrett, 13 How. (U. S.), 101; the *M. M. Caleb*, 10 Blatch. C. C. Rep. 467; the *Rhode Island*, 2 Blatch. C. C. 113; the *Amiable Nancy*, 3 Wheaton, 546; Masterton *v.* The Mayor of Brooklyn, 7 Hill, 62. Papers relating to the Treaty of Washington, Vol. III. pp. 212–214.)

"*e.* If the value of the goods at the port of shipment is the measure of damages, the importer, 'on the merits of the case,' should be allowed what it actually cost him in New York, in currency, to provide the means in the East Indies to purchase and pay for the goods there, with a further allowance of the advance in that market between the date of purchase and the date of destruction.[1] (The *Vaughan* and the *Telegraph*, 14 Wall. 258.)

"Mr. J. A. J. Creswell for the respondent.

[1] Messrs. Field, Lowe, Beaman, Tenney, Cole, and other counsel filed briefs on the questions involved in these cases, or participated in the argument.

"The measure of damages which shall be settled here will be the measure by which we must abide in the case of like claims brought against the United States in the future. (Papers relating to the Treaty of Washington, Vol. III. pp. 223, 224.)

"The court must be governed by the act of Congress creating it, which expressly forbids the allowance of compensation for prospective damage.

"The damage occasioned by the loss of a ship is to be determined by ascertaining her market value at the time of destruction.

"The measure of damage for the cargo destroyed should be found by reverting to the time and place of shipment, taking the original cost and adding reasonable expenses and interest. The rule contended for by the complainants would involve an allowance for prospective profits.

"Claims pending before this court are in the nature of cases arising from marine torts, where the rule adopted is to compute the value of the cargo at the port of departure.

"The cases cited by counsel for claimants are cases of breach of contract, or involve the law of common carriers, where special considerations apply.

"Where suit is brought on an open policy, the value at the time and port of departure has been taken as a basis for the computation of damages. (Kent's Comm. vol. 3, pp. 335, 336; Mayne on the Law of Damages, marginal pages 186, 188; 12 East., Usher *v.* Noble, p. 639; Warren *v.* Franklin Insurance Company, 104 Mass. Repts. 518.)

"In cases of jettison and general average the rule is different, but there nothing is contingent; the other goods have arrived in safety and actually brought the advanced price. If, in case of jettison, the remainder of the cargo does not arrive, the owner of the jettisoned goods is thrown back for his compensation to the value at the time and place of departure. (3 Kent, 243; Tudor *v.* Macombe, 14 Pick. 34; Mutual Safety Insurance Company *v.* The Ship *George*, Olcott's Reports, 157; Gray *et al. v.* Waln., 2 Sergeant and Rawle, 229.)

"The same rule prevails in cases of capture as in cases arising on an open policy of insurance. (The *Charming Betsey*, 2 Cranch, 126; Maley *v.* Shattuck, 3 Cranch, 491; the *Anna Maria*, 2 Wheaton, 334, 335; the *Amiable Nancy*, 3 Wheaton, 546; L'Amistad de Rues, 5 Wheaton, 385; the *Apollon*, 9

Wheaton, 362; Taber *et al. v.* Jenny *et al.*, 1 Sprague, 315; 1 Lowell, 27, 223.)

"The true rule in estimating the value of the cargo is the *restitutio in integram.* The actual loss sustained by the party at the time and place of injury is the measure of damage. The rule in case of collision is to award as damages the value of the goods at the time and place of departure, with expenses, although in cases of breach of contract to deliver it may be otherwise. (Smith *et al. v.* Condry, 1 Howard, 28; the *Ocean Queen*, 5 Blatch. 493; schooner *Lively*, 1 Gallison, 315; the *Vaughan* and the *Telegraph*, Benedict 1, p. 49; 14 Wallace, 258; Sedgwick, marginal p. 469, note; the *Glaucus*, 1 Lowell, 371.)

"No freights can be allowed by this court except those absolutely earned. (Act of 23d June 1874.)

"The words 'unearned freights' refer to freight to be earned after her destruction on the voyage, during the prosecution of which the vessel was lost. Freight should be allowed *pro rata* from the commencement of the voyage to the date of destruction.

"In entering judgment the value of the goods at Manila, in the currency of that place, should be taken, and this amount converted into the currency of the United States or its equivalent, taking gold at its present value.

"JEWELL, J., delivered the opinion of the court:

"These claims were for the loss of the ship *Winged Racer*, and for the cargo, and for the freight of the vessel, on a voyage partly performed from Manila to New York.

"The claimants first named were each owners of seven twenty-fourths of the vessel and freight and joint owners of the cargo which they had bought in Manila and China.

"The third claimant owned seven twenty-fourths of the vessel and freight.

"The owners of the cargo showed that the cargo could have been sold in New York at the time of the probable arrival of the vessel for a large profit over the cost in Manila and China. They also contended that the goods might have been sold in New York, to arrive, at the day of the destruction, for a large profit.

"Before the hearing in the above-named causes it was arranged that, in connection with the argument upon the questions of law proposed to be presented by the counsel in the principal cases, counsel in various other cases pending before

the court in which questions were raised as to the measure of damages in regard to ship, outfits, provisions, cargo, or freight, should be heard with briefs and arguments, so that, if possible, all questions of this class should be at the same time presented to the court.

"In pursuance of this arrangement briefs were filed by several gentlemen of the bar, and the questions have been presented to the court by briefs and oral arguments of exhaustive ability, and the counsel of the United States has with equal ability and exhaustive research presented his views.

"The court acknowledge their obligations to the various counsel for the claimants as well as to the counsel for the United States for the valuable assistance thus rendered.

"For the authority of this court to award any sum either as loss or damage, or as indemnity or compensation for loss or damage on ship, cargo, or freight, we must look to the law under which we act.

"The act, section 11, directs us to examine all claims admissible under it, *directly resulting from damage* caused by the so-called insurgent cruisers, etc., and 'to decide upon the amount and validity of such claims *in conformity with the provisions hereinafter contained*, and *according to the principles of law* and *the merits* of the several cases.'

"By this we understand that each claim is to be decided upon according to the principles of law and the merits of the several cases, and such a sum awarded to each claimant as the principles of law and the merits of his case entitle him to receive, unless the allowance of such amount is specifically forbidden by some provision of the act 'thereinafter contained.'

"What the provisions of law are upon or according to which we are to make up these claims we are not told in the act; we are to seek them in general principles acted on by the courts, or to be found in the decisions to which we look for the authoritative declaration of the law of the land.

"We ought, as it seems to us, to look for these principles especially in the decisions of the Supreme Court of the United States, which are of paramount authority, certainly in cases to which the United States is in any sense a party. We may look for them in the decisions of the circuit courts of the United States, to the practice and procedure in which we are specially referred in the act. And we may also look to the decisions of the courts of the several States, not as conclusive upon us, but

as worthy of examination by reason of the weight of reasoning and broad application of principles exhibited by those very high tribunals. And as these questions, the fund to which they have reference, and this court itself, each and all, are but the fruit of a great settlement between the two leading commercial and maritime powers of the world, we may and ought to draw from the law of nations, and the decisions of the courts of Great Britain, and especially from those tribunals before which questions of the law of the seas, of the rights and duties of neutral nations, are brought and tried, such rules as will best accord with that enlightened sense of justice by which this nation will be willing hereafter to be measured, and to which she will hereafter, without hesitation, appeal.

"It was not improper for the counsel of the United States, in his very able argument, to call to our attention, and the attention of the claimants here, that we must bear in mind that, in making a standard according to which damages are to be awarded to the claimants before us, we at the same time supply a standard according to which hereafter, in all time perhaps, damages will be claimed and enforced against our own government.

"This consideration itself increases in our view the gravity and importance of the questions to be decided; it imposes upon us the greater obligation to consider with the strictest care the matters under deliberation.

"That Congress had this consideration in view in framing the act is evident from the act itself; and section twelve comprises the 'provisions hereinafter contained,' which limit and restrain us in applying what otherwise we might apply to the fullest extent, namely, the allowance of damages in each case according to the principles of law.

"The primary purpose of the act we conceive to be to discover what the *loss or damage* directly suffered by each claimant is according to the principles of law, and to award him that sum, with the limited interest provided in the act; and that amount we are to determine and award, unless we are prevented from allowing the whole of said sum by the restraining clauses before referred to.

"There are some preliminary considerations which we will dispose of before proceeding to an examination of the chief questions at issue.

"It is urged upon us most earnestly by all the counsel for

claimants that the allowance for damage should be of the most liberal nature, inasmuch as these claims arose out of the acts of a wrongdoer; that the capture and destruction of these vessels was attended by wanton outrage and violence, presenting, as is urged, the cases in which courts have uniformly permitted the largest liberality in the assessment of damage. We do not think these considerations apply.

"These captures were made in war; there was no violence greater than is allowed by the laws of war. To be sure, usually captured ships are not destroyed; they are commonly taken as prize before the courts for condemnation; but as the Confederacy had no prize courts, they exercised an undoubted, although extreme, right, and burned their prizes. Every merchant who made an adventure upon the seas was fully aware of the dangers to which his vessel or cargo was exposed. He 'met but what he looked for and should oppose.'

"Besides, this fund is the result of a liability of Great Britain for an act of negligence. This is not a suit against the actual wrong doer. To be sure, by the law of nations we held England liable for these losses, and by the treaty she agreed to be treated as liable, but from first to last she protested that her liability was that which arose from oversight and omission, from a want of vigilance, an inadequacy of exertion in particular cases, a mistake of her duties, and not a wanton or willful act. And, as we understand it, our own government finally acceded to that view.

"In our own highest court, where the owners of a privateer were held liable for the unlawful act of the master and crew, a claim for vindictive damages was rejected, though Mr. Justice Story, in giving the opinion of the court, says, 'upon the facts disclosed this must be pronounced a case of gross and wanton outrage, without any just provocation and excuse.' (The *Amiable Nancy*, 3 Wheaton, 546.)

"We are therefore of opinion that this consideration cannot enter into our judgment in estimating the amount of damage in these cases.

"The various claims for damage arising under this act are:

"First. For the vessel.

"Second. For those outfits or supplies which are put on board prior to the commencement of the voyage and needful or pertaining to the navigation. As to those, it is in every case a question whether they are or not included in the valuation of the vessel itself.

"Third. For those supplies which are in the nature of provisions to be consumed on the voyage.

"Embraced in these second and third classes are the outfits and supplies put on board vessels fitted for whaling or similar voyages, differing in details from the outfits and supplies of ordinary vessels, but presenting no differences of principle.

"Fourth. For the loss of the freight, either as due for the carriage of goods in a general cargo or the amount to become due or agreed to be paid under a contract of affreightment or charter-party, either for a voyage actually entered upon, the goods being already on board, or for a voyage agreed to be made from a port not yet reached, but for which the vessel has sailed, or on a voyage agreed to be made, but for the performance of which no steps have been taken or progress made, except to bind the ship and owners, if the ship or vessel survives accidents, so as to be able so to do.

"All these claims have reference to the owners of the vessel, and can be made by them only, or by their representatives.

"Fifth. For the loss of goods on board, whether specifically as cargo entered on the manifest and paying freight, or as the property and personal effects of officers or men or of passengers.

"*As to the ship:*

"There has been no difference of opinion in the discussions before us as to the measure of damage to the ship or vessel. The decisions of the courts all agree in giving the owner of the vessel its value at the time of its loss or destruction. In the law of insurance, its value at the commencement of the risk is taken to be its value through the voyage, although in fact the ship is continually deteriorating; but this slight deterioration is compensated for as an element of the freight.

"There is nothing in the act limiting the right to give the value of the ship if destroyed. (The *Baltimore*, 8 Wall. 386, and cases in note; Lowndes on Collisions, 141 *et seq.*)

"*As to outfits:*

"As to that class of outfits which pertain to the navigation, such as spare spars, sails, extra canvas, and the like, and materials for the temporary repair of the ship, it has been contended by the counsel for the United States that they properly belong to and are included in the valuation of the ship itself. There is no difference of opinion that when the value of the vessel is clearly proved, exclusive of this class of outfits, and the value of the outfits as a separate item of value is clearly shown, their value, if destroyed, is to be given.

"There is nothing in the act restraining us from giving the value of outfits if thus shown; but we shall in each case, according to the proofs, estimate the value of the ship and outfits, either collectively or separately, as justice shall require.

"*As to the provisions:*

"There has been no difference of opinion in the discussions before us as to the allowance for the provisions on board, unconsumed at the time of loss. Their value must be given either as a separate item of valuation, or as a component part of freight, according as we shall decide to give judgment for the loss of freight. Provisions are a fluctuating quantity, having its maximum at the beginning, and constantly diminishing as the voyage proceeds, till the minimum is reached at its termination.

"In the case of vessels fitted out for whaling or similar voyages occupying long periods, some of the outfits pertaining to navigation, as well as the provisions put on board and the paraphernalia and machinery and the vessels for containing the product of the catch, are substantially cargo on board and must be governed by the rules applicable to cargo.

"*As to the measure of damage for the loss of goods:*

"This question has been argued before us with great ability upon both sides. It is claimed by the owners of goods destroyed that the act intended and expressly directed us to award to each claimant such a sum as would give him an '*indemnity* for losses,' (§ 5,) such as would be a '*compensation* for the actual loss or damage,' (§ 12;) that the claims were for '*damage directly resulting* from the acts of the insurgent cruisers,' &c. (§ 11;) that the words 'compensation' and 'indemnity' (§ 12) are used to indicate the extent of the claimant's rights: that nothing can be indemnity or compensation for this loss or damage which does not put the claimant in the same situation in which he would have been if the capture and destruction in the particular case had not occurred. It is, therefore, claimed that the value of the goods destroyed must be the sum which they would have brought at the place of destination at the probable time of their arrival, and that the average length of passages between the ports of departure and destination should be taken to ascertain the time of probable arrival in each case.

"That this was the market for which the goods were intended, that anything less than the value at the port of destination

would not give 'indemnity' or 'compensation' for the 'damage or loss.'

"It is further claimed that if this measure of value cannot be allowed, at least the value of the goods at the port of destination at the date of the loss should be given.

"All of the numerous authorities cited in support of these positions were of cases arising *ex contractu*. They were chiefly actions brought against carriers, either by land or sea, for nonperformance of the contract of carriage. They were actions between the parties to the contract. There is no doubt that in an action against a common carrier by the owner of the goods for nondelivery the measure of damage universally given is the value of the goods at the time and place when and where the carrier has contracted to deliver them. (Angell on Carriers, § 482; Sedgwick on Damages, c. xiii. See the very numerous cases cited by these authorities.)

"The basis of the doctrine in all these cases is, that it is the policy of the law to hold the carrier liable for the full value at the time and place of destination, to remove from him all temptation to fraud. (Gillingham *v.* Dempsey, 12 Serg. and R. 188.)

"In this case, which was the first case where the question arose in Pennsylvania, and in which all the English and American authorities up to that time were most exhaustively examined, C. J. Tilghman says: 'If we consider the policy which should regulate these contracts, it is best to remove from the carrier all temptation to fraud, which will be best done by making him answerable for the value at the place of *delivery*. If the goods should be of increased value at the place of delivery, as they generally are, and the liability extends no further than the value at the place of shipment, there is very great temptation to fraud.' * * * 'And it would require very strong authority to satisfy me that where the carrier fraudulently disposed of the goods at the place of delivery, and made great profit thereby, he or his principal should be responsible for no more than the value at the place where he received them.' (Watkinson v. Laughlin, 8 Johns. 213; Emory *v.* McGregor, 15 Johns. 24.)

"Another class of cases cited by the counsel for the claimants grows out of the contract of insurance.

"When jettison is made of goods for the relief of the ship in case of peril, the owner of the goods so jettisoned, *if the ship*

arrives, is entitled to be paid for them the price they would have brought at the time of the arrival and at the place of destination. This value is given on the obvious equity that the owner of the goods whose destruction has enabled the others to arrive shall be in no worse condition than are those whose property has been saved by his sacrifice.

"But if the *ship does not arrive*, if the rest are not carried forward, the goods jettisoned are to be paid for at their value at the place of shipment, with charges, insurance, and interest. (Tudor *v.* Macomber, 14 Pick. 34.)

"So, if the ship is compelled to put into port in distress, and to make repairs or procure supplies, where the master has no funds and no credit, he may sell a part of the cargo to procure funds; and *if the ship afterwards arrives*, the owner of the goods sold shall have for them the price which they would have brought if they had remained on board, namely, their value at the time and place of destination.

"But if she *does not arrive*, the value to be paid for them is their value at the port of departure, with charges, insurance, and interest. (Abbott on Shipping, 372; Mayne on Damages, 223; Richardson *v.* Nourse, 3 B. & Ald. 237.)

"Both these classes of cases are exceptions to the general rule followed in actions upon policies of insurance, and both stand upon the same ground, that the owner of the goods sacrificed in jettison, or sold for the exigencies of the voyage, shall be in the same condition as are the other owners whose goods have been insured a safe arrival by his sacrifice. If they gain a profit, so shall he, but if the ship fails to arrive then the goods of all parties are to be valued at the same standard, namely, that of the place of shipment.

"But the act creating this tribunal, it seems to us, has expressly taken away from us the power to estimate the damage upon the principle contended for. Section 12 expressly provides that in no case shall any claim be admitted or allowed for or in respect to * * * *prospective profits*, freights, *gains*, or *advantages*.

"Prospective profits means that profit or advance in price which the owner of goods expects will take place between the place of shipment and the place of destination.

"This is sometimes called *profits*, sometimes *probable* profits, and sometimes *expected* profits. (Phillips on Ins., § 1209; Benecké, pp. 26, 27, 28, 29, 30, 119, 125; Stevens and Benecké, 14.)

"Prospective profits, as applied to goods, can refer only to the difference in price between the port of lading and the port of discharge. Profits expected after the time of discharge have never been given as damage in any case.

"Profits in this sense—expected profits, prospective profits—are the constant subject of insurance, and are certainly as insurable as any other interest; but an insurance to cover them must be of profits *eo nomine;* they cannot be insured under the name of goods or cargo unless in a valued policy. Of course, such expected profits may be included in the valuation of goods in a valued policy on goods, but valued policies rest upon principles peculiar to themselves, by force of which the assured may value as high as he pleases, and the insurer is bound thereby. Valuation in the policy binds both parties in the absence of gross fraud.

"The act enjoins upon us to decide upon the amount and validity of these claims 'in conformity with the provisions of the act, and according to the principles of law and the merits of the several cases' (§ 11). We are to find some rule of valuation which will accord with the provisions of the act *and* with the principles of law at the same time. Both injunctions are to be obeyed if they can be, and the act assumes that they may; and if in examining these claims we can find a course of decisions which will enable us to follow settled principles, and at the same time to give effect to the restrictive clauses in the act, those decisions we must follow.

"The rule of damages followed by the courts of this country and of England in actions upon the contract, and between the parties to the contract of carriage or affreightment, as we have seen, cannot be followed by us. They include a valuation which we are expressly forbidden to allow.

"But there are two classes of cases, either of which we may follow, keeping within the principles of law, and at the same time not contravening the provisions of this act. One of these arises in actions of tort, and the other in actions of contract.

"From the earliest period in our judicial history actions have been brought by the owners of goods against persons other than the parties to the contract of affreightment, growing out of torts committed against the goods while in transit on their way from the port of lading to an intended port of discharge.

"The earliest of these which reached the Supreme Court

of the United States was in 1794. (Del Col *v.* Arnold, 3 Dallas, 333.)

"This was a case of a vessel wrongfully captured by the commander of the *Constellation*, an American vessel of war, and brought into the port of Philadelphia, where the captain instituted proceedings for her condemnation. Pending these proceedings the cargo was sold, and the consul of Denmark intervened in the cause, claiming the vessel and cargo as the property of a Danish subject. The cause was heard by the Supreme Court upon appeal, and Chief Justice Marshall gave the opinion of the court, wherein they fixed the standard of damages by directing in their decree 'that the cause be remanded to the circuit court, with directions to refer it to commissioners, to ascertain the damages sustained by the claimants, * * * and that the commissioners be instructed to take the actual prime cost of the cargo and vessel, with interest thereon, including the insurance actually paid, and such expenses as were necessarily sustained in consequence of bringing the vessel into the United States, as the standard by which damages ought to be measured.'

"A large sum was awarded against Captain Murray in pursuance of this decree, which he was obliged to pay, and which was afterwards reimbursed to him by act of Congress from the Treasury of the United States. (Act January 31, 1805.)

"The rule of damages thus established has been followed from that day to the present, through a series of decisions entirely unbroken and unchanged. (The *Charming Betsey*, 2 Cranch, 64; Maley *v.* Shattuck, 3 Cranch, 458 (1806); the schooner *Lively* and cargo, 1 Gallison, 315 (1812); the *Anna Maria*, 2 Wheat. 327 (1817); the *Amiable Nancy*, 3 Wheat. 546 (1818); L'Amistad de Rues, 5 Wheat. 385 (1820).

"The same rule was applied in the case of an unlawful and unjustifiable seizure of a vessel by the officers of the revenue in 1824. (The *Apollon*, 9 Wheaton, 362.)

"Story, J., says, p. 376: 'This court on various occasions has expressed its decided opinion that the probable profits of a voyage, either upon ship or cargo, can not furnish any just basis for the computation of damages in cases of marine tort.' * * * 'When the vessel and cargo are lost or destroyed, the just measure has been deemed to be their actual value, together with interest upon the amount from the time of the trespass. * * * And it may be truly said that if these

rules do not furnish a complete indemnification in all cases, they have so much certainty in their application, and such a tendency to suppress expensive litigation, that they are entitled to some commendation upon principles of public policy.'

"The rule established in these cases was followed in the first case of damage arising from collision which came before that court. (Smith *v.* Condry, 1 Howard, 28 (1843).

"This rule has been followed by the district and circuit courts in all succeeding cases, and has been affirmed in a very recent case by the Supreme Court. (The *Vaughan* and the *Telegraph*, 14 Wallace, 258; the *Ocean Queen*, 5 Blatch. 493.)

"The other class of cases are those actions brought upon an unvalued or open policy of insurance.

"It is claimed in the argument before us that the rule in these cases does not make good the *damage* or *loss*, does not *indemnify* or *compensate* the parties.

"But it does give that indemnity which, by the custom of merchants ever since insurance was practised in England or in this country, has been given in actions upon policies of insurance not valued; that is, under open policies. And in fixing the standard of indemnity to be given in a case of collision the Supreme Court expressly followed the practice adopted in cases of insurance from the earliest times. (Smith *v.* Condry, 1 Howard, 28.)

"The injured ship in this case was at anchor, ready to sail, in the harbor of Liverpool, laden with salt, intended for sale in the port of Alexandria, where she expected to arrive in season to dispose of her cargo at a large profit. The plaintiffs claimed to recover the value of the salt at the place of her destination.

"Taney, C. J., in giving the opinion of the court, says: 'The plaintiffs offered to prove that if the ship had not been prevented from sailing by the injury complained of she would have arrived at Georgetown in season to have made a large profit on her cargo.'

"But, it will be observed, he makes no allusion whatever to the long course of decisions in the cases of illegal captures already referred to, but adopts the rule of law in cases of insurance as furnishing the proper standard of damages. He says (p. 35), 'It has been repeatedly decided in cases of insurance that the insured cannot recover for the loss of probable profits at the port of destination, and that the value of the

goods at the place of shipment is the measure of compensation. There can be no good reason for establishing a different rule in cases of loss by collision. It is the actual damage sustained by the party at the time and place of the injury that is the measure of damage.' He expressly calls the damage thus measured the *actual damage* suffered by the party.

"The text writers on insurance are uniform in their definitions of the words *loss* or *damage*, and of the corresponding words *indemnity* and *compensation*.

"Indemnity is the compensation for loss or damage.

"Mr. Phillips says:

"'The principle of insurance is indemnity.

"'The indemnity proposed in marine insurance is to restore the assured as nearly as may be to the condition he was in at the outset.

"'It is not intended by the contract of insurance to put the assured in the same situation in case of loss that he would have been in had the adventure terminated successfully. He must take the chances of his speculation on the state of the markets. The indemnity refers to the beginning of the risk.' (2 Phillips on Insurance, § 1220.)

"*Ibid.* § 1219: 'The value of the interest is to be estimated at the time of the commencement of the risk.'

"Emerigon (Am. Ed., 1850), c. 1, § iv. p. 13, states the principle upon which insurance is based.

"'It is plain that insurance is not a source of gain to the assured.

"'*Assecuratus non quærit lucrum, sed agit ne in damno sit,*' says Straccha.

"'In a word,' he continues, 'one may have insured only what one runs the risk of losing, and by no means advantages which one may fail to realize.'

"*Ibid*, p. 213: 'As soon as the assured is indemnified for this value [the value at the time and place of lading] his lawful interest is satisfied.' (1 Arnould on Ins., 301, 302; *Ibid*, 324, 325, 329; Benecké, ch. 4; Stevens & Benecké, 13.)

"That this is the rule—that the *loss* or *damage* to be *compensated* for or *indemnified* against, in cases of insurance in policies not valued, is the value at the commencement of the voyage—hardly needs a citation of authorities.

"The leading authorities in England are: Usher *v.* Noble, 12 East. 639; Lewis *v.* Rucker, 2 Burr. 1167.

"The case of Winter v. Haldemand, 2 B. & Ad. 649, is inter-

esting, because it was a case of loss by capture under an open policy.

"Sir James Scarlett, in argument, stated the rule (pp. 652, 653) in accordance with which the case was decided. He says: 'The rule, invariably adopted in case of an open policy, is to estimate a total loss, not by any supposed price which the goods might have been deemed worth at the time of the loss, or for which they might have been sold had they reached the market for which they were destined, but according to the cost, viz, the invoice price and all expenses incurred till they are put on board.'

"The leading American cases are: Snell *v.* Delaware Ins. Co., 1 Wash. C. C. 509; Carson *v.* Marine Ins. Co., 2 Wash. C. C. 468; LeRoy *v.* United Ins. Co., 7 Johns. 343; Coffin *v.* Newburyport Ins. Co., 9 Mass. 436.

"The latest case on this subject is Warren *v.* Franklin Ins. Co., 104 Mass. 518.

"It is needless to cite authorities further. The rule of damage, or of value in case of damage, is perfectly clear in all cases of marine torts, and the same rule is also universally adopted in that great branch or class of contracts known as insurance, and equally well settled in this country, where we distribute this fund, as in Great Britain, whose government has paid the sum out of which arises our jurisdiction.

"Were these claimants prosecuting their claims in a court from which an appeal might be taken to the Supreme Court of the United States, can there be a doubt what would be the standard of damage and indemnity which would be there applied?

"In some aspects the rule of law applicable to insurance seems peculiarly applicable here, inasmuch as England may in some sense be considered in the light of an underwriter upon an open policy, against any loss by capture at the hands of the cruisers for whose depredations she was held responsible.

"We ought also to say that in coming to this conclusion we have not been constrained in our judgment by the restrictive clauses of the act, but that without them we should have felt bound to adopt the same standard of value as being 'accorded to the principles of law.' It seems to us that the restrictive clauses of the act were, so far as they apply to goods, intended and most carefully adapted to *declare* the law upon this branch of the subject, and not to make any new rule.

"We therefore are of opinion that the measure of value of

goods destroyed by the depredations of the cruisers, for whos acts this fund is created, is to take the value of the goods a the time and place of shipment, with charges upon them til put on board, with the marine insurance actually paid, an interest on the aggregate so made from the date of purchas or shipment till the time of the destruction at the rate of si per cent. For that sum judgment will be entered, and by th terms of the act interest thereafter will run at four per cent.

"In every case, therefore, we must look to the time of paymen for the goods in cash, as shown by the evidence, to obtain th basis for the calculation.

"We believe this measure of value to be that universall adopted in all cases of marine torts by the Supreme Court o the United States, which that court would certainly apply i an appeal lay from our decision to that court.

"It is also the measure of value given by the tribunals o all countries in fixing the indemnity required upon contract of marine insurance.

"Further, any other measure of value we are forbidden t give by the language of the law under which we act, whic expressly excludes *prospective profits* from our estimate of th loss.

"*As to the freight:*

"Having now considered the question of the measure of valu of the cargo, we will proceed to the consideration of the ques tion of freight.

"As between the owners of the ship and cargo, the parties to the contract of affreightment, freight is not earned until th goods are discharged at the port of destination, unless th owner sees fit to receive them at an intermediate port.

"As between the parties, no freight is earned until that por is reached; but as between parties other than the parties t the contract, freight is property in every sense of the law fro the moment when the charter party is executed and the vessel has commenced to take in her cargo, or has left any port fo the purpose of performing the voyage to which the contract of affreightment refers.

"As against the charterer, the owner of the ship has a right to earn freight from the moment of the signature of the con tract.

"As against a wrongdoer, freight is earned from the mo ment of the inception of the voyage.

"Freight is property which may be insured. It is property for which contribution must be made in cases of general average, and in case the vessel is destroyed or injured by any act or negligence of a stranger to the contract, damages in all cases may be recovered for its loss.

"It is none the less property because intangible, or because it is a *chose in action*. The rules of law applicable to tangible property are equally applicable to this, and are applied daily in all the courts.

"In cases of insurance upon an open policy on freight, the owner recovers the gross freight without deduction. (2 Phillips on Ins. § 1238; Arnould on Ins. ed. 1872, p. 304.)

"In cases of general average the owner of a vessel is bound to contribute not only on the value of his vessel, but on the amount of the net freight made up to the time of the injury or sacrifice. (Dixon on Average, 187; Lowndes on Average, 107.)

"In cases of loss of freight which is to be contributed for in general average, gross freight is contributed for. (See authorities last cited.)

"In cases of collision and other marine torts, net freights are allowed against the wrongdoer. (Williamson *v.* Barrett, 13 How. 101, 111; the *Gazelle*, 2 Wm. Rob. 279; the *Baltimore*, 8 Wallace, 386; the *Glaucus*, Lowell, 371; the bark *Heroine*, 1 Benedict, 226; Egbert *v.* Balt. & Ohio R. R., 2 Benedict, 225; the *Galatea*, 6 Benedict, 259; Allen *v.* Mackay, Sprague, 219; the *Rebecca*, Blatch. & H. 147.)

"In cases of illegal capture, or of destruction of a vessel by illegal capture, the owner has been throughout the whole history of prize courts held to be entitled to his freight, not net freight merely, but full or gross weight. (See authorities below.)

"If a neutral vessel having enemy's goods on board is taken, the captor pays the whole freight, because he represents the enemy by possessing himself of the enemy's goods *jure belli;* and, although the whole freight has not been earned by the completion of the voyage, yet, as the captor by this act of seizure has prevented its completion, his seizure shall operate to the same effect as an actual delivery of the goods to the consignee, and shall subject them to the payment of the freight. (The *Copenhagen*, 1 C. Rob. 289, 291; the *Hoop*, 1 C. Rob. 196, 219; the *Bremen Flugge*, 4 C. Rob. 90; the *Vrow Henrica*, 4 C. Rob. 343; the *Anna Catarina*, 6 C. Rob. 10;

the *Catherine Elizabeth*, 1 Acton, 309; the *Fortuna*, Edwards, Ad. 56.)

"The allowance is of *full freight*. (The *Fortuna, ubi sup.* 57.)

"The neutral vessel's right to freight has priority over even the expenses of the captors. (The *Vrow Henrica*, 4 C. Rob. 343.)

"A neutral vessel was lost by the negligence of the captor while being taken into port, to which she was being taken in order to unliver her hostile cargo. The captor in this case, a naval officer of Great Britain, was held liable to payment of the entire freight, in addition to the value of the vessel and cargo. (*Der Mohr*, 4 C. Rob. 314.)

"The English Government paid the amount.

"The doctrine of these cases is well established in this country. (The *Commercen*, 2 Gallison, 261.)

"Story, J., 'The general rule that the neutral carrier is entitled to his freight is now too firmly established to admit of discussion' (p. 264).

"Same case on appeal (1 Wheaton, 382), Story, J., in giving the opinion of the Supreme Court, affirmed this doctrine.

"C. J. Marshall and Livingston and Johnston, JJ., who dissented from the judgment, affirmed the same doctrine, and would have allowed freight, which the majority of the court in the particular case denied.

"When neutral property was found on board of an enemy's ship, and the captors substantially delivered the property to the owners at the place ultimately intended as its destination, the captors were held entitled to freight upon the property. (The ship *Anna Green* and cargo, 1 Gallison, 274.)

"Having seen how freight is treated in the prize courts and in actions against trespassers, we proceed to see how freight is considered in the law of insurance. When is freight recoverable under a policy of insurance? When does it become cognizable in insurance law as a value, as a property, which may be lost or damaged or destroyed?

"Where cargo is on board of either a general ship, sailed by the owners, or where the vessel is actually carrying her cargo under a charter party for a particular voyage, there is no doubt that the pending freight is an existing value, the right to which is protected by all courts, and for the loss of which, if insured, the owner may recover.

"And where the ship is under a contract to carry freight by a charter party executed, the freight reserved or agreed to be

paid is an existing value, may be the subject of insurance, and may be recovered from the underwriters in case of the loss of the ship.

"'Where the freight is the price of the hire of the ship under a charter party, the cases show that the inchoate right to freight vests in the shipowner directly the ship has broken ground on the voyage described in the charter party.' (1 Arnould Ins. 237, § 106.)

"'Inchoate rights to freights founded on subsisting titles, unless prohibited by positive law, are insurable.' (Lucena *v.* Crawford, 2 Bos. and Pull. 95.)

"'Where there is an expectancy coupled with a present existing title, there is an insurable interest.' (*Ibid.* p. 293.)

"The test of insurable interest is 'an expectancy coupled with a present existing title.'

"In Robinson *v.* Manf. Ins. Co., 1 Met. 146, Chief Justice Shaw says:

"'In general the inception of a voyage even in ballast from one port to another pursuant to a charter party is an inception of the voyage on which freight is to be earned, and if the vessel is lost before arriving at the first port to take in cargo, it is a loss on freight.' (See also 3 Kent, 5 ed. 311; Riley *v.* Hartford Ins. Co., 2 Conn. 373; Hart *v.* Delaware Ins. Co., 2 Wash. C. C. 346; De Longuemere *v.* The Phœnix Ins. Co., 10 Johns. 127; the same *v.* The New York Ins. Co., 10 Johns. 201.)

"In McGaw *v.* Ocean Ins. Co. (23 Pick. 409,) Chief Justice Shaw said:

"'In general terms it may be said that the insurance on freight will attach when the shipowner is in such a situation in regard to his vessel and voyage that nothing but the intervention of one of the perils insured against can prevent him from completing his voyage and earning his freight.' (Adams *v.* Warren Ins. Co., 22 Pick. 165.)

"Mr. Justice Chambre, in the case already cited, of Lucena *v.* Crawford, says: 'It would be very extraordinary if freight could not be made the subject of protection by an instrument which had its origin in commerce, and was introduced for the very purpose of giving security to mercantile transactions; *it is a solid, substantial interest ascertained by contract,* arising out of labor and capital employed for the purposes of commerce.'

"Mr. Phillips summarizes the doctrine of all these cases.

"1 Phillips on Ins. § 334, p. 192: 'A charter party being made for successive passages at an entire freight, the interest

in the whole freight commences on the first passage, though the ship may sail in ballast merely on that passage, provided it is let by the assured or he has a cargo at the intermediate port.'

"And § 335: 'A vessel being chartered from A to B, the interest in the freight commences under the charter party on the vessels sailing for A either in ballast or with a small quantity only of goods for B.'

"And he supports these positions by Livingston *v.* Col. Ins. Co., 3 Johns. 49; Hart *v.* Del. Ins. Co., Condy's Marshall, 281 *n*, 2 Wash. C. C. 346; Adams *v.* Warren Ins. Co., 22 Pick. 165; Robinson *v.* Manf. Ins. Co., 1 Met. 143.

"Freight, as between the owner of the vessel and any other person than the owner of the goods, is property or value the moment the goods are on board or a valid contract is made by the owner of the vessel therefor.

"What would be the measure of damage in a suit by the owner of the vessel against the charterer for a breach of his contract to furnish a cargo may be seen in the following cases, and is substantially the same as net freight: Hunter *v.* Fry, 2 Barn. & Ald. 421; Fuller *v.* Staniford, 11 East. 232; Smith *v.* McGuire, 3 Hurls. & N. 554; Ashburn *v.* Baldwin, 7 N. Y. 262; Fox *v.* Harding, 7 Cushing, 516; Bailey *v.* Damon, 3 Gray, 92.

"Freight, therefore, being recognized in all courts as property, which may be destroyed, damaged, or lost by the acts of wrongdoers, is clearly an element of value, for which the claimants now before us are entitled to receive some sum as indemnity for the loss and damage which they have sustained.

"In the cases above cited from the admiralty courts of England, the doctrine of which is approved by our own courts (the ship *Anna Green* and cargo, 1 Gallison, 274), where neutral vessels were arrested and carried into port in order that the entire cargo which they contained might be condemned, it was held that the owner of the neutral vessel, not being in fault, was entitled to the full freight which he would have earned if his voyage had not been interrupted.

"The cases before us present closely analogous situations, looking at the cargoes and vessels separately. The owner of the vessel destroyed, but for the destruction of his vessel, would have proceeded on his voyage and earned the freight which was agreed to be paid for the carriage of the goods on board. The wanton destruction of the cargo did not, as against him,

the owner of the vessel, destroy or take away his property in the freight which the law everywhere recognizes.

"If the Confederate cruiser had captured one of these vessels, and had been allowed to take her with her cargo into an English prize court for condemnation, and had there failed to make good his right to condemnation, on the ground that inasmuch as he had fitted out his vessel in England he could make no lawful prize, those courts would have restored the vessel and cargo, so that the vessel might proceed on her voyage and earn her freight; or, in case the property had been burned in port by the negligence of the captors, would have awarded to the claimant the value of the ship, cargo, and freight. (*Der Mohr, ubi sup.*)

"Freight, gross freight, net freight, prospective freights, or expected freight, are terms often used in the books.

"Freight is the generic term which includes all.

"Gross freight needs no definition; it is the entire sum to become due to the owner of the vessel on the complete discharge of her cargo at the port of destination.

"Net freight is a term never used as between the owner of the vessel and the charterer. It is a term whose use is made necessary by some occasion to apportion the gross freight by reason of an act or thing which has occurred pending the voyage, causing either a temporary or permanent interruption of the voyage, in which case it is needful to look at the freight to be earned if the whole voyage should be completed, as an existing value either in whole or in part, in connection with or in comparison with the other values engaged in the enterprise, namely, with the vessel and the cargo on board.

"This comparison of values is perhaps never made between the owner of the vessel and the charterer. As between them the question is almost universally of the whole freight or of no freight. If the vessel arrives at an intermediate port, and the owner then receives his goods, he pays freight *pro rata itineris peracti.*

"But this comparison of values often takes place from necessities growing out of some forcible or providential interruption of the voyage.

"Forcible, as by capture or seizure of vessel or cargo, or of both.

"Vessel and cargo may be seized as being both hostile property.

"The vessel may be hostile while the cargo is neutral.

"The vessel may be neutral while the cargo is hostile.

"Both may be neutral and yet seized unlawfully.

"If the vessel is neutral, yet she must be carried in to unliver the hostile cargo.

"If the vessel is hostile, she must be taken in to discharge and deliver up her neutral cargo to the owner.

"So there may be damage done to vessel or cargo, or both, by collision. The voyage is interrupted or destroyed, and the various values of ship, cargo, and freight must be examined into at a point between the port of lading and discharge.

"And then there are losses by the perils of the seas, in which the vessel, cargo, and freight may be either partially or totally lost, and these values must be adjusted and compared as between the owners and underwriters of the several subjects.

"In all these cases there is an estimation of freight as the property of the owner.

"The losses which we are called upon to consider took place by capture, unlawful capture as against England, at a point between the ports of departure and destination, and are entirely analogous to the cases of unlawful capture and seizure administered under the law of prize.

"The voyage is interrupted in its midst, and we are to fix the values of the several elements constituting the loss, at the time and place of the destruction.

"'According to the principles of law,' as administered in all the courts, these claimants are entitled to recover for the loss of freights destroyed by the acts of these cruisers.

"What shall be the freight allowed?

"It can not be the gross freight, because the allowance of that is expressly prohibited by the act.

"The disallowance of gross freights is an implied permission or direction to allow net freights.

"It is clear we are to allow some freight; if not gross freight it must be net freight.

"On this subject we derive instruction from the proceedings at Geneva. The arbitrators rejected the claim for gross freights, and did allow a large sum as net freights, as their proceedings show.

"There are two terms used in the act descriptive of freights which remain to be considered.

"What are 'prospective' freights? Prospective we conceive to be synonymous with 'expected' freight, which is a term very often used in the books. We have already defined the

term prospective as applied to profits as being the profits which the owner of goods hopes to gain from the difference in price between the port of shipment and the port of discharge, sometimes called profits and sometimes, also, expected profits.

"Prospective, as applied to freights, we conceive to mean that expectation of obtaining a cargo, and so of having a freight upon a voyage projected but not yet entered upon, as to which the owner has no certainty, no contract, no charter party, but which in the law of insurance may or may not be held to give an interest on which insurance would attach.

"It is called an 'expectancy,' as when a ship is going in ballast to a place where the shipowner owns goods, which she shall there take on board and carry to another port. (Hart *v.* Del. Ins. Co., 2 Wash. C. C. 346.)

"Or where he does not own the goods, but has contracted to purchase them, and has prepared funds to pay for them, and the goods are ready to be delivered to him to put on board. (1 Parsons on Ins. 177.)

"What are prospective freights may be further illustrated by Forbes *v.* Aspinwall, 13 East. 323; Forbes *v.* Cowie, 1 Camp. 520.

"In these cases the owner had no charter party or other contract for freight, but goods were on board sufficient to purchase the remainder of the homeward cargo that were saved and afterwards bartered for goods which would have completed her homeward cargo. She had discharged part of her outward cargo and taken in fifty-five bales of cotton, part of her homeward cargo, and was lost in this condition. It was decided that she should recover only the freight on the fifty-five bales of cotton. (So in Riley *v.* Hartford Ins. Co., 2 Conn. Rep. 368.)

"Freight was insured on goods laden or to be laden, and a part of a cargo was taken on board at Gibraltar, and the ship was proceeding toward the Cape de Verde Islands with funds on board to purchase salt there to make up the cargo, when she was lost.

"It was held that the insurable interest had commenced only in respect of the goods shipped at Gibraltar.

"Another example of prospective freight may be found in Adams *v.* The Penn. Ins. Co., 1 Rawle, 97.

"To apply a phrase before quoted, we should say 'expectancy,' not 'coupled with an existing title,' is 'prospective.' (1 Arnould on Ins. 293.)

"Congress seems to have had in view the probability that

claims might be made not only for the freight actually on board or actually contracted for, but for the freight which the vessel, if not destroyed, might have subsequently earned, either with or without any definite grounds of expectation, and to have declared that all these should be excluded. They may have thought insurable interest on freight would be sought as a test of loss of freight, and intended to have excluded that test in these cases.

"Such freights or compensation for the loss of the use of the vessel during repairs after collision have been demanded, and in some cases allowed. (Williamson *v.* Barrett, *ubi sup.*)

"What meaning shall we give to the term 'unearned freights?'

"The counsel for the government insists that under the use of the words unearned freights, net freights for the entire voyage cannot be allowed, but only net freights *pro rata itineris peracti.*

"Having shown that freight is property, as clearly recognized in law, as the ship or the cargo, or bullion, or coin; that although intangible and resting in action, it nevertheless is protected everywhere by the courts, and that it may be lost or destroyed or damaged, we feel constrained to award a sum sufficient in law to indemnify the claimants for this loss or damage, unless prohibited therefrom by the express provisions of this act.

"We will not presume, except upon clear proof derived from the consideration of this statute, that Congress intended to take away from any of these claimants that which the courts of all nations under like circumstances protect.

"We shall not, in the decision of the case now before us, which is the case of a vessel with her cargo actually on board, go further than is necessary for the decision of this and cases exactly similar. We only propose here to show that the term 'unearned' does not apply to this principal case and to others similar to it. And in stating to what cases we conceive the word 'unearned' does apply, we must not be understood as limiting it to precisely the cases we name. It is sufficient for the decision of this case to show that it may apply to other cases and does not apply to this.

"The term unearned can have no application as between the owner of the vessel and of the cargo in an action upon the contract of affreightment; as between them freight is never earned till complete delivery.

"But as against underwriters on freight, freight is not unearned when anything has been done toward earning it under a contract or charter party therefor. So soon as the ship is bound to the goods and the goods to the ship by a valid contract, and any forward step has been taken by the ship toward the performance of the contract having connection with no other thing, the underwriter is liable for a loss of freight.

"Still more, when, as in the present case, the cargo was on board and the ship was actually engaged in carrying the goods, the vessel as against wrong doers had begun to earn, and as against them freight was not unearned.

"As against the owner of the goods under the contract it was not earned, but as to him even it was not unearned—it was partly earned.

"To what does the term apply?

"Without deciding that it may not apply to other cases, we think it was intended to apply to cases where charter parties had been made, binding both the ship and the charterer, where under the law of insurance the owner of the ship may have had an insurable interest in the amount of the freight to become due under the contract, but where no forward step had been taken by the vessel toward the execution of the charter; where nothing has been done under the contract, where nothing has been done which would not have been done if there had been no contract.

"For example, a vessel being upon a passage from New York to San Francisco with a cargo, during this passage the owners charter her for a voyage from San Francisco to any other port. This charter party executed would give the owners an insurable interest in the entire freight, not only upon the voyage to San Francisco not yet finished, but also upon the second voyage to commence at San Francisco; but till she reaches San Francisco, and has discharged her cargo there, she has taken no step, done no act, toward earning the freight upon the second voyage. The freight in this voyage, though insurable, is in no part earned.

"We think that the word unearned as used here was not intended to exclude us from allowing freight on the voyage actually pending at the time of destruction, but was intended to exclude us from making the time when insurance on freight attaches the test of the right to freight; to exclude us from allowing freight in that class of cases where as against the underwriter the assured might recover for loss of freight, but

in which the freight, though contracted for in a valid charter party, was in no part earned, where the ship had not commenced the series of acts the performance of the whole of which would entitle her to the entire freight.

"In allowing net freight in the particular case under consideration, and in similar cases, we shall feel bound to charge the gross freight in cases where we think justice shall require it, with interest on the value of the vessel, and also a sum to cover the probable depreciation of the vessel, in addition to the other items usually mentioned as needing to be deducted from the gross freight. The act gives interest on the value of the ship from the date of her destruction at 4 per cent. We can not give to the owner without charge the use of the same ship the value of which in contemplation of law the government pays for on the day of its destruction.

"The questions raised by the difference in currencies present great difficulties and embarrassments. If these claims were being considered by a board of assessors, as might have been under the treaty, and if the amount of the claims were to be paid directly from the exchequer of Great Britain, which has but one currency, it is extremely probable that every claim would have been reduced to the standard of gold, and that value which is the coin equivalent of these claims would have been awarded. It is quite possible, indeed quite probable, that this consideration induced the arbitrators to award a sum in gross, thus remitting all questions of value represented by or dependent upon the fluctuations of our currency to a tribunal to be established by the United States. These difficulties must now be met by us.

"In the argument of the eminent counsel for the United States we were urged to fix for the value of all goods purchased in coin or in any other currency than the legal-tender currency of the United States, such a sum in currency as would be equivalent to the value of coin at the present time. But we see no principle upon which such a standard can be adopted. It would still be entirely uncertain how near or how far the sum so fixed would be from the value of gold as compared with currency at the time when the amounts awarded by us will be in fact paid. It would make two standards of value, for which we see no necessity, and no warrant in the law.

"We are left to adopt some rule. It can not be contended that in the case of goods bought during the war for currency we should reduce their nominal cost to the standard of coin at

the day of purchase, and then reduce the coin value to the value of currency of to-day, which it would be necessary to do if we would have only one standard of value.

"We are entirely clear that such a course would be unjust to a large class of the claimants. It will give more equal justice to all to reduce the coin prices actually paid in cases where purchases were made in coin to currency at the rate of the day of purchase, and enter the judgment for the currency cost so ascertained. We see no way in which we can justly adopt two standards.

"To be sure, the rule last suggested will give judgment for a sum in currency, which, received in the prices of gold of to-day, will, if exchanged into gold, give the claimant a sum in coin in excess of what he would otherwise be entitled to claim.

"But the fact that this consequence would follow was not deemed by the Supreme Court a sufficient reason for changing the standard of currency adopted in the circuit court in the case of the *Vaughan* and the *Telegraph*, 14 Wallace, 258; Cushing *v.* Wells, Fargo & Co., 98 Mass. 550.

"But the rule first suggested would give to the other claimants a sum much less than they ought to receive.

"The inequality in both these cases arises from the fact of the appreciation of the legal-tender currency as compared with gold. If we adopt gold as the original standard of value, we give to the government the benefit of this appreciation and fail to indemnify the claimants. If we adopt the other standard, we give the benefit of this appreciation to the several claimants. The claimant in this case obtains an incidental advantage. But as between the claimant and the government, we think this incidental benefit belongs to him. He was compelled by force of law to purchase in legal tender; it was not optional with him whether to do so or not. The value of this enforced currency did not depend upon him. The disadvantage of its use ought not therefore to fall upon him, but rather upon the government, which compelled him to make use of it. No rule which we can adopt will give exact justice in every case; and as we can have but one rule, and must enter our judgments in currency, we must make our valuations according to that standard. This, if not exactly right in every case, has the advantage of simplicity and uniformity, and will more nearly give a just indemnity in every case than any other course.

"Applying these principles to the determination of the pres-

ent case, after having given due consideration to each portion of the large mass of testimony presented to us, we award—

"In No. 278, to Henry Wilson Hubbell, the sum of..... $114,283.41
"In 279, to Charles A. Sherman *et al*..... 114,283.41
"In No. 1131, to Edward H. Gillilan, the sum of..... 23,450.00
"with interest on each of the above-mentioned sums, to be computed at 4 per cent, from November 10, 1863.

"The several judgments to be entered by the clerk in the usual form.

"RAYNER, J., dissenting as to the principle upon which net freight is allowed."

Case of the ships "Highlander" and "Jabez Snow."

"Buck and Spofford and sundry other claimants *v.* The United States,[1] Nos. 406, 407, 408, 409, 410, 411, 412, 597, 598, 599, 600, 601, and 656.

"In the matter of the destruction of the ships *Highlander* and *Jabez Snow*.

"Where a vessel has sailed under a charter party with cargo aboard she is entitled, under the act of Congress of 23d June 1874, to net freight for the whole voyage, in accordance with the terms of the charter, though destroyed by an insurgent cruiser when but one day out.

"Where destroyed while sailing in ballast, under charter, to take in cargo at her port of first destination, to be carried thence to a port of final destination, she is entitled to net freight on the cargo which she was thus to have taken on board.

"Where destroyed while sailing under one charter to deliver, at a designated port, cargo on board, and to bring other cargo home, she is entitled to net freight for the round trip.

"Where destroyed while sailing under two distinct and independent charters, to carry under the first cargo to an intermediate port, and under the second to carry other cargo to a port more distant, she is entitled to net freight under each charter, though destroyed before the fulfillment of the first, if she has made it satisfactorily to appear by proper proof or necessary legal presumption that she entered fairly at the same time on the commencement and prosecution of both voyages.

"STATEMENT OF THE CASE.

"*As to the 'Highlander:'*

"On the 7th March 1863 a charter party was entered into between the captain and Messrs. Hyde & Jones, of London, that the *Highlander* should sail to Akyab, Rangoon, or Bassein (with liberty to make an intermediate voyage) for a cargo

[1] Davis's Report of the Proceedings of the first *Alabama* claims court, p. 78.

of rice, and after loading should proceed to Cork or Falmouth for orders. The *Highlander*, after making the intermediate voyage allowed by the charter party, was proceeding to Akyab to load, when, on the 16th December 1863 she was captured and burned by the *Alabama*. The owners claimed net freight under the Akyab or rice charter—viz, gross freight less all expenses which would have been incurred by the owners if the vessel had continued her voyage and delivered the cargo of rice in accordance with the charter party.

"*As to the 'Jabez Snow:'*

"On the 25th February 1863 the captain signed a charter party providing that the vessel should sail from Liverpool on or before the 31st March 1863 to Montevideo; that as soon as discharged at that port she should proceed to Callao, there report to the agents of the Government of Peru, and after fulfilling certain provisions of the charter party and loading her cargo should sail from Callao to Havre direct.

"On the same day the captain entered into another charter with different parties, providing that the ship should, with 'all convenient speed,' proceed to Cardiff, there load a cargo of coal, and deliver the same in Montevideo.

"At the time these charter parties were signed the vessel was lying in the port of Liverpool. From Liverpool she proceeded to Cardiff, loaded the cargo of coal, and sailed for Montevideo. On the 29th May 1863, before reaching that port, the vessel and cargo were destroyed.

"The owners of the vessel claimed the net freight under both charters—viz, the gross freight under the two charters less all expenses that would have been incurred if the two cargoes had been delivered.

"*As to the 'Sonora:'*[2]

"The complainants, owners of the vessel, entered into a charter party while the ship was on a voyage from New York to Melbourne. By this charter party the ship was bound, upon the discharge of her cargo at Melbourne, to proceed from that place to Akyab, in British India, for a cargo, either directly or after an intermediate voyage to another port in

[2] "The argument of counsel for the complainants in Cushing *et al. v.* The United States (case of the *Sonora*), No. 288, having been extensively referred to by counsel for the complainants and for the respondent, has also been reported, although the case did not come on for trial with the cases of Buck *et al.*"

Australia or the China seas, and in case of such intermediate voyage to leave her last port for Akyab on or before December 1, 1863. She made an intermediate voyage to Hongkong, left that port for Akyab before December 1, 1863, and was burned by the *Alabama* in the Straits of Malacca on the 26th day of December, 1863.

"Besides the loss of vessel, outfits, etc., the owners claimed the net freight on the Akyab charter.

"Mr. C. C. Beaman, jr., for the complainant.

"The freight claimed does not come under the definition of 'prospective' or 'unearned,' as given by the court in the case of Hubbell *v.* The United States.

"The court allowed in that case net freight for the whole voyage when the cargo was on board. The net freight now claimed does not differ from that then allowed in being prospective or unearned.

"The word 'prospective,' as applied to freights, does not relate to the fact of its being on board, but to its dependence upon an expected usual course of business or upon an absolute contract.

"According to the 'principles of law' an award can be made for net freight in these cases:

"*a.* In cases of insurance upon a policy on freight the owner can insure and recover the gross freight on a voyage upon which the ship has entered, even though the cargo is not on board. (Arnould on Insurance, edition of 1872, pp. 30, 31, and 304.)

"*b.* In cases of general average, the owner of the vessel is bound to contribute on the value of his vessel and the amount of his net freight, under the charter on which he has cargo on board, and under the charter upon which he has entered, although he has not yet received the cargo. (The brig *Mary*, 1 Sprague, p. 17; Dixon on Average, p. 187.)

"*c.* Freight has been allowed a neutral vessel with cargo on board, but when she had not sailed from the port where she received her cargo. (The *Catharina Elizabeth*, 1810; 1 Acton, English Admiralty Rep. 309.)

"There is nothing to show that net freight as now claimed would not be allowed a neutral vessel captured under the circumstances in which the *Highlander* and *Jabez Snow* were destroyed.

"*d.* In cases of collisions and other marine torts, freights are

allowed against a wrongdoer to the extent claimed in the cases now under consideration. (Statute 53 George III., A. D. 1813, p. 792; 17 and 18 Victoria, A. D. 1854, p. 595; 25 and 26 Victoria, A. D. 1862, p. 305; 9 U. S. Statutes at Large, p. 635; Allen *v.* McKay, Sprague, p. 219; the *South Sea*, 1856, (Swabey's Reports, p. 141); Case of the *Orpheus*, 1871, 3 Law Reports (Admiralty), p. 308; the *Canada*, 1861, 1 Lushington, p. 586).

"Messrs. Paine and Grafton for the complainants (owners of the *Sonora*).

"I. According to the statute creating the court, it is to decide upon the amount and validity of claims presented in conformity with the provisions of the act, according to the principles of law and the merits of the several cases.

"Causes within the jurisdiction of the court must have originated in a marine tort; therefore the court should look to cases of collision and capture for the establishment of the '*principles of law*' which are to control this case.

"1. In cases of collision as against the owner of the offending ship, the owner of the injured ship, if without fault, is entitled to her net freight, whether she is or not totally lost; provided the performance of the charter party is defeated by the collision.

"As against the captain of the offending ship the rule is the same, unless his misconduct is such as to warrant an award of exemplary or vindictive damages.

"As between the owner of the injured ship and the owner of her cargo, the question of liability depends wholly upon the relative responsibility of these parties for the failure of their contract. (The *Gazelle*, 2 W. Rob. 279; Williamson *v.* Barrett, 13 How. 101; The *Canada*, 1 Lushington, 586; The *Ann Caroline*, 2 Wall., 550; The *Rebecca*, 1 Blatch. & H., 347; The *Cayuga*, 14 Wall. 270; The *Heroine*, 1 Benedict, 226; Egbert *v.* The Baltimore and Ohio R. R. Co., 2 Benedict, 225; The *Favorita*, 18 Wall. 598.)

"2. In cases of capture of neutral ships the following are the rules of damages applicable to freights, both in England and the United States:

"As against the captor the owner of the captured ship, if without fault, is entitled to her full freight, whether she is or is not totally lost, provided the performance of the charter party is defeated by the capture.

"As against the owner of neutral cargo, in case of total loss of both ship and cargo, without the fault of either, there is no liability for freight in favor of the owner of the ship, because if the cargo fails the ship, so also does the ship fail the cargo.

"As against the owner of neutral cargo, in case of total loss of ship alone, without fault of ship or cargo, there is no liability for freight in favor of the owner of the ship, because the cargo waits in vain for the ship to perform the charter party.

"In case of detention or partial loss the liability, as between owners of ship and cargo, will embrace full freight, *pro rata* freight, or no freight at all, according to the relative responsibility of the parties for the failure of their contract. (The *Pearl* (1804), 5 C. Rob. 199, Am. ed.; The *Copenhagen*, 1 C. Rob. Adm. 289; The *Race-Horse*, 3 C. Rob. Adm. 101; The *Lucy*, 3 C. Rob. Adm. 208; *Der. Mohr*, 4 C. Rob. Adm. 314; The *Anna Catharine*, 6 C. Rob. Adm. 10; The *Lively*, 1 Gall. 315; The *Commercen*, 1 Wheat. 382; The *Nuestra Señora de Regla*, 17 Wall. 30.)

"3. The reason for including the net freight of the charter party in the award of damages in the case now before the court is vastly stronger than in the case of a collision, or in the case of a capture of a neutral ship by a belligerent.

"II. The statute forbids allowances for—

"1. Gross freights.

"2. Unearned freights.

"3. Prospective freights, gains, or advantages.

"Gross freight is the entire amount of freight money to be received. (The *Heroine*, 1 Benedict, 226.)

"The expression 'unearned freight' applies to cases where a chartered ship, not having begun to work under her charter party, has not begun to earn her freight, and to an unchartered ship which has not commenced the projected voyage; but it does not apply to a case where a ship has begun to earn her freight—has partly earned it. Unearned freight, in the sense of the statute, is not freight partly unearned, but it is freight wholly unearned. (The *Hamilton*, 3 C. Rob. 107; The *Martha*, 3 C. Rob. 107.)

"The clause as to 'prospective profits, freights, gains, or advantages' refers to matters purely speculative, and means the profits, freights, gains, or advantages of a prospective, not of an actual voyage; of a voyage projected but not commenced.

"III. The claimants are entitled to the entire net freight

under the charter party, for at the time of capture the vessel was working under it. There was no element of adventure or speculation in the voyage.

"A ship is earning freight from the hour she starts after her cargo. (The *Canada*, 1 Lushington, 586; The *Argo*, 1 Spink, 375; The *Mary*, 1 Sprague, 17.)

"Mr. J. A. J. Creswell and Mr. Frank W. Hackett for the respondent:

"In the case of the *Jabez Snow* nothing had been done toward earning the Callao charter that would not have been done had there been no such charter. The vessel was destroyed while prosecuting the Montevideo charter, therefore the claimants are entitled to no indemnity on account of the Callao charter. (Opinion of the court in Hubbell *v.* The United States.)

"Collision cases afford no analogy for the estimate of the court in cases like the one at bar.

"The court keeps within the limit of the direct result of the damage caused by the cruisers. (Hubbell *et al. v.* The United States, *ante.*) The attitude of a claimant in this court is not that of an injured person suing a wrongdoer.

"In cases of capture of vessels under charter, but without cargo, net freights would not be allowed. (Abbott on Shipping, 470; The *Copenhagen*, 1 C. Rob. Adm. 289; The *Frances*, 8 Cranch, 418; Blakey *v.* Dixon, 2 Bos. & Pull. 321; The *Nathaniel Hooper*, 3 Sumn. 542; The *Société*, 9 Cranch, 209.)

"The decisions of the court must be made in accordance with the statute creating it, and the single question for this tribunal under that act is, admitting the claim to be a valid one, how much loss or damage did the claimant actually suffer for which this statute gives power to award indemnity? This court has not the full and peculiar powers of a court of prize, and the express prohibitions of the act creating it exclude any claim for freight made under charter parties where the cargo is not on board.

"The freight claimed in the case at bar is 'unearned' and 'prospective,' for a vessel does not really enter upon the work of earning freight until the cargo is actually or constructively in her possession, and freight *to be* earned is an uncertain profit. (Code de Commerce, article 347; Emerigon on Insurance, pp. 181, 713; Meredith's translation of Emerigon, ed. 1850, p. 713, note; 13 East. 300; Bouvier's Law Dict.; Smith's

Mercantile Law, 283; Abbott on Shipping, 405; Emerigon, p. 178; Papers relating to the Treaty of Washington, IV. 53.

"PORTER, J., delivered the opinion of the court:

"In the case of the ship *Winged Racer*, we were called to consider, among other subjects, a claim for the loss of freight. After a protracted argument by eminent counsel, we reached in that case conclusions which were and are satisfactory to the minds of a majority of the court. In the cases above mentioned some new phases of the question, growing out of a different state of facts, were presented. This led the counsel of the government to insist on re-arguing the original questions decided in the *Winged Racer;* and, specially desiring to be right on a point involving so large a part of the money paid by Great Britain, we accorded this privilege both to them and to the counsel of various claimants. I am now to state the views entertained by the court, after listening to these elaborate and learned arguments, and then to apply the principles we have adopted to the solution of the questions presented in the cases of the *Highlander* and the *Jabez Snow*.

"The Government of the United States presented at Geneva a large claim for the loss of freights. The British experts launched pointed and severe criticisms at the claim made for gross freights, but they could not deny the soundness of the claim for net freights, if the conduct of Great Britain had rendered her liable for the acts complained of by the United States. In the award made in our favor, this principle was set forth as one of the conclusions of the tribunal, that 'in order to arrive at an equitable compensation for the damages which have been sustained, it is necessary to set aside all double claims for the same losses and all claims for gross freights, so far as they exceed net freights.'

"When the act of 23d June 1874 was framed, Congress, following out this principle, gave to this court the following direction (section 12): 'And in no case shall any claim be admitted or allowed for, or in respect to, unearned freights, gross freights, prospective profits, freights, gains, or advantages.' The term 'prospective,' it will be observed, is predicated here, not only of *profits*, to which it stands in juxtaposition, but also of *freights*, *gains*, or *advantages*. We are not to allow a claim for unearned freights, gross freights, or prospective freights; thus, by excluding all other kinds of freight, permitting, and indeed requiring, us to allow claims for net

freight. That is, from the freight which a vessel, when destroyed, was engaged in earning, must be deducted the expenses which she would thereafter have incurred if the voyage had been successfully accomplished. By the immediately preceding section of the act we are required to decide upon the amount and validity of such claims, not only in conformity to the provisions of the statute, but according to the principles of law. We are to exclude profits, freights, and gains which were prospective and freights which were unearned, and we are to do this not in some arbitrary way dictated by our own sense of justice, but according to the principles of jurisprudence as established by courts of law and adopted by the maritime nations of the world. We know, and we have known from the beginning, the importance of reaching a sound conclusion on the question thus arising both out of the treaty and the statute. During the argument we have been properly reminded of the influence which our decision may hereafter exercise on the public interests. It is said that the United States expects to carry out in the future, as she has in the past, the doctrine of neutrality. It is reasonable that the principles adopted in the distribution of the money awarded at Geneva should be applied to her, if she should ever be held responsible for violating those important rules established by the sixth article of the treaty, defining the duties of a neutral government in preventing the fitting out, within its jurisdiction, of vessels intended to carry on war against a power with which it is at peace.

"What, then, is 'prospective freight,' as employed in the award and in the statute? A plain illustration may supply the answer. The owner of a ship at Philadelphia, finding her out of employment, concludes that if he were at the Chincha Islands he would be sure of a profitable cargo to Liverpool or New York. He proceeds, without any contract, written or verbal, equips his ship, sets sail, is captured by the *Alabama*, and sees his own ship sent to the bottom. He files his claim in this court, shows the loss of the vessel, proves her tonnage and the customary freight, and offers the testimony of shippers in Callao, who state that if she had arrived there they would have supplied a cargo equal to the carrying capacity of the ship. He exhibits his calculation showing the necessary deductions from the gross freight and asks the payment of his claim. We decline to allow it, and tell him this was what the

award meant when it declared that 'prospective earnings can not properly be made the subject of compensation;' and this is what the act of Congress meant when it provided that a claim should not be allowed for or in respect to 'prospective profits, freights, gains, or advantages.' Having thus found a distinct subject-matter to which this portion of the statute is applicable, we ought, by well-settled rules of interpretation, to rest content that we have ascertained the kind of profits which Congress meant to define by the term 'prospective.'

"What are 'unearned freights,' as employed in the act? What do these terms, so unusual in the language of judges, shippers, carriers, and underwriters, require us to exclude? By forbidding the allowance of unearned freights it was certainly not intended to allow only freights fully earned. Freight is fully earned in the judicial as well as popular sense when the vessel has reached her port of destination and the cargo has been delivered; a place in which she would not be in much danger of destruction at the hands of an insurgent cruiser. If so destroyed, the question of freight could not have arisen at all, for her charterers would then have been her debtors and the value of the vessel only would have been lost to her owners. It is impossible to suppose that Congress could have put so frivolous a thing into a serious statute. It is just as clear that freights wholly unearned could not have been intended; that is, where no expenses had been incurred, no stores supplied, no cargo taken on board, nothing done by shipper or owner toward the commencement of a voyage. Here, again, the vessel would have been found in her dock and out of the reach of the losses of which the statute treats. Even if she were not, her case is effectually provided for by forbidding any allowance for prospective freights. The provision respecting 'unearned freights' was evidently intended to embrace something different from that of the inhibition of prospective gains and to have some practical effect on the distribution of the money in hand. Let it be observed, then, that between these extremes—of freight wholly earned and freight wholly unearned—there is an ample territory in which judicial investigation has gone on from the dawn of commerce to the present hour, and the results are found along the whole track of the commercial law. A ship is made ready for sea, a charter party more or less formal is executed, her cargo is shipped, and she starts on her voyage. She has not then

earned her freight, and on the shipper or charterer she has no legal claim until after the lapse of many months and the endurance of many perils. But her owner has spent time and labor in fitting her out, has supplied the necessary stores, advanced the wages of the crew, and subjected her to the largest risk to which property is ever subjected, or paid to others the required compensation for assuming such risk. Can it be maintained that her freight is unearned, in the large and general sense in which this term is used in the statute—unearned, without qualification—wholly unearned? Can it be denied that some part of it has been earned? Not as against the shipper, if he has done nothing to change the contract, but even as against him, if he has interrupted the voyage, and certainly as against everyone who willfully or carelessly stops her progress. Here the decisions, European and American, have a uniformity scarcely to be met with in any other department of the law.

"The ship *Cambodia* sailed under charter from Bombay in ballast for Howlands Island, intending to call at a port in New Zealand for water, and, having got on shore on the coast of New Zealand, was so damaged that she was obliged to abandon her voyage. Lord C. J. Cockburn (afterward one of the arbitrators at Geneva) held that, as the ship had sailed with the sole object of going to Howlands Island to earn freight thence to the United Kingdom, the interest in the freight had commenced, although not a pound of the cargo was on board when she struck. (Barber *v.* Flemming, 5 Law Reports, 59, Queen's Bench Cases.) True, this was an action on a contract of marine insurance, created by parties who could make their own terms, and we ought to look for precedents arising outside of the law of contracts altogether. Take, then, the case of a general average arising from the jettison of goods for the common safety of ship and cargo. Here Mr. Lowndes, citing Williams against The London Assurance Company (1 M. and S. 318), states the rule in these terms: 'When a ship is chartered to fetch or carry a cargo belonging to the charterer, the freight under the charter must contribute to the general average, whether or not the cargo is on board the ship at the time of the general-average act, since the loss of the chartered ship, whether laden or not, would deprive the shipowner of his expected freight.' (Lowndes on General Average, 236.) In the case of the brig *Mary*, Judge Sprague carried out the doc-

trine by holding that where, by a charter party, a gross sum, not divisible, was to be paid as freight for a voyage out and home, the principal object of the voyage being to obtain a return cargo, and a general average occurred on the outward passage, when the ship was sailing in ballast, the whole freight for the round voyage must contribute. (1 Sprague's Decisions, 17.) Turning to cases of salvage, we find the same rule to prevail. (The *Nathaniel Hooper*, 3 Sumner, 542.) It is true that Mr. Benecke differs from Sir William Scott in the view taken by the latter in the case of the *Progress* (Edwards, 210), that where a ship goes out under a charter, to proceed to her point of destination, in ballast, and to receive her freight only upon her return cargo, the court is not in the habit of dividing the salvage (in which he is sustained by the case of the *Dorothy Foster*, 6 C. Robinson, 88); but it is sufficient to observe, respecting this difference of opinion, that no man of his age was of higher authority on maritime law than the judge who pronounced the judgment in that case. In the cases of collision of vessels the same doctrine prevails. Even the case of the *South Sea* v. *The Clara Symes* (Swabey's Reports, 141) is really in harmony with the other cases, for although the claim for freight was there rejected, and the owner of the injured vessel was directed to pay the costs attending the claim which he had made for freight, yet this was because of the doubt that arose from the character of the vessel, whether the master could have carried out the charter party, even had the collision not occurred. The decision of Dr. Lushington in the *Gazelle* (2 W. Robinson, 279) and in the *Argo* (1 Spink, 375); the report of the registrar and merchants in the *Canada* (1 Lushington, 586), made under Dr. Lushington's own eye; the decision of Dr. Phillimore in the *Orpheus* (3 Law Reports, 308, Admiralty), where the cargo was not on board at the time of the collision; the opinions of several of our eminent admiralty judges in America—Bark *Heroine* (1 Benedict, 226); Egbert against the B. & O. R. R. Co. (2 Benedict, 225), and the decisions of the Supreme Court of the United States in Williamson against Barrett (13 Howard, 101), the *Cayuga* (14 Wallace, 270), the *Favorita* (18 Wallace, 598)—have placed on a foundation too solid to be shaken the doctrine that the owner of a ship injured by a collision, if not in fault, is entitled to recover her net freight from the owner of the offending ship, if the performance of the charter party be prevented by the collision.

"Undoubtedly the closest analogies to the cases in hand are found in those of the capture of vessels as prize of war. It is true that Great Britain did not admit her liability as a wrongdoer for the acts of the insurgent cruisers, and, indeed, by the first article of the treaty, disclaimed it, but having negligently permitted the equipment in her own ports of vessels which could have had no other object than the destruction of our ships, she was placed by the award in the legal attitude of having wrongfully captured them. There are in the books few cases of the destruction of vessels taken as prize of war, for the reason, chiefly, that they are too valuable to the captor to be destroyed. One of the few is the case of *Der Mohr* (4 C. Rob. 315), which was lost by the negligence of the prize master, an officer of the British navy, while being taken into port, and the captors were held liable both for the ship and the freight, but relieved from liability by act of Parliament. In the *Copenhagen* (1 C. Rob. 289), seized in a British port which she had entered in distress to make repairs, Sir William Scott, in treating of the question whether freight was due from the owner of the cargo to the owners of the ship for the whole voyage or only *pro rata itineris*, thus speaks: 'With respect to the freight, some is admitted to be due, as the ship has brought her cargo from Smyrna through much the most considerable part of the voyage. But it is said that in matters of prize the whole freight is always given, and for this reason, because capture is considered as delivery, and a captured vessel earns her whole freight. I have already said that this is not merely or originally a matter of prize; the ship was not brought in as such; she came in first from distress, and was afterward put upon the proof of her character. It is a case of a mixed nature, and the maxim that capture is delivery is not to be taken in the general way in which it is laid down. It is by no means true except when the captor succeeds fully to the rights of the enemy and represents him as to those rights. If a neutral vessel having enemy's goods is taken, the captor pays the whole freight, because he represents the enemy by possessing himself of the enemy's goods *jure belli*, and although the whole freight has not been earned by the completion of the voyage, yet as the captor, by his act of seizure, has prevented its completion, his seizure shall operate to the same effect as an actual delivery of the goods to the consignee, and shall subject him to the payment of the full freight.' The cases of the

Martha (3 C. Rob. 107), the *Hamilton* (3 C. Rob. 107), and the *Anna Catherina* (6 C. Rob. 10), recognize the same doctrine. In the argument before us it was assumed that in no case of capture had freight been allowed where the cargo was not on board at the time of the capture; but the *Progress* (Edwards's Admiralty Reports, 210) seems to present such a case. That vessel having sailed from England to Oporto, in ballast, under a charter party for an entire voyage out and home, and having performed the outward voyage, was captured by the French in that port and recaptured by the British and Portuguese army under Wellington before she had commenced her homeward voyage. After the capture she had been unladen; on the recapture her cargo was in warehouse on shore. Salvage was allowed on the whole freight out and home. By the decision in the *Catharina Elizabeth* (1 Acton's Admiralty Reports, 309), freight was allowed to a neutral vessel which had not actually sailed, though her cargo was on board. It must be admitted that the American decisions have not yet satisfactorily established here the English rule, and some of them are adverse to it: The *Amiable Nancy* (3 Wheaton, 546); the *Anna Maria* (2 Wheaton, 327); the *Charming Betsey* (2 Cranch, 64). The *Société* (9 Cranch, 209) was the case of a neutral vessel sailing under charter party to Amelia Island with cargo freight free, where she was to take on board such cargo as might be tendered to her, and while thus carrying British goods was captured by a naval vessel of the United States, then at war with Great Britain, and brought into the district of Georgia, where the cargo was condemned as enemy's property. Chief Justice Marshall certainly held the two voyages to be distinct, probably much influenced by the division made of the freight, which as to one voyage was to be free, but payable as to the other. In the comparatively recent case of the *Nuestra Señora de Regla* (17 Wall. 30), a Spanish steamer seized in 1861 as prize of war at Port Royal, in which a huge sum was allowed to the owner for the use of the vessel, there is some recognition of the English rule, which must seem to everyone who carefully examines the subject much more consonant to the whole system of the law of marine torts.

"It certainly follows from this discussion that in the cases before us the allowance of freight *pro rata itineris peracti*, so strongly insisted on by the counsel for the Government, is out of the question.

"1. There is nothing in the act of Congress to justify it.

We are not required to decide a case where the freight was wholly earned, or one in which it was wholly unearned, for neither the one case nor the other, as we have seen, could have arisen out of the depredations of the insurgent cruisers. Such acts came too soon for the one and too late for the other. We are called upon to decide cases occupying ground intermediate between these extremes. The statute, therefore, wisely said nothing about apportioning the freight.

"2. We could not undertake to determine upon and allow freight *pro rata itineris* where it had been partly earned and partly unearned without violating those principles of law which Congress specially cautioned us to observe. Left thus untrammeled by the statute in respect to the measure of freight due, we had either to take ground in opposition to what the most enlightened publicists have written on this subject, and the most distinguished jurists have approved, or to adopt principles which have thus acquired the sanction of the jurisprudence of the maritime world. It required little sagacity and less courage to do the latter.

"3. If we had undertaken to split the freight into fractions and to parcel it out we should have failed in everything except doing injustice. A practical eye will readily see this. Suppose the ordinary voyage of a sailing vessel to be thirty days. In ten days from the time of commencing to put cargo on board she has completed, it may be, four-fifths of her entire earnings. Why? The cost of loading and payment of wages to officers and men, the supply of stores, and the other smaller and incidental but inevitable expenses are the bulk of the cost of earning the entire freight. All she then requires are those propitious influences of the elements for which she is dependent, not on the power of man, but on the favor of heaven. Divide the whole freight thus begun to be earned according to the number of days out, or by any other rule, and not in one case out of a thousand would justice be done. Deduct that which one of these vessels, if not destroyed, must have expended between the point of her actual destruction and the port of destination (generally only the expenses of maintaining the crew, paying the port charges, and delivering the cargo), and you leave her owner just where every innocent man, whose person or property is attacked in violation of law, ought by the law to be left; that is, as nearly sound and whole as if he had not been struck.

"What, then, is the practical result of these doctrines in the

cases before us? Where a vessel has sailed under a charter party with cargo on board she is entitled to net freight for the whole voyage in accordance with the terms of the charter, though destroyed when but one day out. Where she was destroyed while sailing in ballast under charter to take in cargo at her port of first destination, to be carried thence to a port of final destination, she is entitled to net freight on the cargo which she was thus to have taken on board. Where destroyed while sailing under one charter to deliver, at a designated port, cargo on board, and to bring other cargo home, she is entitled to net freight for the round trip. Where destroyed while sailing under two distinct and independent charters to carry, under the first, cargo to an intermediate port, and under the second, to carry other cargo to a port more distant, she is entitled to net freight under each charter, though destroyed before the fulfillment of the first, if she has made it satisfactorily to appear by proper proof or necessary legal presumption that she entered fairly at the same time on the commencement and prosecution of both voyages.

"On these principles we decided, in June last, the case of the *Sonora*. She sailed from New York to Melbourne, and she was thence to sail to Akyab, in British India, to take on a cargo of rice and proceed to one of several designated European ports. The charter permitted an intermediate voyage in the China seas. Having made such an intermediate voyage to Hongkong, she left that port for Akyab, and was destroyed by the *Alabama* in the straits of Malacca. In the judgment entered in favor of her owners we allowed net freight for the cargo not on board at the time of her destruction. So, also, in the case of the *Emma Jane*, decided during the same month. The case of the *Commonwealth*, argued during the present month, affords an illustration of the application of the same principle. She sailed from New York to San Francisco with a large freight list, and when about twenty-eight days out was destroyed by the *Florida*. After she had sailed, and before receiving information of her destruction, her owners executed a charter binding her to proceed from San Francisco to the Chincha Islands to take on guano deliverable at Hamburg. She had not sailed under the charter for the Chincha Islands. She had done nothing whatever under it. Her officers did not even hear of it until after her destruction. As to that charter, her gains were prospective, which the award declares 'can not

properly be made the subject of compensation, inasmuch as they depend in their nature upon future and uncertain contingencies.' We accordingly disallowed to her freight under that charter, but admitted her right to net freight on the voyage to San Francisco. We could not have done otherwise.

"In the cases of the *Highlander* and the *Jabez Snow*, now before us, we have as little difficulty in allowing the freight. The *Highlander* was to proceed under charter to Akyab, Rangoon, or Bassein (with the privilege of an intermediate voyage to a port in India or China), to take on at one of those ports rice deliverable at Cork or Falmouth. She had performed the intermediate voyage, and was proceeding in ballast to Akyab for cargo when she was destroyed by the *Alabama*. The *Jabez Snow* carried with her two charters, under one of which she sailed from Cardiff with coal for Montevideo, and by the other she was to proceed thence to Callao to take on guano deliverable at Havre. She was destroyed by the *Alabama*, with the coal on board, before reaching Montevideo. So far as we can judge, after a careful scrutiny of all the testimony before us, each of these vessels, at the time of her destruction, was proceeding in good faith in the actual execution of the contracts which she had thus lawfully assumed. We know of nothing more which either of them could have done in the prosecution of the respective voyages thus commenced and suddenly terminated by the act of the most successful of the insurgent cruisers. We accordingly allow to each of them net freight on the cargo which she was thus proceeding to take on board when destroyed. While we do not agree with the claimants respecting the amounts which they are entitled to claim, these are the principles of law on which we have reached the conclusions embodied in the judgments about to be entered.

"RAYNOR, J., dissenting."

Prospective profits, freights, gains, or advantages.

"Henry P. Haven[1] and Charles A. Williams, executors, *et al. v.* The United States, 992: Complainants were the owners of the bark *Alert*, which was destroyed by the *Alabama* on the 9th September, while on a voyage to Kerguelan Land, otherwise called Desolation Island, to procure a cargo of sea-elephant oil. It appeared that this oil was imported almost exclusively from this and Hurd's Island, and the entire business was carried on by the complainants; that in prosecuting these voyages

[1] Davis's Report, First *Alabama* Claims Court, 18.

a large ship and one or more schooners were usually employed, and it was alleged that no ship or bark could procure a cargo of this oil without having a schooner to assist her. The schooner *E. R. Sawyer* was sent out as a companion to the *Alert*, and arrived in safety at her destination, where it was alleged large numbers of sea elephants were found, and a cargo of oil could have been taken had the *Alert* arrived. As soon as the owners heard of the destruction of the *Alert* they fitted out the *Arab*, a smaller vessel, and sent her to Desolation Island, where she procured a cargo of oil. The *Alert*, before her destruction, had taken two sperm whales and had the oil on board.

"The complainants in this case claimed their share (seven forty-eighths) of the bark, cargo, and outfits, and seven forty-eighths of the difference between the cargo brought home by the *Arab* and that which the *Alert* would have procured had she reached Desolation Island.

"The court in entering judgment delivered no opinion, but by a comparison of amounts it appears that judgment was entered for the value of the vessel, and the oil actually on board at the time of destruction, and that no allowance was made for the probable catch of sea elephants.

"In calculating the value of the sperm oil on board, the market rate on the day when it would have arrived home in the usual course of business seems to have been taken as the measure of damage."

Colby's Case.

"Charles L. Colby *v.* The United States, No. 1187,[1] and sundry other claims: These claims were brought by the owners of the ship *Commonwealth*, destroyed by the *Alabama*, for the value of the vessel, outfits, and freight.

"The *Commonwealth* sailed from New York for San Francisco on the 19th of March 1863, laden with a general cargo. On the 17th of April following she was destroyed.

"On the 15th of April 1863 a charter party was entered into between the owners of the vessel and the agents of the Government of Peru, agreeing that the vessel should proceed from San Francisco to Callao, Peru; thence, on receipt of orders, to the Chincha Islands for a cargo of guano; thence to Hamburg or Rotterdam, calling at Cowes for orders. The complainants claimed net freight on this charter party, which a comparison

[1] Davis's Report, 18.

of the amount claimed with the amount awarded by the court shows was not allowed."

Upton's Case.

"George B. Upton, jr., *et al. v.* The United States, No. 960:[3] The complainants were the owners of the ship *Nora*, her tackle, apparel, outfit, and freight.

"The *Nora* sailed from Liverpool for Calcutta about February 14, 1863, and on the 27th March was destroyed by the *Alabama*. The value of the vessel was claimed as increased by her vicinity to a point where vessels were in demand. A claim was also made for services and risk of money.

"The judgment in the case was for $74,603.10, with the legal interest from the date of destruction.

"No opinion was delivered in the case, but a comparison of amounts shows that the court did not allow the claim for enhanced value or for services or risk of money.

"Sixty thousand dollars, gold, was stated by the complainants as the value of the *Nora* when new. This amount reduced to currency, with expenses at Liverpool and freight added, and insurance received subtracted, gives approximately the judgment rendered."

Fisler's Case.

"Lorenzo F. Fisler *v.* The United States, No. 404: The complainant, a photographer, on his way to China in the ship *Talisman*, was captured by the *Alabama*, and his clothing, stock in trade, etc., were destroyed.

"The complainant showed that, at the time of his capture, he had an agreement with a firm in China, the conditions of which were that, in return for his professional services, he was to receive a salary of one hundred Mexican dollars per month, and his expenses paid; or in lieu thereof, one-fourth share in the profits of their business; that, immediately upon his arrival at Shanghai, thirteen months after the date when the *Talisman* would have reached her destination, had she not been destroyed, he entered into the employment of that firm, with a compensation equal to one-fourth of the profits. It was alleged that on this basis, during the thirteen months he was delayed, his share of the profits would have been about $2,600 gold.

"No opinion was delivered by the court. The complainant proved $1,180 gold as the value of his goods actually destroyed.

[3] Davis's Report, 18.

Adding to this sum the premium on gold on the day when the *Talisman* was destroyed, we have $1,722.80, the amount for which the court entered judgment. It appears, therefore, that the claim for compensation for delay in fulfilling his contract was not allowed."

Net freights.

"The complainants in case No. 1942, William Johnston Taylor *et al. v.* The United States,[1] were the owners of the steamship *Electric Spark*, which sailed July 9, 1864, on a voyage from New York to New Orleans and return under charter of the New York Mail Steamship Company. The vessel was destroyed by the *Florida* on the 10th July, 1864. The complainants recovered the value of the vessel and outward freight in another petition and now claimed the value of the return freight and passage money, it being shown that the vessel was engaged full of passengers and freight for the return trip by the agent at New Orleans of the New York Mail Steamship Company.

"The compensation to the owners of the vessel, under the charter, was to be the freight and passage money less a commission to the New York Mail Steamship Company.

"Mr. Throckmorton, for complainants, contended that an allowance for the return freight and passage money should be made under the decision in Buck & Spofford *et al. v.* The United States.

"The court ruled that the engagement of the freight and passage money by the New York Mail Steamship Company's agent did not establish such privity of contract with the owners of the vessel as to enable them to recover therefor, the vessel having been destroyed before arrival at the port where the freight and passage money was engaged."

Catch.

"Many of the seamen sailing on whaling vessels were paid from the catch, their 'lay' depending upon the amount of oil and bone taken by the vessel in which they sailed.

"Owing to the difficulty experienced in properly apportioning their claims in accordance with the various contracts entered into by them with the shipowners, to avoid the danger of a double allowance, to protect sailors absent at sea, and to

[1] Davis' Report, First Court of Commissioners of *Alabama* Claims, 21.

enable owners to obtain payment of advances made to seamen on the credit of the catch, the court entered judgment in favor of the owners of the vessel for the value of the oil and bone on board the ship at the time of her destruction, which judgment, with the interest thereon, was 'to be received and distributed by the said owners according to law, among the respective parties entitled thereto in their due proportion.'

"The owners, therefore, hold the money awarded by the court in these cases subject to all claims, as they would have held the proceeds of the oil and bone taken, had it arrived at its destination and been sold.

"The district court of Massachusetts, acting as a court of admiralty, has, I learn, been applied to to settle questions arising under these awards, and has adjusted them substantially in accordance with the rulings of this court.

"In estimating the value of the oil and bone lost on whaling vessels, the court seems to have taken their average value for the year during which the vessel would have reached home, in the ordinary course of navigation.

"The claim of John Stevens, a seaman on the *Ocean Rover*, for the value of his share of the oil on board of that vessel at the time of her loss, was dismissed by the court, his remedy being against the owners, a judgment having been entered in their favor for the whole value of the catch."[1]

Wages and expenses of seamen.

"It appears that the court allowed wages to seamen for the time shown to have elapsed from the destruction of the vessel to the date when employment was next secured, not exceeding in any case one year. The wages, up to the date of destruction, appear not to have been allowed, as the seamen have their remedy for this loss against the owners.

"The actual expenses of seamen in returning home, or to the place where they next secured employment, appear to have been allowed.

"Seamen on whaling vessels generally sailed under an agreement to receive from the owners as compensation a proportion of the proceeds of the catch of the vessels. For the judgment of the court in these cases, see Catch, *supra*."[1]

[1] Davis's Report, First *Alabama* Claims Court, 23.

"MOSES HYNEMAN
v.
THE UNITED STATES. } No. 643.[1]

"The act creating the Court of Commissioners of Alabama Claims limits its jurisdiction to claims for losses directly resulting from damage caused by certain so-called insurgent cruisers.

"The cost of an adjustment of general average on a ransom bond taken from the master of a vessel captured (but not destroyed) by the *Alabama* is not a loss directly resulting from damage caused by one of the said cruisers.

"The case is stated in the opinion of the court.

"Mr. Frank W. Hackett for the complainant.

"Mr. J. A. J. Creswell for the respondents.

"PORTER, J., delivered the opinion of the court:

"In December 1862 the complainant shipped from New York on the steamship *Ariel* certain merchandise destined to San Francisco. When the *Ariel* had prosecuted her voyage about as far south as Cuba she was pursued, fired upon, and stopped by the rebel cruiser *Alabama*. The commander of the *Alabama* evinced a strong desire to destroy the steamship, as he had done, and continued to do, so many other valuable vessels. But the *Ariel* had on board six hundred and sixty-seven passengers, including one hundred and forty United States marines and their officers, too many to be taken on board the *Alabama* or to be sent adrift in small boats. Embarrassed by this circumstance, he exacted from the master of the *Ariel* a ransom bond, which purported to be executed by the master for himself, the owners of the ship, and of its cargo, and stipulated well and truly to pay the sum of $261,000 'unto the president of the Confederate States of America, his successor or successors in office, within thirty days after the conclusion of the present war between the said Confederate States and the United States.' On the arrival of the goods at San Francisco the owners of the steamship line, regarding the case as one of general average, placed it in the charge of professional adjusters. The proceedings of the adjusters have not been very substantially proved in this court; but we assume the professional competency of the persons so employed, and the technical accuracy of their work. They apportioned the respective amounts which the vessel, the freight, and cargo were liable to contribute if pay-

[1] Davis's Report, First *Alabama* Claims Court, 45.

ment of the bond were finally exacted; and they also apportioned the expenses of the adjustment among these different interests. They fixed the sum which would be payable by Mr. Hyneman as his portion of the bond at $4,880.53, and his portion of the expenses of the adjustment at $78.73. He paid the last-mentioned sum in gold, and he claims to recover it from the money awarded to the United States at Geneva. Can we allow it? It is a case on which several cases are said to depend, and deserves the careful consideration which we have endeavored to give it.

"It may be admitted that where a ship is seized and detained by a superior force, a sum of money paid to ransom her constitutes a case of general average. (Emerigon on Insurance, 485; 1 Parsons on Maritime Law, 299; Clarkson *v.* Phœnix Insurance Co., 9 Johnson, 1; Girard *v.* Ware, Peters's Circuit Court Reports, 142.)

"In the present case no money was paid, but a bond was required, and we think the claimant justly entitled to the inference that if the master had refused to give the bond the ship and her cargo would have been destroyed. It is clear, also, that by long-established usage, as recognized by the best writers (2 Phillips on Insurance, 100), the charges of the adjuster or *despacheur* are to be borne proportionately by the owners of the property saved by the payment of a ransom. The peculiarity of this case is that payment of the bond was never demanded, and, as the facts show, never could have been enforced. It must be regarded now as an instrument utterly void in law. Can the claimant recover from this fund the sum which he was compelled to pay toward the expenses of an adjustment consequent on the giving of such a bond?

"By the act of Congress of 23d June 1874 our powers are thus limited: 'It shall be the duty of said court to receive and examine all claims admissible under this act that may be presented to it directly resulting from damage caused by the so-called insurgent cruisers,' etc. In the jurisprudence of most countries a distinction has been necessarily drawn between the proximate and remote causes of loss. In Livie *v.* Janson (12 East. 648), Lord Ellenborough held that if a ship meet with sea damage which checks her rate of sailing, so that she is taken by an enemy from whom she would otherwise have escaped, the loss is to be ascribed to the capture and not to the sea damage. So, where a vessel was compelled by sea damage to

put into a foreign port for repairs, and the climate of the country rendered necessary the sale of a part of the cargo, a loss thus arising is not a consequence of the perils of the sea (Goold *v.* Shaw, 1 Johnson's Cases, 293.)

"In Hillier *v.* The Allegheny County Insurance Company (3 Pa. State R. 470), it was held that, where goods not touched by fire were removed under a reasonable apprehension that they would be consumed by a fire then raging in the immediate neighborhood, the injury sustained was not covered by a policy against the peril of fire. The books are full of such cases. They were well known to the eminent lawyers of each house of Congress who so long had this act in their charge. The losses cognizable in this court were therefore defined with severe precision. We are to consider and determine upon claims for losses arising not simply from the wrongful acts of the insurgent cruisers, nor merely growing out of the injuries really occasioned by such acts, but for losses directly resulting from damage caused by the said cruisers. An act of damage must be shown to have been committed, and the act must appear to be the direct, as distinguished from the remote, cause of the loss. The loss from a probable or anticipated injury may have been greater in some cases than from a real act. The remote result of an act of damage may have been ruinous to the party suffering it. Upon the consideration of these cases we are expressly prevented from entering. In every case brought here two things must be shown to have concurred, namely, damage done by one or more of the insurgent cruisers, and a loss as its direct result. If either of these elements be wanting we are powerless to give a claimant any redress.

"Has this claimant suffered any loss which is the direct result of damage caused by the *Alabama*? She did no damage whatever to the *Ariel*, or to her cargo, and did not exact from her the payment of a dollar of money. The apprehension on the part of the owners of the *Ariel* that they might at some time be required to pay led them to demand the money from the claimant, and he, to save the trouble of a contest over it, paid the sum required. If he has lost by the transaction he has been unfortunate; but it is plain to us that his loss is not one directly resulting from damage caused by the *Alabama*, as these terms are employed in the act of Congress, whence our powers are derived.

"Judgment for the United States."

"ANN ELIZA GANNETT, OF MASSACHUSETTS, administratrix of the estate of Abraham Osborn, deceased, *et al.*,
v.
"THE UNITED STATES.[1] } No. 184.

"1. All claims for damage caused by the so-called insurgent cruisers *Alabama*, *Florida*, and their tenders, and all claims for damage caused by the so-called insurgent cruiser *Shenandoah*, after her departure from Melbourne on the 18th day of February A. D. 1865, must *directly result* from damage caused by said cruisers.

"2. No claim for '*prospective profits*' can be admitted or allowed under the act of Congress of June 23, 1874, creating the Court of Commissioners of *Alabama* Claims.

"The case is stated in the opinion of the court.

"Messrs. Corwine and Manning for the complainant.

"Mr. J. A. J. Creswell for the respondents.

"WELLS, presiding judge, delivered the opinion of the court:

"Petition embracing alleged facts as follows:

"'*To the honorable judges of the Court of Commissioners of "Alabama" Claims:*

"'First. Your petitioner, Ann Eliza Gannett, administratrix of the estate of Abraham Osborn, deceased, for herself and the other parties whose names are set forth in the caption and made part hereof, respectfully represents that said Abraham Osborn, together with said parties, was the owner of the whale ship *Splendid* on the 11th day of August 1862, which was fitted out and fully equipped at Edgartown, Dukes County, State of Massachusetts, to pursue the whale fishing in the Atlantic Ocean for a voyage of thirty months, with a full complement of officers and crew; that said ship was owned at Edgartown; that she was driven out of said Atlantic Ocean by the rebel cruiser *Alabama* while engaged in pursuing her voyage and business on those fishing grounds, and after obtaining supplies at the port of St. Catherines she proceeded to the Arctic Ocean and the Anadir Sea; that while so engaged she was pursued by the rebel cruiser *Alabama*, with the purpose of capturing and destroying her, and was compelled to leave said fishing ground, and then and there and thereafter prevented by said rebel cruiser from returning to said fishing ground for a period of more than two months; that when so compelled to leave, the preparations which had been made at that time, and the work that had already been done, promised a most successful season's catch; that the unlawful act of the

[1] Davis's Report, First *Alabama* Claims Court, 42.

Alabama caused injury to the property and interests of petitioners 'directly resulting from damage caused by' said cruiser, in this, that it broke up the season's catch, destroyed the enterprise, and put an end to the voyage, to the great pecuniary damage and serious material injury to your petitioner, whereby the said owners lost their entire outfits, refits, and investment, except the ship itself, and that was greatly deteriorated in value, requiring large outlays to fit it for another season's voyage; that the master of said ship was compelled to escape with his said ship from the pursuit of said rebel cruiser, or otherwise have his said ship burned, as was the fact with many whalers at that time, being on the same cruising ground.

"'And petitioner avers and states that it cost the owners of the *Splendid*, for the preparation of said voyage, for the outfit of said vessel, etc., the sum of $50,000.

"'That that season's catch, covering a period of about one year, broken up by this act of said rebel cruiser, was well worth, and would have realized the owners of said ship, the sum of $50,000; which loss wholly and directly resulted from the damage caused by said rebel cruiser, in manner and under the circumstances aforesaid.'

* * * * * * *

"To which the United States interposes a demurrer, as follows:

"'1. Because the said claim of said complainant is not admissible under the provisions of the law creating this court.

"'2. Because the said claim is not a claim directly resulting from damage caused by the so-called insurgent cruisers *Alabama*, *Florida*, and their tenders, or any of them, nor one directly resulting from damage caused by the so-called insurgent cruiser *Shenandoah*, after her departure from Melbourne on the 18th of February 1865.

"'3. Because the said claim is based upon unearned freights, gross freights, prospective profits, freights, gains, and advantages.

"'4. Because the Government of the United States is not bound to afford a convoy to every ship upon the high seas, and can not be held responsible for unlawful acts perpetrated upon citizens of the United States by hostile and belligerent cruisers.

"'5. Because the said claim is not admissible under well-established principles of mercantile law.'

"Section 11 of the act of Congress, approved June 23, A. D. 1874, under which this court was organized, would seem to dispose of this case; in fact, two words of this section, if the exact meaning of the same could be clearly reached, would remove a difficulty which has involved lengthened discussion,

and presented an amount of legal learning very interesting to the court and creditable to the gentlemen engaged in the case. The two words 'directly resulting,' occurring in the third line of section 11, in almost any other connection, would seem to have by themselves a significance that could not be misinterpreted; the words in their connection in this section of the law, it seems to the court, are not used loosely, as though Congress, in the hurry and confusion of its session about to close, had not been carefully critical in expressing the intent of the lawmaking power. Section 11 reads as follows: 'That it shall be the duty of said court to receive and examine all claims admissible under this act that may be presented to it, *directly resulting* from damage caused by the so-called insurgent cruisers *Alabama*, *Florida*, and their tenders, and also all claims admissible under this act *directly resulting* from damage caused by the so-called insurgent cruiser *Shenandoah*,' etc. Now, if Congress had intended such construction of this section as has been insisted upon by claimant in this case, why was the word 'directly' used at all? The case of claimant might possibly have been covered by the language of this section if it had read, 'That it shall be the duty of said court to receive and examine all claims admissible under this act that may be presented to it, *resulting* from damage caused,' etc., leaving out the word 'directly,' for the term 'resulting from' implies a direct or indirect result, a result of the hour, or a result after months or years, a result now and here, or a result hereafter; not so with the phrase 'directly resulting;' this fairly implies an immediate consequence, a prompt following after an act now and here done and performed.

"It is hardly possible for this court to fail to distinguish the difference in two cases, the one where a vessel was captured by one of these insurgent cruisers, the immediate announcement that she is a prize, her officers and men in irons transferred at once to the Confederate vessel, the captured vessel in flames, and all this within an hour; the other case, a vessel driven from her fishing ground, and a conclusion, reached after a lapse of two months or more, which may be correct or incorrect, that her prospects or season's catch is broken up, that her voyage, intended for years, is at an end, except to return to her port of departure. In the one case, all is certainty, a 'direct result;' the captured vessel in flames immediately after her surrender, and sure to be totally consumed, except so much of the same as may be beneath th

ocean's surface; and, in the other case, a something to occur in the future, and possibly to be qualified as to loss or no loss by the timidity or cowardice of a commanding officer or the destruction of a vessel by fire, collision, or storm.

"The construction placed by this court on the words 'directly resulting' does not imply that we entertain the idea that Congress acted wisely or unwisely in the use of the word 'directly' as it occurs in section 11; the court has nothing to do with the action of Congress in this respect; it is our duty to construe the law as we find it, and to give, as we may have the ability, a reasonable construction to every part of section 11, as it comes to our hands from the law-making power.

"In giving an opinion as to the construction of section 11 and other portions of the act of June 23, A. D. 1874, the court has carefully examined the authorities cited from the Congressional Record, vol. 2, part 6; The Treaty of Washington, by Cushing, pages 164, 165, and 166, and the various decisions of the courts affecting the construction of the act of June 23, 1874.

"If the claimant in this case can substantiate what she alleges as fact in her petition, it may be a proper subject for Congressional action in the future so to legislate as to bring such case within the purview of the law, and thus give to her and others the benefit of a portion of the fund which Great Britain, in the furtherance of justice, has paid the United States as compensation for an omitted national duty. Congressional legislation must give the relief, if any is to be had. This court is without the power, much as its sympathy might be enlisted for the claimant, to give her any relief.

"In considering this case, as it is connected with section 11 of the law creating this court and defining its duties, we have not been unmindful of that provision of section 12 of the same law which prohibits the allowance of any claim based on 'prospective profits,' which prospective profits might be involved in the statement of claimant in her petition that the 'season's catch,' covering a period of about one year, broken up by the act of the rebel cruiser *Alabama*, was well worth, and would have realized the owners of said ship, the sum of $50,000.

"In enacting this provision of the law, of course Congress had in view that part of the decision and award of the tribu-

nal at Geneva which was cited by counsel, and reads as follows:

"'And whereas prospective earnings cannot properly be made the subject of compensation, inasmuch as they depend in their nature upon future and uncertain contingencies, * * * the tribunal is unanimously of opinion that there is no ground for awarding to the United States any sum by way of indemnity under this head.'

"Now, were there no uncertain contingencies connected with the 'prospective' or expected catch of the whale-ship *Splendid*, 'equipped to pursue the whale fishing in the Atlantic Ocean for a voyage of thirty months?'

"The dangers of the sea are topics of talk with a host of our legal brethren from the opening to the end of the year, and every year since our government was founded. There is no end to the number of volumes on the subject of marine law, embodying elementary principles and adjudicated cases, abroad and in this country, a large proportion of which exhibit the uncertain contingencies connected with ocean navigation.

"Millions of capital are invested to guard against marine risks, and in every policy of insurance issued some of the perils of the sea are enumerated. God's providence and His wisdom can only protect against the dangers of the deep.

"In view of all this, in view of the actual realities of life, we are led to the conclusion that there were many 'uncertain contingencies' connected with the 'season's catch' of the whale ship *Splendid*, the season embracing a term, as stated in the petition, of not less than one year, and with the vessel fitted to pursue the whale fishing for thirty months.

"After full consideration of the arguments and authorities cited by counsel, the court sustains the demurrer filed in this case and enters judgment for the respondents."

"WILLIAM PHILLIPS ET AL.
v.
THE UNITED STATES.[1] } No. 1228.

"In re bark *Richmond*.

"The court has no authority to make compensation for damages occasioned by taking the crews of vessels destroyed by one of the so-called insurgent cruisers from a vessel captured and bonded, and carrying them to a place of safety; the vessel for which compensation is claimed never having been captured.

"The damage under these circumstances is too remote.

[1] Davis's Report, First *Alabama* Claims Court, 56.

"A statement of the case will be found in the opinion of the court.

"Mr. William W. Crapo for the complainants.

"Mr. J. A. J. Creswell for the respondent.

"JEWELL, J., delivered the opinion of the court:

"This is a claim made by the owners of the bark *Richmond* for compensation for the use of the said vessel, and damage for consequent loss of the catch of the same.

"It appears that the bark *Richmond* was, in the month of June 1865, in the Northern Pacific Ocean, near Behring's Straits, pursuing the whaling business. The Confederate cruiser *Shenandoah* had captured a large number of whalers, and among them the bark *General Pike*. The others had been burned and the *General Pike* spared, and the officers and crews of the other vessels, to the number of 252, placed on board of her for conveyance to the nearest port, or to any port which they might be able to reach. The last of these captures was on the 28th day of June.

"On the 1st day of July the master of the *Richmond* felt himself compelled to take on board his own vessel a portion of the officers and men from the *General Pike* under circumstances fully detailed by him in a 'statement' annexed to the petition, which is as follows. We also add the statement of the masters, made at the request of Captain Weeks:

"'*Statement of the master of the "Richmond."*

"'We left Honolulu in the bark *Richmond*, bound on a whaling cruise to the Arctic Ocean. While in the prosecution of such, on our arrival in the vicinity of Behring Straits, we came up with a whale ship on fire. Not knowing the cause of it, I began to save such articles as I could from the wreck, as she had drifted into the ice, and her mast falling over the side, I found I could save many articles valuable to the use of my own bark, and as the wind was against me, I was not losing much time by so doing. While doing this a ship came to me with all sail set, steering to the southward, hailing me as he passed by, telling me there was a pirate close at hand, at the same time advising me to flee, as he was doing, for probably all that remained would be destroyed. But on due consideration I determined not to leave, for I would as quick lose the ship as go without oil. I came to the conclusion I would await a southerly storm or foggy spell usual at such times of the year, and take advantage of the opportunity and get through the straits in spite of the *Shenandoah*, as it proved to be. My

experience in those waters would enable me to do this. While waiting for a favorable opportunity to do this we raised a sail in the north coming toward us. A few hours after the wind died away and a boat was lowered from her and came in pursuit of us. Coming alongside I was surprised to see so many faces of shipmasters. They had been taken by the *Shenandoah* and put on board the *General Pike*. They stated they were crowded and suffering from want of room, &c. They all joined in begging me for the sake of humanity to relieve them. I went on board of the *General Pike* to see for myself, and found they had not misrepresented the matter. I next returned to my own vessel, consulted with my officers, and came to the conclusion we ought to relieve them. I then told the shipmasters and prisoners that if they still insisted on my taking a portion of them, and would give me the same in writing, with their signatures, which was agreed to and signed by all the shipmasters, I dare not do otherwise. Under such conditions I had to submit. They put on board of me 52 men; with those I sailed for Honolulu, and thereby losing my season.

"'W. P. WEEKS, *Master*.

"'*Statement of the masters.*

"'AT SEA, *July 1, 1865*.

"'We, the undersigned, do solemnly swear that our ships were burned by the pirate *Shenandoah*, and we were placed with our crews on board of bark *General Pike*, 252 men, all told; and being afraid of sickness, on account of the crowded state of the ship, we requested Captain Weeks, of bark *Richmond*, to take some of our men, which he kindly consented to do out of humanity's sake.

"'O. G. ROBINSON, *Captain bark Gypsey*.
"'HUDSON WINSLOW, *Captain bark Isabella*.
"'WILLIAM H. PHILLIPS, *bark Catharine*.
"'F. S. REDFIELD, *brig Susan Abagail*.
"'JAMES M. CLARK, *bark Nimrod*.
"'P. H. COOLEY, *bark Wm. C. Nye*.
"'WILLIAM BENJAMIN, *ship Gen. Williams*.
"'HEBRON M. CROWELL, *bark General Pike*.'

"The conduct of the master of the *Richmond*, as shown in this statement, in refusing to flee from the *Shenandoah*, saying he would 'as quick lose the ship as to go without oil,' supporting his declaration by his action in remaining, and in finally yielding to considerations of humanity what he would not yield to fear, is worthy of the highest praise.

"His desire of making a cargo of oil was greater than h[illegible] fear of capture by the *Shenandoah*. What fear could not co[illegible] strain him to do, feelings of humanity did.

"After a careful examination of the necessities he volunt rily abandoned his own adventure to save the lives of th officers and men put in peril upon the overcrowded *Genera Pike*.

"Nothing more honorable or praiseworthy has been show in all our hearings. Can this court make compensation fo the loss thereby incurred?

"We are compelled to say that under no view of the act o Congress creating this court can we find authority so to do The claims admissible before us must be such as directly resul from damage caused by the so-called insurgent cruisers.

"In two cases heretofore considered by us, where vessels were captured by the *Alabama* and the crews of other vessels put on board for transportation to a port of discharge, we have awarded compensation for such compulsory service. But both those vessels had been actually captured. Here there was no capture.

"The petition must be dismissed."

Case of the "Baron de Castine."

"The brig *Baron de Castine* on the 20th October 1862 sailed from Bangor, Maine, with a cargo of lumber, bound for Cardenas, Cuba. On the 30th October she was captured by the *Alabama*, bonded in the sum of $4,000 on the brig and $2,000 on the cargo, and forty-four prisoners were put on board of her. The brig was obliged to make for Boston, the nearest port, where she arrived on the 2d November. She was detained at Boston about ten days making repairs, when she proceeded to Cardenas.

"The brig at the time of capture was sailing under a charter binding her to take a cargo of lumber from Bangor to Cardenas, returning to New York with a cargo of merchandise, thirty lay days being allowed to receive and discharge cargo; the compensation agreed to being $2,250, currency, and foreign port charges paid.

"Counsel for complainants, Mr. Alexander P. Morse, contended that damages should be estimated by accepting the value of the charter party, allowing its full value, less any indemnity or compensation paid complainants in consideration thereof. (Rogers *v.* Beard, 36 Barbour, 31; 20 Howard, Pr. Reports, 102.)

If this basis of compensation should not be accepted by the court, counsel claimed indemnity, to be estimated as follows, viz, by computing the number of days lost by capture and

multiplying it by a figure representing a fair compensation on that account.

"That an allowance should be made also for provisions consumed and other actual expenses consequent upon the capture. (McAfee *v.* Crofford, 13 How. 447; 6 Bingham, 716; No. 19, Eng. L. R. 215, *et seq.;* Sedgwick on Damages, pp. 57, 63 (note), 69, 99.)

"Judgment was entered in favor of the complainants. No opinion was delivered. From a comparison of the amounts claimed and awarded it appears that the court calculated damages in accordance with the second basis of computation suggested by counsel."[1]

Case of the "Justina."

"In the case of the bark *Justina* it appeared that while on a voyage from Rio de Janeiro to Baltimore she was captured and bonded. Nineteen prisoners were placed on board, and the master was ordered to and did proceed to Baltimore without stopping at any intermediate port; that the *Justina* was in ballast, and but for the capture would have stopped at the West Indies for a cargo to Baltimore.

"Complainants claimed the passage money of the nineteen men at $100 gold, each, amounting in currency to $2,750.25; the value of one crate of bananas, taken by the crew of the *Alabama*, $25, and the value of the vessel for freighting purposes during the time she was under bond, viz, thirty-six days at $75 a day, amounting to $2,700; the total amount claimed being $5,475.25.

"The court awarded $1,425, with the usual interest. The amount of the judgment can be reached by allowing passage money at $2 and a small fraction per day per man for the prisoners on board for the thirty-six days they were on the vessel, adding the value of the crate of bananas."[1]

Haskins's Case, No. 208.

"William Henry Haskins *v.* The United States, No. 208. The complainant was master of the ship *Louisiana*, a whaling vessel which was driven into Kotzebue Sound, in her attempt to escape from the *Shenandoah*, where she stuck on a sand-bar, took fire, and was burned, with nearly all her contents. This complainant asked indemnity for loss of personal effects, wages, and share of oil, together with his expenses in returning home.

[1] Davis's Report, First *Alabama* Claims Court, 21.

"Counsel on behalf of the United States demurred to the petition.

* * * * * * *

"Third. Because the claim of the said complainant is not admissible under the law creating this court.

"Fourth. Because the said claim is not a claim directly resulting from damage caused by the so-called insurgent cruisers *Alabama*, *Florida*, and their tenders, or by either of them; nor is it a claim directly resulting from damage caused by the so-called insurgent cruiser *Shenandoah* after her departure from Melbourne on the eighteenth day of February in the year eighteen hundred and sixty-five.

"Argument on the demurrer was had at the final hearing of the cause. Mr. H. H. Wells, for the complainant, contended that the claim was for a loss directly resulting from damage caused by the *Shenandoah*, and was within the jurisdiction of the court, citing the eleventh section of the act of June 23, 1874, and the following authorities: Waters *v.* Merchants' Louisville Insurance Co., 11 Peters, 213; David C. Magoun *v.* New England Marine Insurance Co., 1 Story, 157; 1 Phillips on Insurance, sec. 1132, page 677, 5th edition, 1867; Thomson *v.* Hopper, 1 Ellis, Blackburn & Ellis, 1038; Hahn *v.* Corbet, 2 Bing. 205; Patrick *v.* Commercial Insurance Co., 11 Johnson, 9; Peters *v.* Warren Insurance Co., 14 Peters, 99; Insurance Co. *v.* Tweed, 7 Wallace, 44; Dole *v.* New England Mutual Insurance Co., 2 Clifford, 394; Voss *v.* United Insurance Co., 2 Johnson's Cases, 180; Luckley *v.* Delafield, 2 Caine's Cases, 222; American Insurance Co. *v.* Dunham & Wadsworth, 12 Wendell, 463; Havelock *v.* Hansell, 3 Term Reports, 277; Grim *v.* Phœnix Insurance Co., 13 Johnson, 451; Montoya *et al. v.* London Assurance Co., 4 Eng. Law and Eq. 500; Savage *v.* Pleasants, 5 Binn. 403; Coolidge *v.* New York Fireman's Insurance Co., 14 Johnson, 308.

"Mr. John A. J. Creswell, counsel on behalf of the United States *contra*.

"The court dismissed the petition."[1]

Gannett's Case, No. 1321.

"Ann Eliza Gannett, administratrix of the estate of Abraham Osborn, deceased, *v.* The United States, No. 1321: The following allegations were made in the petition: Complainants were owners of the ship *Mary*, of Edgartown, which cleared the 18th of June

[1] Davis's Report, First *Alabama* Claims Court, 19.

1861 for a whaling voyage of five years in the Atlantic and Indian oceans and elsewhere. In November 1863 the master, to escape the Confederate cruiser *Alabama*, ran into Singapore, and being blockaded there shipped his oil on a British ship to England. This was valued in Singapore, as shipped, at $36,852 gold, but netted the owners (in gold) at home (through England) only $9,990, making a loss, in gold, of $26,862, which sum was claimed.

"This claim was dismissed, together with others similar to it in principle."[1]

Osborn's Case, No. 787.

"In the case of Samuel Osborn, jr. *et al. v.* The United States, No. 787, the following allegations were made in the petition: That the whale ship *Almira*, in the summer of 1865, was fitted out to pursue the whale fishery in the Pacific Ocean for a voyage of four years, and proceeded to the Arctic Ocean. While there she was 'pursued by the rebel cruiser *Shenandoah*, with the purpose of capturing and destroying her; and she was compelled to leave said fishing grounds, and then and thereafter prevented by said rebel cruiser from returning to said fishing grounds for a period of more than two months; that, when so compelled to leave, the preparations which had been made and the work which had already been done promised a most successful season's catch.' The owners claimed the value of the season's catch so lost.

"This claim and others similar to it were dismissed by the court, after extended argument.

"The gross amount claimed in this class of cases is estimated at $2,000,000, not including interest."[1]

WILLIAM A. BAILLIE AND ELIZABETH H. BAILLIE *v.* THE UNITED STATES.[2] } No. 2066, Class 1.

This claim involved the question as to the standard by which the value of property destroyed by the Confederate cruiser *Tallahassee* on the high seas on August 12, 1864, should be measured. The value of the property as found in

[1] Davis's Report, First *Alabama* Claims Court, 20.
[2] Second *Alabama* Claims Court.

the claim filed in the Department of State on the 31st October 1865 was $19,700, but the amount was swollen in t memorial before the court to $96,182.18, on which interest w also asked. The goods destroyed were comprised in 44 pac ages. Of these 38 were purchased in China and Japan f 17,749 Mexican dollars, silver, worth, if converted into Japanese bill of exchange on London, $20,964.78 United State gold, which, together with port charges and interest at 6 pe cent from the date of shipment to the date of loss, amounte in legal-tender notes of the United States at that time t $54,570.12.

The other 6 packages were bought in London, and their valu with charges, freight, and interest from date of capture to dat of loss was $6,301.54, aggregating with the amount last abov named to $60,871.66. This was brought up to $90,182.18 b an amendment to the memorial including certain other item for goods alleged to have been captured and destroyed but no included in the original memorial. The court rejected th amendment, the property embraced therein appearing to hav been included in the invoices described in the original petition

As to the allowance of the value in legal tenders by conver sion of the amount in gold by that standard, Judge Harlan who delivered the opinion, said that the court had held i numerous cases "that the value of the property destroyed mus be ascertained and reckoned in the currency used by th owners in the transaction of the business out of which th claims arose." In coin transactions coin values had been use in making up judgments; in legal-tender transactions, legal tender values had been used. Judge Harlan said:

"A seeming exception, but not a departure in principle, ha been made in cases in which the business was transacted i coin and the coin itself was purchased for that purpose wit legal-tender notes. In all such cases the court has felt con strained to adopt the paper-currency value of the property i the rendition of judgments.

"The court does not attempt to conceal from itself what mus be obvious to everyone, that the adoption of this rule of inter pretation and application of the statutes bearing on the sub ject affects these two classes of claimants unequally, but, it i believed, not unjustly.

"Such claimants as paid for the property destroyed in stand ard coined dollars, recovering judgments for the number o dollars thus invested, payable in standard coined dollars or a equivalent, will receive full indemnity for their total loss, an

will have no cause to complain, although another class of claimants who, endeavoring to support the policy of their government and to sustain its credit, having purchased property with legal-tender notes when below par in the money markets of the world, will recover judgments for the number of dollars thus invested by them, also payable in coined standard dollars or an equivalent. The advantage accruing to the latter class works no injustice to the former class, and is derived by them in common with other patriotic citizens who at the same time invested legal-tender notes in government bonds and other securities payable in paper money which have since become equal to coin in value. And this court finds nothing in the statutes, nothing in the policy of the government, and nothing in the decisions of the courts, State or national, to justify it in reducing the value of property bought with legal-tender notes when below par to its coin value of that period in the rendition of judgments.

"But if the rule adopted by the court could be shown to be erroneous in this respect, it would not affect the rights pro or con of claimants at bar. They purchased the larger part of this property in Japan or China, and paid for it, as they allege, in Mexican silver dollars, and the residue in London, and paid for that in sterling money. Hence, when they shall obtain judgment for a sum of money payable in the coin of the United States or its equivalent in value to the value of the Mexican dollars and sterling money so used, they will have been fully indemnified.

"The claim for premium on the alleged gold value of this property is therefore disallowed."

The rest of the opinion was as follows:

"Claimants allege that the 17,749 Mexican silver dollars used in the purchase of these Chinese and Japanese goods were worth, in a six months' time draft or bill of exchange on London, $20,964.78 in the gold coin of the United States, and also insist that they are entitled to compute interest on this sum from the date of shipment to the date of loss as an increment of value. It is clear, however, that the value of the use of money during the period named in a time draft must be a part of the consideration regulating the cost of exchange. Hence, if the claim for exchange should be allowed, the demand for interest in this case must be rejected. Otherwise the same element of value would be duplicated.

"Claimants aver in the amendment to their petition that a part of these Chinese and Japanese goods were purchased by them originally for less than their commercial value, and that said goods had increased in value after the date of purchase and before the date of destruction, so that at the latter date they were in fact worth double their original cost; an increase, as they allege, equal to the value of 10,804 Mexican

silver dollars, which they pray may be added to the original claim.

"In the opinion of the court, the claimants have a legal right to recover the value of their property at the date of the loss; but when the destruction occurs in mid ocean its value can not ordinarily be ascertained at the place of loss. Hence, the rule heretofore observed by the court in this respect has been to endeavor to ascertain its value at the port of shipment. For this purpose evidence of its cost is not only admissible, but, in the absence of other paramount testimony, may be treated as conclusive. For although the cost or purchase price of property must be considered merely as evidence of value, to be weighed in connection with any other testimony produced, yet it is fair to presume that property will usually sell for all that it is worth at the place of purchase, and that the vender will not ordinarily accept in exchange for it less than its mercantile value.

"This method of ascertaining the value of property is so satisfactory as to have been adopted by Congress. Hence, all the departments are required by law to make purchases of property for the government of the lowest bidder, after sufficient advertisement, and to sell government property, after due public notice, to the highest bidder, and contentions at the custom-houses as to the value of dutiable goods are settled by offering samples for sale at public outcry. And this method of ascertaining the value of property in private business pursuits is generally regarded as reliable.

"In the case at bar the cost of the goods is not established with precision. No bills of sale, receipted bills, or book entries in current account, made at the time of purchase, showing their cost, are produced. The cost is arrived at by claimants only approximately. They both testify that these Chinese and Japanese purchases were made by them at sundry times covering a period of several years next preceding their shipment, and that memoranda of the articles were made as the packing progressed prior to embarkation, and that on the passage with these goods from Japan to London a list of these packages and their contents was written by one of these claimants in a book, and that in consultation with each other as to their original cost prices were written opposite each article, and that like entries were made in the same book, on the passage to the United States, of the London purchases, which book memoranda is produced in support of their testimony.

"They also testify that they made up the statement of their claim as set forth in their original petition from this book memoranda, both of them alleging, under oath, in said petition that said goods were worth $19,919.92, exclusive of interest, exchange, and gold premium.

"The court finds that on the 13th day of October 1865, Wm. A. Baillie, one of these claimants, filed a claim in the State Department for these same 44 packages of goods, with a view

of recovering indemnity from Great Britain, alleging, under the solemnities of his oath, that they were of the value of $19,700. The statute of June 23d, 1874, provides that the court shall receive this State Department paper and give to it 'such weight as evidence as the court shall think just.'

"It appears that this State Department paper was prepared from the same book memoranda. And both claimants testify that the book memoranda itself was made up, in part, from loose slips of paper containing memoranda of these purchases and personal recollection as to the various items of said property and their value.

"In the opinion of the court, the evidence of presumptive value derived from the cost of the property in the country from which it was shipped, having been thus ascertained near the date of the purchase, and deliberately written down by the purchasers themselves, and adhered to a year afterwards when the claim was filed in the State Department, is not overcome by the testimony of the same witnesses taken in their own behalf, seventeen years later, supported, as it is, only by circumstantial testimony of others who never saw the goods.

"The claim for additional and enhanced value is, therefore, rejected.

"The court is, however, satisfied from the testimony that the articles of property described in the amendment were a part of the cargo of goods shipped and lost by claimants, and that they are legally entitled to recover the original cost of the entire cargo destroyed, including in the estimate of value the premium on Mexican silver dollars above the gold coin of the United States in exchange on London, proper port charges, and prepaid freight.

"Judgment will, therefore, be entered in favor of Elizabeth H. Baillie, in the sum of $11,838.67, with interest thereon from the 12th day of August 1864; and in favor of Elizabeth H. Baillie, administratrix of the estate of Wm. A. Baillie, deceased, in the sum of $11,838.67, with interest thereon from the same date."

Brook's Case: Consequential Damages.

Aaron Brooks, a citizen of the United States, claimed damages from Mexico to the amount of $85,000 for the acts of the military authorities in 1864, 1865, and 1866, while engaged in war with the French, in conscripting the laborers and seizing and using his effects on a cotton plantation in Sinaloa. The Mexican commissioner, Mr. Palacio, admitted the liability of Mexico for property taken and appropriated, and, referring to the law of Mexico of November 19, 1867, providing for the examination and payment of debts so incurred, said that if the claimant had ever presented his case to the Mexican Government his claim doubtless would have been allowed to that

extent. He considered the claim for $85,000 "simply monstrous," but was ready to award $1,000 to indemnify the claimant "for the value of his implements, a saddle, and a mule." Mr. Wadsworth thought that $7,000 should be awarded. The umpire, Dr. Lieber, said:

"Aaron Brooks, a naturalized citizen of the United States, left California for Mexico in order, as he says, to plant cotton, following a proclamation of President Juarez, which invited foreigners to settle in Mexico. Brooks went to the State of Sinaloa, in the Republic of Mexico, in the month of April 1864, the very month when the attack of France on the republic began. He ought to have been somewhat prepared for the shifting occurrences of war. It was an ill time and place to begin cotton planting, and how he ever obtained any knowledge of this branch of agriculture, which requires much practice and experience—he, who says that by trade he is a pattern maker—does not appear from his memorial. He went from California to Mexico with a very moderate outfit and remained in Mexico a few years, during which he suffered from the military under General Corona. The war between the Republic of Mexico and the French Empire—plainly to characterize it, a filibustering expedition sent by a monarch against a republic—was then carried on, on Mexican soil, and the generals of the Mexican Republic were obliged by the necessities of war occasionally to seize upon private property for the support of their troops. The republic has acknowledged its obligation to make good, as far as it is capable to do so, the losses thus sustained. Brooks did not avail himself of the Mexican law calling on the sufferers to present their claims, but he calls now upon an international commission to give him an award of $85,000 against the Republic of Mexico. The right of Brooks to present his claims to our commission is acknowledged on both sides; the amount he claims is acknowledged as extravagant equally on all hands, except by himself. * * * The sum of $85,000 has been arrived at, by the claiming party, by adding a large sum for consequential damages.

"These consequential damages have been asked before, and may appear again before the umpire. Let him then give briefly his opinion on consequential damages, to which he may hereafter refer. * * * These potential and prevented profits, called consequential damages, are but rarely and reluctantly allowed by law unless plainly fair. They are hardly ever allowed, if ever, when the injury done has been occasioned by an authority doing its bounden duty, and never when the injury suffered was inflicted by the authority doing its sacred duty to defend and save the country. The French Government has recently voted a large sum to pay the sufferers from the recent war for the losses sustained during the war. These are not war damages, but the essential character of the

losses, with reference to consequential losses, is the same. What would be thought of a man, under these circumstances, who should present a schedule of his losses, including the loss of potential wealth? Nor can these high damages be explained as exemplary damages. Our commission has no punitive mission, nor is there any offense to be punished.

"The Mexican Government thinks it fair to allow claimant $1,000. The American commissioner allows $7,000. This sum is claimed by Brooks for his provisions, implements, etc., destroyed by the Mexican soldiers. Dividing the difference may be as fair a mode of settling this question as any other, since data plainly to be relied upon do not appear. * * * It is my decision therefore that the Republic of Mexico pay to the United States for the benefit of Aaron Brooks, claimant, the sum of $4,000 in United States currency."

Aaron Brooks v. *Mexico:* No. 898, convention of July 4, 1868, MS. Op., II. 206.



CHAPTER LXXI.

INTEREST.

Commission under Article VII., Jay Treaty.

In July 1799 the proceedings of the commission at London, under Article VII. of the treaty between the United States and Great Britain of November 19, 1794, commonly called the Jay Treaty, were suspended by the withdrawal of the British commissioners, under the orders of their government, in consequence of the suspension of the proceedings of the commission at Philadelphia, under Article VI. of the same treaty, by the refusal of the American commissioners further to give their attendance at the meetings of the board. The details of these incidents are fully set forth in the history of the two commissions. On the 8th of January 1802 a convention was concluded by which the claims under Article VI. were settled for a lump sum; and, by an article inserted in this convention, it was agreed that the commissioners under Article VII. should reassemble and proceed in the execution of their duties. After the commissioners reassembled a question arose as to whether interest should be allowed on claims during the period of the board's suspension.

Opinion of Dr. Swabey.

The minutes of the board, under date of March 17, 1803, contain thefollowing entry:

"Dr. Swabey, having been requested by Mr. Gore and Mr. Pinkney to assign his motives in writing for hesitating for the present to sign the several awards which are prepared, thought proper to repeat, at the opening of the board of this day, that he still feels difficulties in that respect which give him much anxiety; these are already well known to arise upon the subject of interest, as calculated for the said awards for the time, inclusively, during which the proceedings of the commissioners for executing the seventh article of the treaty of amity, commerce, and navigation concluded at London on the

4th of November 1794, between His Britannic Majesty and the United States of America, stood suspended owing to difficulties which had arisen in America in the execution of the sixth article of the same treaty, and he declared that after deliberate reflection he had not yet been able to satisfy his mind of the equity or justice of adding to the amount of compensation to be paid by the British Government the accruing interest during such interval, and in regard to an incident of this magnitude, certainly not in contemplation of the said seventh article of the said treaty, nor, so far as he was able to decide for himself, of any provision of the convention which has been subsequently concluded, should strongly doubt of the fitness of certifying (did he otherwise at present think himself sufficiently authorized to certify) any further award in which interest shall have been thus calculated, without some communication of what may be the understanding of the said governments or specific instructions in that behalf."

Opinion of Mr. Anstey.

March 22, 1803, the following entry was made:

"Mr. Anstey, having been absent from indisposition at the last and seven preceding meetings of the board, upon the opening of the business of this day requested that the minute entered by Dr. Swabey on the journal of the last meeting be read, and the same having been read accordingly, he declared that his sentiments upon the question of interest as it regarded the interval during which the proceedings of the board had been suspended coincided with those of Dr. Swabey, expressed in the said minute."

Opinion of Mr. Gore.

Under date of April 16, 1803, the minutes read as follows:

"Mr. Gore requested that the entry made on the journals on the 17th of March last by Dr. Swabey, stating his motives for declining to certify several awards, might be read; which being done, he observed that in consequence thereof the execution of them had been postponed until the present time, beyond which a further delay would be inconsistent with public duty and with the rights of the claimants, the justice of whose demands and the amount of whose compensation were decided several months since, and waited only for a certificate, the evidence of what the board had actually determined, to which no objection of the kind alluded to by Dr. Swabey appeared to have been made at the time of deciding their several cases; he therefore declared he could no longer refrain from proposing that the awards should be definitely acted upon; at the same time he submitted to the consideration of the commissioners the following remarks, not without the hope of obtaining their unanimous consent to the proposition he was about to offer.

"The convention of the 7th of January 1802, referred to in said entry, authorizes the commissioners to proceed in the

execution of their duties according to the provisions of the 7th article of the treaty of amity, etc., *except only* as to the time when the awards shall be made payable. Thus the powers and duties of the board and the rights of the claimants remain the same as described in the said article, and as though its sessions had been continued without interruption, except only as to the time of rendering its awards payable.

"To ascertain the amount of loss and damage sustained by the capture has always been considered as peculiarly within its competency, and expressly submitted to the decision of the majority of its members by the terms of the treaty. *Vide* Dr. Nicholl's Opinion, recorded in the case of the *Betsey*, Furlong, master.

"The rule whereby interest is calculated is the same now as was adopted in the year 1797, in the first case decided, and has been uniformly acted upon both before and since the suspension. Dr. Swabey expressed some doubts on this subject early after the reassembling of the commissioners, and in August last, when an award was requested in the case of the *Pigou*, Lewis, he declined certifying the same for the reason now advanced. In this state of the business time was afforded to the British commissioners to consult with their government. After such consultation the board understood the objection to be removed, and more than fifty cases were decided to be the subject of interest, and an award in the case particularly excepted against was applied for and certified by all the commissioners.

"The rule of the board in ascertaining the amount of compensation due has been to add to the value of the property captured an interest from the time the party might be supposed to have become possessed of the proceeds had not the voyage been interrupted, or had the property been restored when the court, in the judgment of the commissioners, ought to have restored the same, and not by adding to the amount of compensation to be paid by the British Government the accruing interest, etc., as stated by Dr. Swabey.

"The two governments respectively promised to make full and complete compensation for the loss and damage complained of. Whether the board was or was not in session at any particular time can not render that a compensation in the one case which would not be in the other, and to whom or to what it was owing that its functions were suspended is a subject entirely foreign to its duty to inquire, much more so to impute the suspension as a fault to one of the high contracting parties, and for that cause to mulct the citizens thereof and to discharge the other from the performance of their promise. An order from His Britannic Majesty in July 1799 directed the British commissioners to decline attending the meetings of the board. In consequence thereof its powers were suspended until February 1802, when an order from the same authority, directing them to resume their functions, placed the board in a capacity to execute the office assigned to it by the treaty of

1794; and by a copy of the convention, transmitted at the same time, it appears that whatever were the provisions of the sixth article, full satisfaction was made by one party and accepted by the other for everything that could have been claimed in virtue thereof.

"As the objection made by Dr. Swabey on the 17th ulto., and concurred in by Mr. Anstey on the 22nd, is on a subject manifestly within the competency of the board to decide, according to the letter of the treaty, and expressly so recognized by its uniform practice both before and since the suspension, Mr. Gore declared that considerations well known to every member of the board to be of a nature too pressing and important to be any longer resisted obliged him to enter his solemn protest against a further delay in the discharge of that trust, which all had undertaken to execute with diligence, especially for the avowed purpose of obtaining opinions which, however otherwise entitled to respect, could have no influence on the minds of the commissioners in the performance of a duty clearly within their province, and exclusively committed to them.

"He therefore moved that the commissioners do now subscribe the awards ready for their signature."

Opinion of Mr. Pinkney.

Upon this motion being made, Mr. Pinkney read the following opinion, which was entered on the minutes:

"Mr. Pinkney observed that the nature of the motion and the circumstances connected with it made it proper that he should explain at some length the view he had taken of the questions involved in it. These questions are—

"1st. Whether the board is competent, under the treaty and convention, to include in the amount of compensation to be awarded to claimants, if it shall appear to be just and equitable to do so, interest during the late suspension?

"2d. Whether it would be just and equitable to do so?

"On the first question—

"It is understood that no doubt is entertained as to our power on the subject of interest generally. The actual doubt is confined to interest from July 1799, when our proceedings were interrupted by the interference of the British Government, until the resumption of our duties in January or February 1802, after the making of the convention. It is not easy to ascertain the exact foundation of this extraordinary doubt: but, so far as I am able to collect it from the entry on the journals of the 17th of last month, made at the instance of Dr. Swabey, I understand it to be that the treaty did not contemplate such an incident as this interruption of our proceedings, and therefore could not intend to authorize the allowance of interest during that interruption; and moreover that such interest is not the subject of any provision in the convention

subsequently concluded. It is of course supposed to be *casus omissus*.

"In the examination of this ground (which Dr. Swabey now admits to be correctly stated) I might certainly decline to perplex myself with an inquiry whether the framers of the treaty did or did not foresee that our progress might be occasionally suspended by the occurrence of difficulties growing out of the novel and complicated arrangements contained in the sixth and seventh articles. It would be sufficient to say that the assumption of the fact that such a suspension could not be or was not contemplated at the making of the treaty is purely gratuitous; but I can not forbear to add that, of all gratuitous assumptions, it is the least suited to the use that has been made of it, as it is not only highly improbable in itself, but would be of no importance in the argument if it were true. It is, undoubtedly, to ascribe to the makers of the treaty a singular and most discreditable want of foresight to suppose that it never occurred to them that obstacles against which no human wisdom could guard might, in the course of this before untried experiment, *temporarily arrest our proceedings without destroying our functions;* and this supposition will appear to be more peculiarly inadmissible when it is considered that, independent of the difficulties in America, by which the commission under the sixth article was constantly embarrassed, so as that it might almost be said to be in a perpetual state of suspension, we ourselves had scarcely assembled in 1796 before our proceedings in a whole class of cases of the greatest value and extent were entirely suspended; nor did the interruption cease until the British Government, in a way which it ought to be confessed was highly honorable to it, thought proper to direct its commissioners to go on. Soon afterwards (early in 1798) we were reduced to a similar predicament in another class of cases then comprehending the whole, or nearly the whole, of the complaints before us. So that in truth the suspension now in question was the *third* by which the commission has been retarded since its first organization. Of such an event, therefore, which this new and delicate scheme of adjustment was naturally to be expected to produce not once only, but frequently, and which accordingly it did produce, from time to time, as difficult topics presented themselves for discussion, it can not be allowable to say that it was *an incident not in the contemplation of the treaty, or of those by whom it was framed.*

"But, admitting it to be true that the exact case of a suspension was not, at the making of the treaty, contemplated as a possible incident, does it therefore follow that, if a suspension should nevertheless occur, everything connected with it or arising out of it should, upon our resuming our proceedings, be considered as *casus omissus?* One should rather be disposed to think that, before we could venture upon such a conclusion, it would be our indispensable duty to go a little

further and examine whether the actual provisions of the treaty, reasonably interpreted with a proper view to their spirit and object, were sufficiently ample to reach and embrace the subject so connected with or arising out of the suspension?

"The seventh article of the treaty is not an arrangement of detail. It would not have been made if detail had been practicable. Accordingly, after reciting complaints of loss and damage sustained by the citizens or subjects of the contracting parties, it submits these complaints without limit or exception to us. It makes us the exclusive arbiters, not only of the *justice of the complaints*, but also of *the amount of compensation* to be paid in each.

"Of what the items of compensation shall consist, or by what process it shall be ascertained, it does not profess to state. It declares only that the compensation shall be *full and complete*, and leaves the rest to this board, in confidence that it will do justice; and so far is that confidence carried that, in the cases submitted to us, our award is declared to be *final and conclusive.*

"In such a provision it would be vain to search for the traces of any anticipation of the incidents, to which its execution might give birth, with any view to the modification of the powers communicated by it. Such modification was incompatible with its genius and character. Its prominent feature, which it would seem to be impossible to mistake, is a clear intention to authorize the tribunal erected by it, *whensoever and under whatever circumstances* it should be occupied with the claims committed to it, to deal with those claims according to its own opinion honestly formed of their title to redress, and the proper measure of that redress. Whether this commission should endure three years or eight—whether it should proceed without impediment, or at times be prevented from proceeding at all, were points which the treaty could not settle; but it could determine, and it *has* determined, in the most explicit manner, that, when allowed to exert our powers, we should find in them no deficiency in regard to the justice of any claim regularly before us, or the amount of the sum to be awarded. On these two points, therefore, viz, *the justice of a claim* within our cognizance and the *amount of the compensation* so emphatically and completely referred to us by words of the widest extent and most comprehensive import, evidently in unison with the whole plan of the provision itself, there can be no *casus omissus* in the treaty.

"Indeed the correctness of this conclusion is in effect admitted by those who deny it. They admit that we are empowered to grant interest both before the interval of the suspension and since. Whence do we derive that power? Certainly not from any words in the treaty, taking notice of interest *eo nomine*, or giving a defined or modified authority on the subject of it. We derive it simply from those words in the treaty, which submit the *amount of the compensation to our decision.*

"The conceded power, therefore, to give interest on either side of the suspension, rests upon this, that such a power is

necessary to enable us to settle the *amount of compensation* according to our notions of justice and equity. But is not this reason, undoubtedly the only one that can be assigned in favor of the power to grant interest *before and since the suspension*, broader than the power itself; and does it not discredit and falsify the pretended exception? In other words, does it not, in all fair reasoning, incontrovertibly prove that we have the power to grant interest *during* the suspension as well as *before and after*, such a power being just as necessary, in the one case as in the other, 'to enable us to settle the amount of compensation according to our notions of justice and equity?' It is quite impossible to avoid the force of this argument otherwise than by showing that there is an exception of some sort, either in the treaty or the convention, in regard to this obnoxious interest, an attempt which would presuppose an abandonment of the ground of *casus omissus* in favor of another, still less capable, if that were possible, of being defended. In the *treaty*, I think I have already shown that no such exception exists; and we shall soon see that it is not to be found in the *convention*, whose *provisions* it is now time to examine.

"The convention directs us to proceed in the execution of our duties *according to the provisions of the seventh article of the treaty*, except only that we are to make our awards payable in three equal annual installments. Subject to this exception, therefore, our powers continue to be at least as ample as under the treaty.

"The convention may be considered as *recommunicating* in 1802, by reference to the seventh article of the treaty, the powers originally communicated by that article in 1794, with the single modification above mentioned. We have, of course, the same power now, as formerly, conclusively to fix the amount of compensation in claims which we have decided to be just. But we not only have that power (in which it is admitted that a power to give interest is included) unimpaired, we have it freed by the convention from Dr. Swabey's objection, even if that objection was a sound one as applied to the treaty only. The objection as applied to the treaty does not rely upon the inadequacy of the language of it to give the power in question, but upon a loose inference drawn from a loose speculation that such an incident as the suspension was not contemplated by it. Can *this* objection be transferred from the treaty to the convention? Manifestly not. The convention was *posterior* to the suspension, recites it, and removes it. The suspension was consequently in the contemplation of that instrument. To whatsoever objection, therefore, the original communication of the power in question may have been liable on the supposition that such an event as the suspension was not then in view, the *recommunication* of this power *since* the suspension and with particular reference to it must be free from that objection. In a word, there is not, in my judgment, even the appearance of a reason for questioning the *authority of the board* on this occasion.

"On the second question:

"The power of the board to grant the interest in question, being thus, as I think, obvious, I will now say a very few words on the matter of equity. I have not been able to discover upon what precise grounds it is supposed that in this view interest *during* the suspension is distinguishable from interest *before and since*. It can not be upon the naked foundation of a temporary want of capacity in this board, from July 1799 until 1802, to relieve the claimants; for, independently of the gross absurdity of allowing to such a fact, singly taken, so important an influence on the measure of the relief, what shall we say of interest from 1793 to 1796, when this board was not even in existence? If the mere cessation for a season of our capacity to act under the treaty renders it unjust to allow interest during the period of that cessation, surely the argument is infinitely stronger against the allowance of interest during a period when we had no official capacity whatever; and yet it never occurred to any of us, or to either of the high contracting parties, that the interest before 1796 was inequitable. A notion must therefore be entertained that, in regard to this suspension, some *peculiar* considerations exist by which interest during the interval occupied by it ought to be held to be affected. What those considerations are I am left to conjecture since they have not been explained.

"It is perhaps imagined that if a claimant should receive such interest from the British Government, the former would be placed in a better situation and the latter in a worse than if the suspension had not happened. If this should appear to be true, I agree that it would be of great weight. It is, however, so totally erroneous as to be the exact reverse of the truth; the fact is, that the claimant will be a loser and the British Government a gainer by the suspension, even after this interest shall have been paid and received. A very short examination will make this apparent.

"As to the *claimant*. If the suspension had not taken place, his complaint, supposing it to be ready for decision, would have been decided by the board, so as that an award would have been made in his favor, payable in the spring of 1800, for principal and *interest then due*. He loses, of course, by the suspension the use, from the spring of 1800, not only of his principal, but of such interest upon that principal as but for the suspension would at that time have come to his hands. To put him, therefore, in anything like so good a situation as he would have been in if the suspension had not occurred, it would be necessary not only to give him interest upon his principal during and after the suspension, as we propose to do, but also to give him interest from the spring of 1800 upon the amount of such interest as the suspension prevented him from then receiving. A claimant whose case was ready for decision will consequently be so far from being a gainer by the suspension, if the interest in question be allowed him, that even after the receipt of that interest he will still have sustained a con-

siderable loss, for which it is not intended by any member of this board to give him any compensation at all. In addition to this, it is to be considered that the claimants, being merchants, are not adequately compensated for the privation of what ought to have formed a part of their capital, at a time when commercial capital was more than usually active, by a retribution granted with a view to the mere rate of interest.

"The foregoing observations, it is to be admitted, apply solely to claimants whose cases, in regard to the judicial remedy, were ready for our decision at the commencement of the suspension, or would have become so in the course of it; and they apply undoubtedly with less or greater force, according as the time when the case was or would have been ready shall be taken to have been late or early. As to the other claimants (not many in number), they were certainly not losers by the suspension, for it produced no effect at all upon their claims. But it must at the same time be seen that, for precisely the same reason, Great Britain could not be, as to such claims, in the *slightest degree injured* by the suspension; and, indeed, it is understood to be admitted that, on the footing of equity, the suspension does not affect these claims in the same manner as it is supposed to affect the others.

"Let us now see how the account stands on the part of the British Government.

"The gain of the British Government may safely be affirmed to be at least co-extensive with the claimants' loss. In cases ready for decision, or that would have become so during the suspension, it has already been shown that it has enjoyed the use of the claimants' principal *by reason of the suspension only;* and if this were the whole benefit it would seem to be obvious that the suspension rather furnishes an argument in favour of the payment of interest than the contrary. But the suspension has also given it the use of the claimants' *interest* due at the time of it, which interest must have been paid in or about the year 1800, and upon which, if it had been paid, the British Government would now be paying, as well as upon the principal, an annuity to some public creditor. The whole foundation of the argument, then, against the equity of granting against the British Government interest, during the suspension, on the claimants' principal is, properly understood, neither more nor less than that during the interval it has had the use of both *principal and interest*, so far as interest had then accrued. There can not be a better foundation on which to *grant* this interest.

"To what has been said it ought to be added that the British Government has been benefited by the suspension to a considerable amount in another respect. Large sums have been recovered by the claimants from the captors during the suspension, which might otherwise have been wholly or in a great measure lost. The effect has been greatly to lessen the aggregate of the sums awarded. Upon the whole the suspension is not an event by which the British Government has suffered,

or can suffer, so as to create an equity in its favor on thi occasion. It has, on the contrary, been and will continue t be advantageous to it and prejudicial to the claimants, let thi question be disposed of as it may.

"In what other view this subject can be considered, I an entirely at a loss to conjecture. We do not, I take it fo granted, think ourselves at liberty to go into an endless and odious inquiry by whose fault, if by any fault, the suspension was produced. Nor do we, I also take it for granted, imagine that, even if such an inquiry could now lead to any result, the utility of that result, as it might be made to bear upon the question before us, would make amends for the time and attention employed upon it. The convention is either a dead letter or it has put such an offensive discussion forever at rest both here and elsewhere; and, if it had not, where are our means of agitating it with any hope of arriving at a correct conclusion? To endeavor at this late hour to influence either the sense or the practical operation of the convention by an arbitrary and invidious imputation of an antecedent blame avoided, and therefore rejected, by the convention itself, and which, if not so rejected, it would now be impossible to fix, would be so extraordinary and monstrous an irregularity that I am entirely confident it has not been thought of. The convention has told us all that it was intended we should know on this subject, and all that either of the contracting parties can at this time be free to insist upon, viz, that the suspension was produced by the immediate act of the British Government, in consequence of difficulties having arisen in America, under the sixth article of the treaty.

"With this character conclusively given to that transaction by the convention, it would be worse than idle to attempt to give it another, in which the presumed misconduct of either of the two governments should be an ingredient. But give to it what character you will, and ascribe to it what fault you may, still, if the situation of the British Government in reference to the claims depending under the seventh article is no worse than it would have been had not the suspension happened, it is inconceivable in what way or upon what intelligible principles it can be given an equity against those to whom the suspension or its consequences can not be attributed, to whom it has been so far from being advantageous that the most liberal compensation which they are likely to procure will not repair the injury that they have sustained by it.

"I will make but one observation more on this subject. If we should enter into an inquiry whether either and which of the two governments was in fault as to the suspension; if we should even be disposed to think, as most certainly some of us would not, that the American Government was so in fault; if we should go on to infer that *therefore* the *British* Government was not to pay interest during the suspension to *American* claimants, there would still remain a most embarrassing ques-

tion which we should find it difficult to settle—i. e., whether the *American Government* should pay interest during the suspension to *British* claimants.

"To give to British claimants a larger measure of redress in this respect than we give to American claimants, upon a vague charge of misconduct against one of the high contracting parties, for which no countenance is found in the contract itself, would be to set up a distinction which the convention does not acknowledge, but disclaims; which the contracting party, outraged by the accusation, would hold, and justly hold, to be invidious and arrogant, and which, as regards the innocent complainants, would be too iniquitous for any honest man to lend himself to.

"On the other hand, if, withheld by these or other considerations, we should forbear to make the distinction, what will have become of our principle, or our title to consistency? This is a dilemma on which I will not enlarge, but on which it might be well to reflect. It shows the utter inadmissibility of the objection which, if listened to and acted upon, would produce it."

Final Decision.

Mr. Pinkney concluded by seconding the motion; but, at the request of Mr. Trumbull, it was postponed for a few days, and on the 30th of April the board proceeded to make awards on the principle contended for by Mr. Gore and Mr. Pinkney.

Rules prescribed for the Assessors.

Previously to the foregoing discussion, the board, on motion of Mr. Pinkney, prescribed the following rules for the assessors:

"Instructions to the assessors, October 2, 1802, confirmed by order dated December 8."

"*Ordered*, That Mr. Cabot,[1] assisted by the secretary of the board, subjoin to such of the reports of Messrs. Cabot and Glennie as have been examined and approved an estimate of the interest, at the rate of 6 per cent, to be included in the amount of compensation to be awarded according to the following rules, viz:

"Upon sums allowed in the said reports for the net value of the cargo and adventures interest is to commence from the time when such value would probably have been received—i. e., from the expiration of three months after the probable time of arrival at the port of destination. The same rule is to be applied to sums allowed for the value of the vessel, for freight, for demurrage, and for costs and expenses incurred, or disbursements of whatsoever kind, made before the expiration of the said three months.

"Upon sums allowed for costs and expenses incurred after the expiration of the said three months, and actually paid by the parties or their

[1] "This duty afterward assigned to Mr. Petrie, the other assessor. The fifth commissioner made the calculation of interest in all cases awarded prior to the suspension."

agents (not including such as have been paid by the Government of t United States), and generally for all disbursements of whatsoever ki actually made by the said parties or their agents after the expiration the said three months, interest is to commence from the time of the e penditure, except only when the items of expenditure constituting o general charge have different dates not greatly distant from each othe in which case the latest date shall be taken.

"The sum in every award being payable, according to the late conve tion, in three equal annual installments, the first whereof will be due o the 15th day of July 1803, the sums reported are to be divided int thirds, and interest is to be estimated on one of these thirds to the tim when the first installment is payable; on another of these thirds to th time when the second installment is payable, and so on of the other third and the results of each estimate being added together and to the whol principal, the total is again to be divided into thirds as the installments o the award.

"Whatever sums have been received from the captors or the Britis Government are to be credited at the times of payment, by deductin them from the principal and interest then due, and the farther calculatio of interest is to be made on the balance only.

"Where the vessel and cargo belong to different claimants, and gener ally where there are several claimants not partners in trade, havin interests which it may be perfectly practicable and convenient to separ ate, distinct calculations are to be made for the share of every suc claimant.

"The estimates are to be so reported that it may be apparent that th foregoing rules have been observed."

"Order respecting awards, October 14, 1802.

"*Ordered*, That in future the awards shall not be entered at large on th minutes, but shall only be so entered in a book to be kept for that pur pose. The secretary is, however, to state in the minutes the actual mak ing of all awards, the name of the case, the sum awarded, and the manne in which and the person to whom the same is payable."

"Order respecting assessors reports, January 24, 1803.

"*Ordered*, That the reports and schedules of the assessors of the board a finally approved and acted upon, as also their subsequent estimates, ex hibiting the gross amount of the principal and interest of compensation and the distribution of the same into installments in all cases in whic awards have been or shall be made since the reassembling of the boar in February, 1802, be recorded in a book."

Mexican Commission, 1839.

A question arose as to what rate of interes should be allowed on the sum of $6,500, whic the Mexican commissioners had concurred i awarding to an insurance company to reimburse it for money paid on the brig *Brazoria*, which was seized by the Mexica

authorities in 1832 and then abandoned by the owners to the company. The American commissioners proposed 6 per cent, the Mexican 5. The umpire, July 10, 1841, allowed 5 per cent.

Jackson Maritime Insurance Company of New York v. *Mexico:* Commission under the convention between the United States and Mexico of April 11, 1839.

Case of the "Louisa."

The ship *Louisa*, the property of citizens of the United States, was seized at Acapulco in January 1821, by order of Iturbide, for the use of the Mexican Government; and both the ship and the cargo were in like manner ordered to be paid for. Only a part of the money, however, was paid, and for many years the owners fruitlessly prosecuted a claim for the remainder. Their claim having been submitted to arbitration, the American and Mexican commissioners agreed to award a certain sum as damages resulting from the taking of the ship and cargo, and also to award the sum of $7,750 for the expenses incurred by the claimants in Mexico in their efforts to obtain payment of what was due them. On the former sum the commissioners allowed interest at 5 per cent from the time the principal first became due, but they differed as to the allowance of interest on the award for expenses. The umpire, April 9, 1841, "discharged" the Government of Mexico "from the demand of interest on the said sum of $7,750."

Commission under the convention between the United States and Mexico of April 11, 1839.

Green's Case.

In 1828 Pardon C. Green, a citizen of the United States, advanced a sum of money to the captain of the Mexican war brig *Hermon*, which had put into Key West, Florida, for repairs and supplies. The commissioners unanimously allowed interest at 6 per cent on the sum advanced, that being the legal rate in Florida at the time of the advances.

Hetty Green, administratrix of Pardon C. Green, v. *Mexico:* Commission under the convention between the United States and Mexico of April 11, 1839.

Slacum's Case.

A claim was made for the amount of customs duties overcharged by the Mexican authorities at Mazatlan on the cargo of an American brig. The American commissioners awarded the sum demanded, with interest at 5 per cent from January 3, 1835, when the

excess was paid. The Mexican commissioners concurred in the award of principal, but refused to allow interest. The umpire adopted the award of the American commissioners.

Jane Slacum, executrix of William A. Slacum, v. *Mexico:* Commission under the convention between the United States and Mexico of April 11, 1839.

Commissioners under the Act of 1849.

William Richardson, owner of the brig *Mary*, presented a claim to the mixed commission under the convention between the United States and Mexico of April 11, 1839, for damages for the sale of the brig, under the decree of a Mexican court, to pay certain fines levied upon her for violation of the Mexican custom laws. The claim for damages was disallowed by the umpire; but it was suggested by the American commissioners that Richardson had a valid claim against Mexico for the excess of what the brig brought over and above the amount of the fines, and that this claim was not passed upon by the mixed commission. It was afterward laid before the commissioners, Messrs. Evans, Smith, and Paine, under the act of 1849, who said:

"In the progress of the cause before the mixed commission the Mexican commissioners, though denying totally the justice of the claim then under consideration, admitted that the claimant was entitled to the amount for which the brig was sold, less the fines, to pay which the court rendered the decree of sale, and that this sum, without interest, was all that the claimant could properly demand. It is for this sum that the claimant now presents his claim and demands interest thereon from August 1837, the date of the sale of the vessel. Ought interest to be allowed? It is a principle of law well established that upon a deposit of money, either by the owner, or for his use by another, and more especially by virtue of a judgment or decree of a court, interest can not be demanded unless by contract, or unless it be proven that the party with whom the deposit was made had used it. It is not pretended in this case that there was any contract for interest or for the use of the money out of which a claim for interest could arise. A demand on the part of the claimant for the money admitted to belong to him, and a refusal to pay, would have entitled him to interest from the date of such demand, but it is not alleged or proven that any such demand was ever made. On the contrary, the evidence shows that the claimant and his agent abandoned such demand and insisted on heavy damages for a tort. There is not even an allegation made by the claimant, nor is there an attempt to prove, that the money to which he is entitled has not been at all times ready in the Mexican court to be paid over to him when applied for. From all the evidence in the case

the board is constrained to consider that the claimant now for the first time has demanded payment, and consequently that he is entitled to receive the principal money as claimed, without interest."

Spanish Commission, 1871.

Certain property belonging to citizens of the United States was seized and sold by the authorities in Cuba as the property of a Spanish subject who was charged with being a rebel. Subsequently the Captain-General of the island ordered the proceeds of the sale to be paid to the American owners, less a certain amount that had been paid out on a claim against the property. The owners, who claimed what they alleged to be the value of the property, refused to accept the sum so decreed and appealed to the commission under the agreement between the United States and Spain of February 12, 1871. The arbitrators differing in opinion, the umpire awarded the claimants the sum ordered to be paid to them by the Captain-General, and refused to allow interest on the following grounds:

"As early as March 1872, by decree of the Captain-General of Cuba, the sum of $13,600 was ordered to be paid to the claimants. This amount the claimants did not accept, and, through the United States Government, presented their claim to this commission for a larger sum.

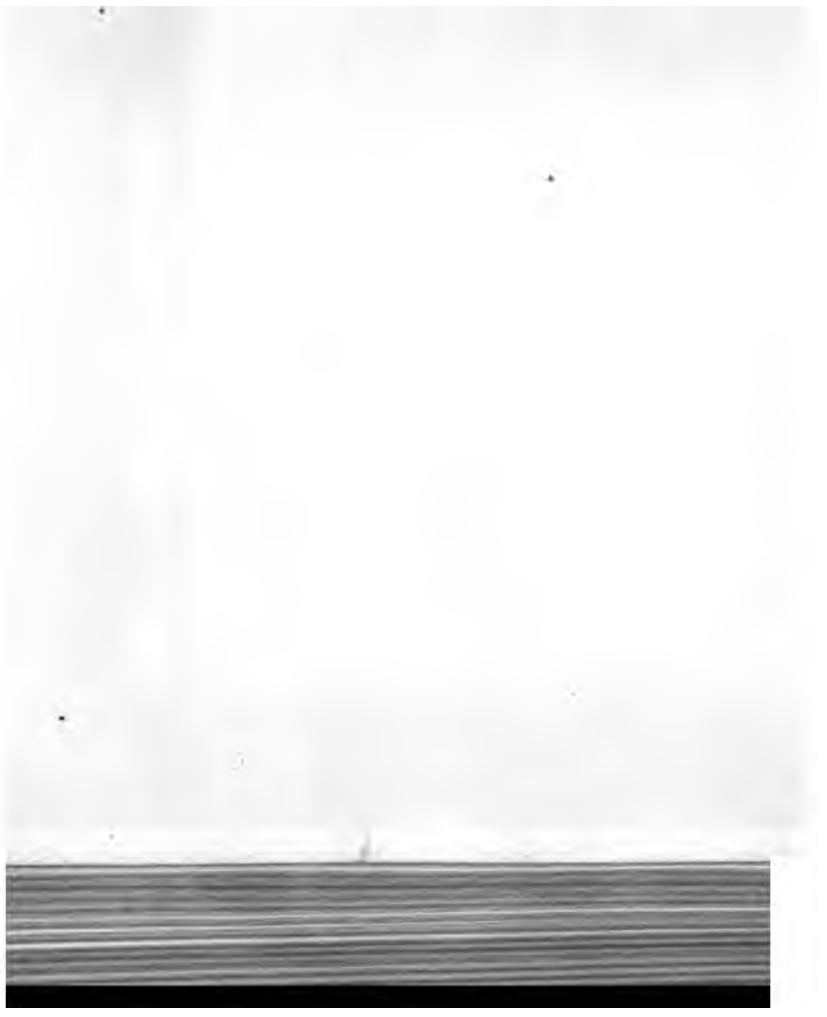
"It will also be noted, as going to the equities of any claim for interest, that, as asserted on behalf of Spain, the closing of the case could have been compelled before September 1872, according to the rules of the commission. No cause is shown to explain or justify, as required by the rules, the long delay which has been suffered to accrue. It is my opinion that an unexplained delay of eight years is far in excess of the reasonable period contemplated by the convention, and by the rules for the closing of claims before this commission. Such a delay could not be forced upon the claimants against the will of the United States Government. This circumstance, coupled with the decree ordering in March 1872 the payment of the sum since finally awarded to the claimants, makes it improper that interest should be charged against Spain."

Baron Blanc, umpire, April 16, 1880, *Young, Smith & Co.* v. *Spain*, No. 96, Spanish Claims Commission, agreement of February 11–12, 1871.

British Commission, 1871.

The commission ordinarily allowed interest at the rate of 6 per cent per annum from the date of the injury to the anticipated date of the final award.

American and British Claims Commission, treaty of May 8, 1871, Article XII., Hale's Report, 21.



CHAPTER LXXII.

MISCELLANEOUS CASES.

Case of D'Arcy & Didier. Date of Commencement of a State.

Eugene L. Didier, administrator, et al., as legal representatives of the firm of D'Arcy & Didier and Thomas Sheppard, citizens of the United States, presented a claim against Chile growing out of two contracts made in 1816 between General José M. Carrera, the duly authorized representative of the republican government of Chile, and D'Arcy & Didier and Thomas Sheppard. The nature of the contracts it is needless to examine, as no question was raised on that subject.

The agent of Chile demurred to the memorial on the ground that Chile was at the time when the contracts were made a Spanish colony, and that consequently the commission had no jurisdiction of the claim. He stated that the independence of Chile was recognized by the United States in January 1822, and by Great Britain two years afterward.

The agent of the United States, apart from technical arguments as to what was admitted by the demurrer, urged that the acknowledgment of the independence of Chile by the United States in 1822 related back to the beginning of the Carrera government in 1811.

A majority of the commission, Messrs. Claparède and Gana, rendered the following decision:

"Considering:

"1st. That it being judicially acknowledged that the recognition of Chile by the United States of America took place in 1822; that until that date Chile was *de jure* under Spanish domination so far as concerned the United States; that it is only from such period that legal international relations began between the two countries signing the convention concluded in Santiago, August 7, 1892;

"2d. That upon signing said convention the United States of America and the Republic of Chile, animated by the desire

to settle and adjust amicably the claims made by the citizens of either country against the government of the other, had not in view any claims arising out of the period prior to the recognition of the Government of Chile by that of the United States of America, and before the establishment of legal international relations between the two nations;

"3d. That if their intention had been to extend the jurisdiction of the convention of Santiago to a period prior to the recognition of the Republic of Chile by the United States, such intention would have been expressly indicated in said convention, which has not been the case;

"4th. That the contracts upon which the memorialists base their claim, according to their own allegations, were signed on October 31 and November 18, 1816, by the house of D'Arcy & Didier on the one part, and General Carrera on the other part—that is to say, several years before the recognition of the Republic of Chile by the United States of America;

"Declares:

"That the demurrer submitted to its decision by the honorable agent of the Republic of Chile is sustained, and the claim is not within its jurisdiction."

Mr. Goode dissented. Apart from the contention that the demurrer admitted the allegation of fact in the memorial that there was a republican government of Chile in 1816, he said that he understood it to be a sound principle of international law that when a government was once recognized as independent, such recognition related back to the beginning of its existence, and that it would seem to follow that the government of the Republic of Chile was the legitimate and responsible successor of the republican government of Chile of 1816 and earlier.[1]

A motion for a rehearing was filed, and on this motion briefs were submitted and oral arguments made, in which the ques-

[1] Mr. Goode, in the course of his opinion, said: "We learn that although no formal declaration of independence was made at the commencement of the revolutionary movement, on the 18th of September 1810, a junta was formed on November 15, 1811, which exercised all the functions of government; that it promulgated a constitution in the latter part of 1812, established a school system, organized an army, and enacted laws through its regular legislative assembly. It appears that after the disastrous battle of Rancagua, on October 1, 1814, the patriots were not able to renew hostilities until they had organized "the army of the Andes," which was formed in part of the soldiers who had fought at Rancagua; that with the army thus organized they fought the battle of Chacabuco on the 12th of February, 1817, and achieved a decisive victory; that the independence of Chile was proclaimed one year later, on the 12th of February 1818, and recognized by the United States in January 1822."

tion of the beginning of the Republic of Chile was fully discussed. Counsel for the United States, contending for the liability of Chile, cited *Williams* v. *Bruffy*, 96 U. S. 176; *United States* v. *Trumbull*, 48 Fed. Rep. 94; *United States* v. *Prioleau*, 35 L. J. C. H. N. S. 7; Kent's Comm. I. 25; Phillimore, Int. Law, I. 171; Vattel, book 2, ch. 12, sec. 191; Grotius, book 2, chap. 9, sec. 8. He argued that September 18, 1810, had always been celebrated in Chile as independence day; that Leon Levy, Int. Law, 72, says: "Chile declared her independence of Spain September 18, 1810; the declaration of independence of January 1, 1818, refers to the revolution of 1810;" that O'Higgins's manifesto of May 15, 1818, declared: "Chileans, the eighth year of our revolution will be forever memorable;" that Theodorick Bland, in his report of November 2, 1818, states, among Chile's expenses: "Six debts contracted by the state in 1814, $12,700," etc.

The agent of Chile contended that the debts contracted prior to the organization of the government and prior to its recognition by other countries were not debts and liabilities for which the new government became responsible, unless special provision was made therefor, citing the history of the United States in making provision for the payment of the debts of the Confederation; and reasserted that the Republic of Chile for all international purposes dated from its recognition as a sovereignty by other nations, and, therefore, that the liability of Chile under the treaty was limited to acts committed by its civil or military authorities since its recognition by the United States.

On the motion for a rehearing, Messrs. Claparède and Gana rendered the following final decision:

"1. That this commission is clothed by the convention of August 7, 1892, with judicial faculties to decide finally the claims to which that convention refers.

"2. That as a judicial body the exclusive faculty, inherent in its nature, of determining its competency and jurisdiction in the cases that might be submitted to it rests entirely in its discretion.

"3. That it is not a necessary condition precedent to the decision of the tribunal on the question of jurisdiction that the grounds on which the decision is based should have been argued by the parties.

"4. That the convention of August 7, 1892, having been concluded between the United States and the Republic of Chile to settle the claims that under certain conditions the citizens

of one country might present against the government of the other, without determining the period within which the acts giving birth to such claims occurred, it is not possible to extend the period beyond the date at which, through a formal declaration of the United States made in 1822, Chile ceased to be, as far as the United States were concerned, a colony of Spain, in order to become from that date an independent state.

"5. That were this commission to extend its jurisdiction to a period prior to the existence of Chile as an independent state it would per force admit an entirely different judicial position, since in that period Chile was not an international entity, but was *de jure* a colony of another independent state.

"6. That accepting this uncertain situation, which is governed by elements and rules of another order, the tribunal would not find a fixed point for the determination of its jurisdiction.

"7. That the opinions of the authors cited by the claimants have no application to this case, as they tend to establish the liabilities of a government respecting the acts of its predecessors as independent states, while what this commission has established is that the convention of August 7, 1892, between the United States and the Republic of Chile, must not be interpreted in a sense that would extend it beyond the date of the recognition of Chile as an independent state capable of contracting rights and obligations in conformity with international law.

"8. That it is not a principle accepted by the best recognized opinions of authors on international law, as is alleged, that the recognition of a new state relates back to a period prior to such recognition.

"For these reasons, and without considering for the present whether the terms of the convention of August 7, 1892, and the rules of this commission admit of a motion for a rehearing, such as the one under consideration, the majority of the commission decides to deny this motion and declares that the decision to which it refers shall stand."

Mr. Goode dissented, saying that he adhered to the views previously expressed by him.

United States and Chilean Claims Commission, convention of August 7, 1892, Shields's Report, 41: *Eugene L. Didier, adm. et al.*, v. *Chile*, No. 5.

Case of the "Alleganean:" Extent of Territorial Waters.

By section 5 of the act of June 5, 1882, reestablishing the Court of Commissioners of *Alabama* Claims, it was provided that the tribunal should receive and examine certain classes of claims, among which were "claims directly resulting from damage done on the high seas by Confederate cruisers during the late rebellion, including vessels and cargoes

attacked on the high seas, although the loss or damage occurred within four miles of the shore."

In the case of *Stetson* v. *The United States*, No. 3993, class 1, a claim was made under this clause for the destruction of the ship *Alleganean* in the Chesapeake Bay. The question was thus raised as to whether the Chesapeake Bay was to be considered as a part of the "high seas" in the sense of the act, or whether it was to be considered as a part of the territorial waters of the United States. The opinion of the court, as delivered by Draper, J., is given below:

"The facts upon which a judgment to the amount of $69,334.80 is prayed for in this case are substantially as follows:

"The ship *Alleganean* duly registered at the port of New York, and being recently repaired and well equipped and entitled to the protection of the United States, cleared with a cargo from the port of Baltimore on the 22d of October 1862 upon a voyage to London. Six days later, at about 10.30 o'clock in the evening, being at anchor, in rough water in Chesapeake Bay, south of the mouth of the Rappahannock River and opposite Guinn's Island, she was boarded by some eighteen officers and men of the Confederate navy, commanded by Lieutenants John Taylor Wood and S. Smith Lee. These leaders were commissioned officers in the Confederate navy, and in the attack upon the *Alleganean* they were acting under the special orders of the secretary of the navy of the Confederate States, and the men accompanying them had been specially detailed from the James River squadron for the purpose of preying upon United States merchant vessels in Chesapeake Bay. They came overland to the Chesapeake Bay from the *Patrick Henry*, an armed and commissioned Confederate vessel, and securing two or three small vessels—the largest being of fifteen or twenty tons burden—had been cruising about two or three nights before the attack. The precise relationship which these vessels bore to the Confederate navy is left by the evidence in some doubt.

"Lieutenant Wood says of the vessel in which he operated: 'She was a boat fitted out for this purpose, and attached to the squadron as a tender. She was about fifteen or twenty tons, armed as customary with this class of boats. * * * The tender which I commanded was one belonging to a regular commissioned ship of the Confederate States navy.'

"Lieutenant Lee says: 'We had two small boats that we obtained on the bay shore, with sails, and a sailing skiff we

captured from two Union men. No boats were brought from Richmond or from any Confederate cruiser.'

"There is no proof, and it was not contended upon the argument, that they were either 'in commission' of or that they bore letters of marque from the Confederate government, but there seems to be ample evidence that the crews were a part of the naval forces of that government attached to duly commissioned, armed war vessels, and now only temporarily detached therefrom, and coming directly from such a vessel for this special service under orders of their secretary of the navy. These small boats seem to have carried no armament. Lieutenant Wood says 'the vessels were armed as customary with this class of boats,' and that 'the men were armed and equipped as man-of-war's men.' Lieutenant Lee says 'the vessel carried no guns, but the men were armed with cutlasses and pistols.'

"This force boarded the *Alleganean*, as stated, speedily reduced the crew of that vessel to subjection and the state of prisoners of war, and then burned the ship, totally destroying her, except that some few remnants were afterward picked up and disposed of, the proceeds of which the owners account for in making up their claim.

"The value of the *Alleganean* at the time of loss is placed by the marine experts on behalf of the government at $52,591.03, and by the witnesses for the claimants at amounts varying from $60,000 to $75,000.

"The evidence seems to establish beyond question the fact that the vessel was more than four miles from any shore at the time of capture and destruction.

"The claimant's counsel, with his case as exhaustively prepared and as fully and ably argued as any which has been before this court, contends that these facts establish a right to a judgment, as of the first class, under the provisions of section 5 of the act of June 5, 1882, being a claim 'directly resulting from damage done on the high seas by Confederate cruisers during the late rebellion, including vessels and cargoes attacked on the high seas, although the loss or damage occurred within four miles of the shore.'

"The learned counsel on behalf of the United States insists that the claimants ought not to recover—

"First. Because all the waters of the Chesapeake Bay, even such as are more than a marine league from shore, are territorial waters of the United States, and subject to the exclusive

control and jurisdiction thereof, and that in consequence the *Alleganean* was not attacked nor the damage done on the 'high seas' within the meaning of the term as used in the act under which judgment is claimed.

"Second. Because the persons who destroyed the ship and the vessels employed by them did not constitute a 'Confederate cruiser' within the meaning of that term as used in the statute.

"The term 'high seas,' as used by legislative bodies, the courts, and text writers, has been construed to express a widely different meaning. As used to define the jurisdiction of admiralty courts, it is held to mean the waters of the ocean exterior to low-water mark. As used in international law, to fix the limits of the open ocean, upon which all peoples possess common rights, the 'great highway of nations,' it has been held to mean only so much of the ocean as is exterior to a line running parallel with the shore and some distance therefrom, commonly such distance as can be defended by artillery upon the shore, and therefore a cannon shot or a marine league (three nautical or four statute miles). This court, after very able argument by learned counsel and after much deliberation, has held that the term was used in the act of June 5, 1882, in the same sense in which it is employed by the international law writers. (*Rich* v. *United States.*)

"From this it necessarily follows that such portions of the waters of Chesapeake Bay as are within four miles of either shore form no part of the high seas. But much of the bay is more than four miles from shore, and is accessible from the ocean without coming within that distance of the land. The distance between Cape Henry and Cape Charles, at the entrance of the bay, is said to be twelve miles, and it is stated that lines starting from points between the capes, four miles from each, and running up the bay, that distance from either shore, would not intercept each other within 125 miles from the starting points. The evidence shows that the *Alleganean* was anchored between such lines at the time of destruction. Was she upon the high seas as the court defines the statutory term?

"By common agreement all the authorities assert that there are arms or inlets of the ocean which are within territorial jurisdiction, and are not high seas. Sir R. Phillimore (1 Int. Law, § 200) says:

"'Besides the rights of property and jurisdiction within the limit of cannon shot from the shore, there are certain portions

of the sea which, though they exceed this verge, may under special circumstances be prescribed for. Maritime territorial rights extend, as a general rule, over arms of the sea, bays, gulfs, estuaries which are inclosed, but not entirely surrounded, by lands belonging to one and the same state. * * * Thus Great Britain has immemorially claimed and exercised exclusive property and jurisdiction over the bays or portions of the sea cut off by lines drawn from one promontory to another, and called the King's Chambers.'

"Grotius (bk. 11, ch. 3, §§ 7, 8) and Vattel (vol. 1, bk. 1, ch. 23, § 291) assert substantially the same doctrine, and the later writers follow them. Wheat. Int. Law (Dana's 8th ed. p. 255) says:

"'The maritime territory of every state extends to the ports, harbors, bays, mouths of rivers, and adjacent parts of the sea, inclosed by headlands, belonging to the same state. The usage of nations superadds to this extent of territorial jurisdiction a distance of a marine league, or as far as a cannon shot will reach from the shore, along the coasts of the state. Within these limits its rights of property and territorial jurisdiction are absolute, and exclude those of every other nation.'

"Chancellor Kent avows the general doctrine and makes very much broader claims in reference to the jurisdiction of the United States over adjacent waters, and says (Com. vol. 1, pp. 29, 30):

"'Considering the great line of the American coasts, we have a right to claim for fiscal and defensive regulations a liberal extension of maritime jurisdiction; and it would not be unreasonable, as I apprehend, to assume for domestic purposes connected with our safety and welfare the control of waters on our coasts, though included within lands stretching from quite distant headlands, as, for instance, from Cape Ann to Cape Cod, and from Nantucket to Montauk Point, and from that point to the capes of the Delaware, and from the South Cape of Florida to the Mississippi.'

"Dr. Wolsey (Int. Law, § 60) upholds the general doctrine, but thinks the claims of Chancellor Kent are too broad, and rather 'out of character for a nation that has ever asserted the freedom of doubtful waters, as well as contrary to the spirit of more recent times.'

"Dr. Wharton (Int. Law, § 192) finishes the subject with the conclusion: 'That it would seem more proper to adopt the test of cannon shot, * * * which would, in case of waters whose headlands belong to the same sovereign, exclude all bays more than eighteen miles in diameter, assuming the range of cannon shot to be nine miles. But this should be

made to yield to usage. If a particular nation has exercised dominion over a bay, and this has been acquiesced in by other nations, then the bay is to be regarded as belonging to such nation.'

"We are quite certain that none of the American courts have passed upon this subject, although decisions holding that specified waters are within or without the jurisdiction of the admiralty courts are numerous. The question has, however, been before the English courts upon two occasions at least.

"*Reg.* v. *Cunningham*, Bell Crown Cas. 72, was the case of a crime committed upon an American vessel lying in the Bristol Channel, about three-quarters of a mile off the shores of the county of Glamorgan, in Wales, but below or exterior to low-water mark, and perhaps ten miles from the shores of the county of Somerset, in England. The prisoners were indicted and tried in Glamorgan. The question was whether the crime was committed within the county of Glamorgan or upon the high seas. It was held that it was within the county. The crime was committed, it is true, within the marine league from shore, but the court did not rest its conclusion upon that ground. Lord Chief Justice Cockburn, delivering the opinion of the court, said:

"'Looking at the local situation of this sea, it must be taken to belong to the counties, respectively, by the shores of which it is bounded. * * * The whole of this inland sea, between the counties of Somerset and Glamorgan, is to be considered as within the counties by the shores of which its several parts are respectively bounded.'

"But perhaps the most thoroughly considered and important case is that of *Direct U. S. Cable Co.* v. *Anglo-American Tel. Co.* in the House of Lords. (2 App. Cas. 349.) It came up on an appeal from the supreme court of Newfoundland against an order confirming an injunction preventing the Direct Cable Company from landing their wire upon the soil of Newfoundland, on the ground that it would be an infringement of the rights of the Anglo-American Company. The cable, as a matter of fact, was buoyed in Conception Bay, more than a marine league from shore, and it nowhere came within that distance from the shore, purposely to avoid coming within territorial jurisdiction. But it was asserted that the whole of Conception Bay was within the territory and jurisdiction of Newfoundland. The supreme court of the province so held, and the

determination was upheld by the House of Lords in a somewhat elaborate opinion.

"This opinion states that Conception Bay is a body of water having an average width of fifteen miles, a distance of forty miles from the head to one of the capes at the entrance and fifty miles to the other, and a distance of twenty miles between the headlands. Coming to the question, the Lords say (p. 419):

"'We find a universal agreement that harbors, estuaries and bays, landlocked, belong to the territory of the nation which possesses the shores round them, but no agreement as to what is the rule to determine what is a "bay" for this purpose. It seems generally agreed that where the configuration and dimensions of the bay are such as to show that the nation occupying the adjoining coasts also occupies the bay, it is a part of the territory; and with this idea most of the writers on the subject refer to defensibility from the shore as the test of occupation; some suggesting, therefore, a width of cannon shot from shore to shore; some a cannon shot from each shore; some an arbitrary distance of ten miles. All of these are rules which, if adopted, would exclude Conception Bay from the territory of Newfoundland, but also would have excluded from the territory of Great Britain that part of the Bristol Channel which in *Reg.* v. *Cunningham* was held to be in the county of Glamorgan.

"'It does not appear to their lordships that jurists and text writers are agreed what are the rules as to dimensions and configuration, which, apart from other considerations, would lead to the conclusion that a bay is or is not a part of the territory of the state possessing the adjoining coasts, and it has never, that they can find, been made the ground of any judicial determination. If it were necessary in this case to lay down a rule, the difficulty of the task would not deter their lordships from attempting to fulfill it. But in their opinion it is not necessary. It seems to them that in point of fact the British Government has for a long time exercised dominion over this bay, and that their claim has been acquiesced in by other nations. * * * This would be very strong in the tribunals of any country to show that by prescription this bay is a part of the exclusive territory of Great Britain. In a British tribunal it is decisive.'

"We must now examine the local circumstance touching the status of Chesapeake Bay, and then determine whether those waters should be held to be the open ocean or jurisdictional waters of the United States in the light of these authorities.

"The headlands are about twelve miles apart, and the bay is probably nowhere more than twenty miles in width. The length may be 200 miles. To call it a bay is almost a mis-

nomer. It is more a mighty river than an arm or inlet of the ocean. It is entirely encompassed about by our own territory, and all of its numerous branches and feeders have their rise and their progress wholly in and through our own soil. It can not become an international commercial highway; it is not and can not be made a roadway from one nation to another.

"The second charter of King James I. to the Virginia Company in the year 1609 granted: 'All those lands, countries, and territories situate, lying, and being in that part of America called Virginia, from the point of land called Cape or Point Comfort, all along the seacoast to the northward 200 miles, and all along the seacoast to the southward 200 miles, and all that space and circuit of land lying from the seacoast of the precinct aforesaid up into the land throughout from sea to sea, west and northwest, together with all the soils, grounds, havens, ports, * * * rivers, waters, fishings, etc.'

"This language would seem to place Chesapeake Bay within the boundary lines of Virginia. A line running north (as near as may be) from Point Comfort along the seacoast crosses the mouth of the bay from Cape Henry to Cape Charles.

"By the King James charter to Lord Baltimore in 1632, erecting the territory of Maryland, the southern boundary line is made to cross Chesapeake Bay from Smiths Point, at the mouth of the Potomac River, to Watkin's Point, on the eastern shore, which apparently places a portion of this bay within the territory of Maryland. Had this not been intended, the boundary would presumably have followed the shore line around the bay.

"It is a part of the common history of the country that the States of Virginia and Maryland have from their earliest territorial existence claimed jurisdiction over these waters, and it is of general knowledge that they still continue so to do.

"The legislation of Congress has assumed Chesapeake Bay to be within the territorial limits of the United States. The acts of July 31, 1789, ch. 5; August 4, 1790, ch. 35; and March 2, 1799, ch. 128, § 11, establishing revenue districts, provided that 'the authority of the officers of the district (Norfolk to Portsmouth) shall extend over all the waters, shores, bays, harbors, and inlets comprehended within a line drawn from Cape Henry to the mouth of James River.' By section 549, Rev. Stat. U. S., the eastern judicial district for Virginia embraces the 'residue of the State' not included in the western

district. The boundaries of the State include all of Chesapeake Bay south of a line running from Smiths Point to Watkins Point, and hence the eastern district must embrace so much of the bay.

"The position taken by this government and by England and France in the matter of the British brig *Grange*, captured in Delaware Bay in 1793 by the French steamer *l'Embuscade* (1 Am. State Papers, 147, 149) has, it seems to us, an important bearing upon the question under discussion. The brig was seized and the crew made prisoners, the two foreign governments being at war. The British Government must have demanded that the United States compel France to release the captured vessel on the ground that the seizure was unlawful as having been made in our territorial and neutral waters. The State Papers do not show this demand, but it is not material. The opinion of the Attorney-General was asked, and was given somewhat elaborately by Mr Randolph. (1 Op. Att'ys-Gen'l, 32.) It quotes the text writers, and concludes that the whole of Delaware Bay is within the territorial jurisdiction of the United States, regardless of the marine league or cannon shot limit from the shore. The learned Attorney-General says: 'In like manner is excluded every consideration of how far the spot of seizure was capable of being defended by the United States; for although it will not be conceded that this could not be done, yet will it rather appear that the mutual rights of the States of New Jersey and Delaware up to the middle of the river supersede the necessity of such an investigation. No. The corner stone of our claim is that the United States are proprietors of the lands on both sides of the Delaware from its head to its entrance into the sea.'

"Acting upon the opinion of the Attorney-General, the Secretary of State, Mr. Jefferson, demanded that France should make restitution of the *Grange*, and set the prisoners taken upon her at liberty, which demand was promptly and cheerfully complied with by the French Government.

"If it be said that the mere claims of a nation to jurisdiction over adjacent waters are to be accepted with some degree of hesitation, then the action in reference to the *Grange* is of much weight, for there the claim made by the United States was promptly acquiesced in by two great foreign powers, when passions were excited, and when such acquiescence was greatly against the immediate interest of one of the combatants, as well as against the general interest of both.

"It will hardly be said that Delaware Bay is any the less an inland sea than Chesapeake Bay. Its configuration is not such as to make it so, and the distance from Cape May to Cape Henlopen is apparently as great as that between Cape Henry and Cape Charles.

"Reflection upon the subject has caused the court to consider this question of very considerable national importance. Contingencies might arise which would make it of very grave import. The 'high sea' belongs to all alike. It is the great highway of nations. One can not lawfully do anything upon it which any other has not the right to do. One can not exercise sovereignty over it. Can an American court concede so much as to Chesapeake Bay? Other nations, by common consent of all, have well-recognized peaceable rights even in our territorial waters. Ought we to admit that they have any rights hostile to the United States, or can we permit belligerent operations between foreign nations within the shores of this bay? What injustice can be done to any other nation by the United States exercising sovereign control over these waters? What annoyance and what injury may not come to the United States through a failure to do so?

"Considering, therefore, the importance of the question, the configuration of Chesapeake Bay, the fact that its headlands are well marked, and but twelve miles apart, that it and its tributaries are wholly within our own territory, that the boundary lines of adjacent States encompass it; that from the earliest history of the country it has been claimed to be territorial waters, and that the claim has never been questioned; that it can not become the pathway from one nation to another; and remembering the doctrines of the recognized authorities upon international law, as well as the holdings of the English courts as to the Bristol Channel and Conception Bay, and bearing in mind the matter of the brig *Grange* and the position taken by the government as to Delaware Bay, we are forced to the conclusion that Chesapeake Bay must be held to be wholly within the territorial jurisdiction and authority of the Government of the United States and no part of the 'high seas' within the meaning of the term as used in section 5 of the act of June 5, 1872."

Stetson v. *United States*, No. 3993, class 1, Second Court of Commissioners of *Alabama* Claims.

Fisheries—Case of the "Washington."

The American schooner *Washington*, while engaged in fishing in the Bay of Fundy, ten miles distant from the shore, was seized by one of Her Britannic Majesty's cruisers and taken to Yarmouth, in Nova Scotia, and condemned, on the ground that she was engaged in fishing in British waters in violation of the provisions of the convention relative to the fisheries, entered into between the United States and Great Britain, on October 20, 1818. A claim for damages was made before the commission under the claims convention between the United States and Great Britain of February 8, 1853, on the ground that the seizure was in violation of the provisions of the convention of 1818 and of the law of nations.

Hornby, British commissioner, maintained that the seizure was justified, both on the ground that the Bay of Fundy was an indentation of the sea, over which Great Britain might by virtue of the law of nations claim exclusive jurisdiction, and also on the ground that, by a fair construction of the convention of 1818, the Bay of Fundy was one of the "bays" in which, by that convention, the United States had renounced the right to take fish.

Upham, the American commissioner, denied both these contentions, citing Vattel, 1. ch. 20, ss. 282, 283; Grotius, II. ch. 2, sec. 3; 1 Kent's Comm. 462; Sabine's Report on the Fisheries, 282, 294.

The umpire rendered the following decision:

"The schooner *Washington* was seized by the revenue schooner *Julia*, Captain Darby, while fishing in the Bay of Fundy ten miles from the shore, on the 10th of May 1843, on the charge of violating the treaty of 1818. She was carried to Yarmouth, Nova Scotia, and there decreed to be forfeited to the Crown by the judge of the vice admiralty court, and with her stores ordered to be sold. The owners of the *Washington* claim for the value of the vessel and appurtenances, outfits, and damages, $2,483, and for eleven years' interest, $1,638, amounting together to $4,121. By the recent reciprocity treaty, happily concluded between the United States and Great Britain, there seems no chance for any future disputes in regard to the fisheries. It is to be regretted that in that treaty provision was not made for settling a few small claims, of no importance in a pecuniary sense, which were then existing, but as they have not been settled they are now brought before this commission.

"The *Washington*, fishing schooner, was seized, as before stated, in the Bay of Fundy, ten miles from the shore, off Annapolis, Nova Scotia.

"It will be seen by the treaty of 1783, between Great Britain and the United States, that the citizens of the latter, in common with the subjects of the former, enjoyed the right to take and cure fish on the shores of all parts of Her Majesty's dominions in America used by British fishermen; but not to dry fish on the island of Newfoundland, which latter privilege was confined to the shores of Nova Scotia[1] in the following words: 'And American fishermen shall have liberty to dry and cure fish on any of the unsettled bays, harbours, and creeks of Nova Scotia, but so soon as said shores shall become settled it shall not be lawful to dry or cure fish at such settlements without a previous agreement for that purpose with the inhabitants, proprietors, or possessors of the ground.'

"The treaty of 1818 contains the following stipulations in relation to the fishery: 'Whereas differences have arisen respecting the liberty claimed by the United States to take, dry, and cure fish on certain coasts, bays, harbors, and creeks of His Britannic Majesty's dominions in America, it is agreed that the inhabitants of the United States shall have, in common with the subjects of His Britannic Majesty, the liberty to fish on certain portions of the southern, western, and northern coast of Newfoundland, and also on the coasts, bays, harbors, and creeks from Mount Joly, on the southern coast of Labrador, to and through the Straits of Belle Isle, and thence northwardly indefinitely along the coast, and that American fishermen shall have liberty to dry and cure fish in any of the unsettled bays, harbors, and creeks of said described coasts until the same become settled and the United States renounce the liberty heretofore enjoyed or claimed by the inhabitants thereof to take, dry, or cure fish on or within three marine miles of any of the coasts, bays, creeks, or harbors of His Britannic Majesty's dominions in America not included in the above-mentioned limits: *Provided, however*, That the American fishermen shall be admitted to enter such bays or harbors for the purpose of shelter and of repairing damages therein, of purchasing wood, and of obtaining water, and for no other purpose whatever. But they shall be under such restrictions as may be necessary to prevent their taking, drying, or curing fish therein, or in any other manner whatever abusing the privileges hereby reserved to them.'

"The question turns, so far as relates to the treaty stipulations, on the meaning given to the word 'bays' in the treaty of 1783. By that treaty the Americans had no right to dry and cure fish on the shores and bays of Newfoundland, but they had that right on the coasts, bays, harbors, and creeks of Nova Scotia; and as they must land to cure fish on the shores, bays, and creeks, they were evidently admitted to the shores of the bays, etc. By the treaty of 1818 the same right is granted

[1] The privilege also extended to the Magdalen Islands and Labrador. The quotation Mr. Bates gives from the treaty is in fact a summary of its terms. See the chapter, *supra*, on the history of the Halifax Commission.

to cure fish on the coasts, bays, etc., of Newfoundland, but the Americans relinquished that right and the right to fish within three miles of the coasts, bays, etc., of Nova Scotia. Taking it for granted that the framers of the treaty intended that the word 'bay' or 'bays' should have the same meaning in all cases, and no mention being made of headlands, there appears no doubt that the *Washington*, in fishing ten miles from the shore, violated no stipulations of the treaty.

"It was urged on behalf of the British Government that by coasts, bays, etc., is understood an imaginary line, drawn along the coast from headland to headland, and that the jurisdiction of Her Majesty extends three marine miles outside of this line; thus closing all the bays on the coast or shore, and that great body of water called the Bay of Fundy against Americans and others, making the latter a British bay. This doctrine of headlands is new, and has received a proper limit in the convention between France and Great Britain of 2d August 1839, in which 'it is agreed that the distance of three miles fixed as the general limit for the exclusive right of fishery upon the coasts of the two countries shall, with respect to bays the mouths of which do not exceed ten miles in width, be measured from a straight line drawn from headland to headland.'

"The Bay of Fundy is from 65 to 75 miles wide and 130 to 140 miles long. It has several bays on its coasts. Thus the word bay, as applied to this great body of water, has the same meaning as that applied to the Bay of Biscay, the Bay of Bengal, over which no nation can have the right to assume the sovereignty. One of the headlands of the Bay of Fundy is in the United States, and ships bound to Passamaquoddy must sail through a large space of it. The island of Grand Menan (British) and Little Menan (American) are situated nearly on a line from headland to headland. These islands, as represented in all geographies, are situate in the Atlantic Ocean. The conclusion is, therefore, in my mind irresistible that the Bay of Fundy is not a British bay, nor a bay within the meaning of the word as used in the treaties of 1783 and 1818.

"The owners of the *Washington*, or their legal representatives, are therefore entitled to compensation, and are hereby awarded not the amount of their claim, which is excessive, but the sum of three thousand dollars, due on the 15th January 1855."

Bates, umpire, case of the *Washington*, convention between the United States and Great Britain of February 8, 1853. (S. Ex. Doc. 103, 34 Cong. 1 sess., pp. 184.)

Case of the "Argus."

"The umpire, appointed agreeably to the provisions of the convention entered into between Great Britain and the United States on the 8th of February 1853 for the adjustment of claims by

a mixed commission, having been duly notified by the commissioners under the said convention that they had been unable to agree upon the decision to be given with reference to the claim of the owners of the schooner *Argus*, of Portland, United States, Doughty, master, against the British Government; and having carefully examined and considered the papers and evidence produced on the hearing of the said claim and having conferred with the said commissioners thereon, hereby reports that the schooner *Argus*, 55 tons burden, was captured on the 4th August 1844, while fishing on St. Ann's Bank, by the revenue cruiser *Sylph*, of Lunenburg, Nova Scotia, commanded by William Carr—Phillip Dod, seizing master—carried to Sydney, where she was stripped and everything belonging to her sold at auction. At the time of the capture the *Argus* was stated on oath to have been 28 miles from the nearest land—Cape Smoke. There was therefore in this case no violation of the treaty of 1818. I therefore award to the owners of the *Argus*, or their legal representatives, for the loss of their vessel, outfits, stores, and fish, the sum of two thousand dollars on the 15th January 1855."

Bates, umpire, case of the *Argus*, December 23, 1854, commission under the convention between the United States and Great Britain of February 8, 1853. (MSS. Dept. of State.)

Case of the "Pallas."

"The umpire, appointed agreeably to the provisions of the convention entered into between Great Britain and the United States on the 8th of February 1853 for the adjustment of claims by a mixed commission, having been duly notified by the commissioners under the said convention that they had been unable to agree upon the decision to be given with reference to the claim of the owners of the fishing schooner *Pallas*, of Rockport, United States, Harkall, master, against the British Government; and having carefully examined and considered the papers and evidence produced on the hearing of the said claim and having conferred with the said commissioners thereon, hereby reports that it is stated the *Pallas* was chased by a revenue cruiser from off Chittican Bay on the 4th August 1840 for forty or fifty miles, captured, and sent to Sydney, detained six weeks, and when released it was found that some of the rigging had been taken away, the cable damaged, and stores missing, part of the crew had left, and the voyage was broken up. There being no evidence of these facts beyond

the depositions of the president and directors of the insurance company at Rockport (Maine), I reject the claim for want of evidence."

Bates, umpire, January 15, 1855, convention between the United States and Great Britain of February 8, 1853. (MSS. Dept. of State.)

Exemption from Jurisdiction—Case of the "Ann."

The American brig *Ann* sailed from Gibraltar March 21, 1829, for New Orleans with a cargo of Naples brandy. Having encountered boisterous weather in the Gulf of Mexico, and being in need of provisions, she put into the port of Vera Cruz on the 17th of May to obtain supplies. Immediately on arriving the captain declared this object. Forty-eight hours afterward he prepared to depart, as authorized by article 6, chapter 1, of the Mexican tariff, but clearance was refused and payment of duties demanded, and when this demand was resisted the vessel was libeled on allegations that the brandy was Spanish and that the captain had been guilty of fraudulent acts. On the trial before the district judge these allegations were held to be untrue, and it was decreed that the vessel should be allowed to proceed at once to New Orleans, as she had touched at Vera Cruz only for repairs and supplies. The custom-house took an appeal to the circuit court, which affirmed the decree of the district court, directing the vessel to be released. Meanwhile, the cargo had been landed and taken to the custom-house, and, notwithstanding the decree of the court, the captain of the brig was unable to obtain its restoration, and after many fruitless efforts he was obliged to pay the duties and sell the cargo at Vera Cruz at a great sacrifice. The money exacted as duties was placed in the public treasury, which was then in great need of funds. Even after this an embargo was laid on the vessel, and the master did not get away till the 15th of August. The amount of duties paid into the treasury was $21,425.12 and the loss by demurrage $1,500. Had the cargo been taken to New Orleans, it was estimated that it would have sold for $23,227.50, after payment of duties. The actual net produce of the cargo at Vera Cruz was $4,820.25. An award was made by the umpire for $37,558.98.

Charles Callaghan v. *Mexico:* Commission under the convention between the United States and Mexico of April 11, 1839.

Case of the "Augusta."

The American schooner *Augusta*, Robert Perry, owner, sailed from New Orleans June 6, 1833, for Belize, British Honduras. After being four days at sea the master became ill. On June 15 he made

land about 30 miles south of Rio Grande del Norte, and with the supercargo and two of the men went on shore. Soon afterward a gale sprang up which prevented the party from returning, and caused considerable damage to the vessel. Her cables were parted and her anchors lost. The master immediately proceeded to Brazos de Santiago, and there learned that the schooner was off that port in distress. The gale had not entirely abated, and she was in a perilous position; and the master, at extraordinary expense, procured a pilot to go with him beyond the bar and bring the vessel into port. She was brought in on June 18, and the master, immediately on her arrival, exhibited to the custom-house her clearance, bills of lading, and other papers. A permit was granted to unlade the cargo, for the purpose of repairing the vessel and fitting her to resume her voyage. She had sprung aleak, and part of the cargo was materially damaged. But, when the repairs were completed, permission to reload the cargo was refused; and the vessel and cargo were both detained by the authorities on a *suspicion* that she had come on the coast with an *intention* to introduce merchandise into the country contrary to law. The master refuted this charge by all the proof that could be afforded. On the other hand, no fact was proved to sustain the suspicion entertained by the authorities, beyond the landing of the master on the coast, which was explained by his illness and the necessity of securing medicine. Every effort was made to effect the immediate release of the vessel and cargo, but particularly of the vessel, since, if she remained, she would be ruined by the worms. These efforts were ineffectual. The vessel was held and the proceedings protracted, so that before their conclusion, which resulted in an acquittal, the vessel was so much injured that she was formally abandoned and became a total loss to the owner.

The American commissioners allowed the claimant $4,500 for the vessel, with interest from January 20, 1833, and the expenses of translation. The umpire on October 27, 1841, rendered a decision sustaining the award of the American commissioners. He also made an award in favor of Charles Stillman, assignee of S. S. Hurlbut, owner of the cargo, for expenses and losses caused by its detention.

Robert Perry v. *Mexico*, and *Charles Stillman, assignee of S. S. Hurlbut*, v. *Mexico:* Commission under the convention between the United States and Mexico of April 11, 1839.

Case of the "Susannah."

The American schooner *Susannah*, James H. Clay, master, cleared at New Orleans, in November 1845 with a cargo for Corpus Christi, Texas. Having arrived at Aransas Pass and taken a pilot, she was driven to sea by violent winds and finally compelled to enter the mouth of the Rio Grande, which she made in December following, in great distress, having lost her anchors and cables, leaking badly, and being out of provisions and water. Her master, after reporting her condition, sought from the Mexican authorities permission to remain and refit his vessel. This permission was, however, refused, and the vessel and cargo were seized and libeled for a breach of the revenue laws of Mexico. The case was tried before the court at Matamoras, and the vessel and cargo condemned and confiscated, and the master adjudged to pay a heavy fine, on failure to pay which he was imprisoned for about five months. He brought a claim for his imprisonment before the commissioners under the act of Congress of March 3, 1849, who said:

"The only grounds assumed by the court for the judgment and sentence were that the vessel had sailed for Corpus Christi, the same being a port of Mexico and closed to foreign commerce, and that part of her cargo consisted of goods declared contraband by the laws of Mexico. Upon these grounds such judgment and sentence were palpably erroneous, since Corpus Christi was a port of the Republic of Texas and entirely beyond the jurisdiction of Mexico, the former having continued to exercise and maintain exclusive sovereignty there for nearly ten years. Nor ought any goods which the vessel might have carried been considered contraband, since her entry into a Mexican port was not for the purpose of commerce, but from necessity, and to escape destruction.

"This right of entry, under such circumstances, was a perfect right under the treaty then existing between the United States and Mexico. The duty of the Mexican authorities was to render assistance to the master, instead of augmenting his misfortunes. The imprisonment of the master, James H. Clay, was not only unjust, but his wrongs were heightened by treatment degrading and inhuman, and he was only released from imprisonment by order of General Taylor, upon the entry of the Army of the United States into the territory of Mexico. * * * The board decides the said claim to be a good and valid one."

Memorial of *James H. Clay:* Opinion of Messrs. Evans, Smith, and Paine, commissioners, December 6, 1850, under the act of Congress of March 3, 1849. The award in this case was for unlawful imprisonment and personal ill usage, and a half interest in the vessel. An award was made on the memorial of *George N. Downs* for *Owen & Downs*, owners, for the cargo.

Case of the "Enterprise."

From 1835 to 1841, inclusive, three American vessels, the *Enterprise*, the *Hermosa*, and the *Creole*, having large numbers of slaves on board, were, as it was claimed, forced, by or as the result of stress of weather or other overruling necessity, to enter the British jurisdiction in the West Indies, where in each instance the slaves were released, under circumstances which appear below.

The brig *Enterprise* sailed from Alexandria, then in the District of Columbia, on January 22, 1835, for Charleston, South Carolina, having on board 73 slaves. Encountering severe weather she was driven, after being three weeks at sea, to put into Port Hamilton, in Bermuda, to refit. While the vessel was in port she was entered by persons in authority under the government, and the slaves were liberated.

Argument of the British Agent.

Hannen, the agent of Great Britain, resisted the claim on the following grounds:

"1. That laws have no force in themselves beyond the territory of the country by which they are made.

"2. That, while, by the comity of nations, the laws of one country are, in some cases, allowed by another to have operation within its territory, when it is so permitted the foreign law has its authority in the other country from the sanction given to it there, and not from its original institution.

"3. That every nation is the sole judge of the extent and the occasions on which it will permit such operation, and is not bound to give such permission when the foreign law is contrary to its interests or its moral sentiments.

"4. That England does not admit within its territory the application of any foreign law establishing slavery, having abolished the status of slavery throughout her dominions.

"5. That the condition of apprenticeship, as permitted to remain in the West India islands, formed no exception to the abolition of slavery throughout the British dominions, as it was a system entirely different from slavery, and would not justify sustaining any other description of slavery.

"6. That the liberty of any individual in British territory could not be restrained without some law to justify such restraint, and that neither the apprentice law nor any other law could be appealed to to justify the detention of these negroes.

"7. That slavery was not a relation which the British Government, by the comity of nations, was bound to respect."

Argument of the American Agent.

Thomas, the agent of the United States, adverted to the fact that the slaves on board the *Comet*, in 1830, and the *Encomium*, in 1834,[1] were liberated by the British colonial authorities under

[1] See the history of the commission under the convention between the United States and Great Britain of February 8, 1853.

similar circumstances, and that the British Government had made compensation in both those cases, on the ground that they occurred while slavery existed by British law; but that it had refused compensation in the case of the *Enterprise*, for the alleged reason that at the time this vessel arrived at Bermuda slavery had, by the emancipation act of 1833, been abolished throughout the British Empire. But he maintained that the principle which required compensation in the cases of the *Comet* and the *Encomium* equally applied to the case of the *Enterprise*. By the act of 5 Geo. IV. c. 113 (1824), it was made a felony for any person to bring slaves or other persons into the British possessions with a view to their being dealt with as slaves. This act, he maintained, abolished slavery in regard to all persons brought into Bermuda as effectually as did the act of 3 and 4 Wm. IV. c. 73 (August 28, 1833), in regard to persons already there. It was evident, therefore, that in the cases of the *Comet* and the *Encomium* effect was allowed to the United States law, by which the vessel was governed, for the reason that when vessels are driven by necessity into a foreign jurisdiction they are under the protection of the law of nations and "shielded from any control of the local authorities."

Mr. Thomas also argued that when the *Enterprise* arrived at Bermuda slavery had not been abolished "throughout the British Empire." By section 44 of the act of 1833 territories in the possession of the East India Company, the Island of Ceylon, and the Island of St. Helena were excepted from its operation, the effect of which was to reestablish slavery in those places, if section 12 had abolished it, and to permit its continuance there, as it actually did. He also argued that from 1834 to 1840, when the act took complete effect, the condition of slavery in the West India colonies was merely changed to that of apprenticeship, in which the negroes virtually continued to be bondsmen.

Proceeding to the question of jurisdiction, Mr. Thomas maintained that "international law isolates the vessel driven by necessity into a foreign port, and preserves in force the laws of her own country." On this point he cited *Madrazzo* v. *Willes*, 3 Barn. and Ald. 353; *Le Louis*, 2 Dod. Adm. 210.

Opinion of the American Commissioner.

Upham, the American commissioner, expressed, in the case of the *Enterprise*, the following views:

"In March, 1840, resolutions were submitted to the United States Senate relative to this claim, by Mr. Calhoun, which

were adopted by that body, and which briefly set forth the principles on which the claim is based.

"These principles are: 'That a vessel on the high seas, in time of peace, engaged in a lawful voyage, is, according to the law of nations, under the exclusive jurisdiction of the state to which she belongs; and that, if such vessel is forced, by stress of weather or other unavoidable circumstance, into the port of a friendly power, her country, in such case, loses none of the rights appertaining to her on the high seas, either over the vessel or the personal relations of those on board.'

"It was contended that the *Enterprise* came within these principles, and that the seizure and liberation of the negroes on board of her, by the authorities of Bermuda, was a violation of these principles and of the law of nations. * * *

"I shall endeavor to ascertain what this law is. Before proceeding, however, to give my views fully on this subject, I shall advert briefly to the various points taken in the argument addressed to us by the learned counsel for the British Government.

"These points are:

"1. 'That laws have no force, in themselves, beyond the territory of the country by which they are made.'

"My reply is that this is usually the case; but it is subject to the important addition that the laws of a country are uniformly in force, beyond the limits of its territory, over its vessels on the high seas, and continue in force in various respects within foreign ports, as we shall hereafter show.

"2. It is contended 'that by the comity of nations the laws of one country are, in some cases, allowed by another to have operation within its territory; but, when it is so permitted, the foreign law has its authority in the other country from the sanction given to it there and not from its original institution.'

"3. 'That every nation is the sole judge of the extent and the occasions on which it will permit such operation, and it is not bound to give such permission where the foreign law is contrary to its interests or its moral sentiments.'

"As to these points, I concede that there are many laws of a foreign country, in reference to its own citizens or their obligations, that another nation may enforce or not, where the citizens of such a country voluntarily come within its borders in order to place themselves under its jurisdiction. But there are cases where persons are forced by the disasters of the sea upon a foreign coast, where, as I contend, a nation has fundamental and essential rights within the ordinary local limits of another country, of which it can not be deprived, and that are operative and binding by a sanction that is wholly above and beyond the mere assent of any such state or community.

"Such rights are defined by jurists as the absolute international rights of states. I might also add, it is not now a question whether the doctrines of international law shall prevail either in England or America.

"'International law,' says Blackstone, 'has been adopted in its full extent by the common law of England; and whenever any question arises which is properly the subject of its jurisdiction, it is held to be a part of the law of the land.' (Black. Com. vol. 4, p. 67.)

"International law is also recognized by the Constitution of the United States, and it is made the duty of Congress to punish offenses against it.

"4. It is contended 'that England does not admit within its territory the application of any foreign laws establishing slavery, having abolished the *status* of slavery throughout its dominions.'

"This position is open to the exception taken to the second and third propositions, and is subject to the same reply.

"5. It is contended 'that the condition of apprenticeship, as permitted to remain in the West India Islands by the act of 3 and 4 Wm. IV. ch .73, is no exception to the abolition of slavery throughout the British dominions;' because, it is said, the system is entirely different from slavery in point of fact, and because, however near a resemblance it may bear to it, it could afford no justification for an English court to hold that another sort of slavery was valid.

"Our reply to this is, that slavery does not necessarily depend on the length of time the bondage exists, but on its character.

"The apprenticeship system continued, as to a portion of those to whom it was applicable, for twenty-one years; and few persons can calculate on a lease of life for a longer time.

"Apprentices also were liable to be bought and sold or attached for debt. The system therefore had all the worst characteristics of slavery.

"Further, the act abolishing slavery acknowledged the legality and validity of slavery as an institution, as it rendered compensation for the liberation of slaves according to their respective valuations, and also gave to the owners of slaves the benefit of a term of intermediate service. If it was not considered right to liberate *British* slaves except on these conditions, how can it be right to compel the liberation of American slaves, casually thrown within the country, when no such compensation has been made or term of service secured to their owners?

"This forced liberation of the slaves of another government without compensation is placed on the ground of the universal 'abolition of slavery throughout the British dominions.' Such abolition, however, was not effected by this act, as the sixty-fourth section provides 'that nothing in the act contained doth or shall extend to any of the territories in the possession of the East India Company, or to the Island of Ceylon, or to the Island of St. Helena.' It was merely enjoined on the East India Company by Parliament at the same session 'that they should forthwith take into consideration the means of mitigating slavery in their possessions, and of extinguishing it as soon as

it should be practicable and safe,' and slavery was not abolished in those provinces for some years subsequent to that period.

"It is also said 'that the provincial government of Bermuda, after the passage of the general act abolishing slavery, abolished the apprenticeship system prior to the liberation of the slaves on board the *Enterprise*,' but such abolition was not made till, under the general law, they had received compensation for their slaves.

"6. 'The principle on which the right of every man to personal liberty within British territory is attached is that some law must be appealed to to justify the restraint of liberty; and that neither the apprentice law nor any other law can be appealed to to justify the restraint of these negroes.'

"To this we reply that the law of the country from which the vessel comes, as sustained and enforced by the law of nations, can as well be appealed to on this subject as on any other. It is expressly admitted in the argument that the law of nations may be appealed to, as exempting property, other than slaves, in cases of shipwreck and disaster, and exempting vessels of war from ordinary municipal jurisdiction; and this is done by giving to the law of nations, in such case, the force and effect of municipal law, which is all that is asked to be done in this case.

"7. It is contended 'that slavery is not a relation which the British Government, by the comity of nations, is bound to respect.'

"But such is not the doctrine of the British courts. They hold themselves bound, by the comity of nations, to respect both slavery and the slave trade; and they uphold and sustain it in their decisions, where the rights of other nations are concerned.

"In 3 Barn. & Ald. 353, *Maddrazzo* v. *Willes*, Chief Justice Abbott says 'it is impossible to say that the slave trade is contrary to the law of nations;' and Lord Stowell says, in Le Louis, 2 Dodson's Admiralty Reports, 210, 'that the slave trade is not piracy or crime by the law of nations, and is therefore not a criminal traffic by such law; and every nation, independent of treaty relations, retains a legal right to carry it on.' * * *

"I shall now proceed, as I proposed, to state my views as to the principles of international law applicable to cases of this description. They are * * *:

"I. That each country is entitled to the free and absolute right to navigate the ocean as the common highway of nations, and while in the enjoyment of this right retains over its vessels the exclusive jurisdiction of its own laws.

"The Emperor Antoninus said 'though he was the lord of the world, the law only was the ruler of the sea.'

"Grotius says 'that the sea, whether taken as a whole or as to its principal parts, can not become property. For the magnitude of the sea is so great it is sufficient for all peoples' use.

There is a natural reason which prevents the sea from being made property, merely because occupation can only be applied to a thing which is bounded. Now, fluids are unbounded and can not be occupied except as they are contained in something else, as lakes and ponds are occupied, and rivers as far as their banks; but the sea is not contained by the land, being equal to the land, or greater, so that the ancients say the land is bounded by the sea.' (Grotius, book 2, ch. 2, sec. 3.)

"Vattel says 'that the right of navigating the open sea is a right common to all men; and the nation that attempts to exclude another from that advantage does her an injury, and furnishes her with sufficient grounds for commencing hostilities.' And 'that nation which arrogates to itself an exclusive right to the sea does an injury to all nations, and they are justified in forming a general combination against it, in order to repress such an attempt.' (Vattel, book 1, ch. 23, secs. 282, 283.)

"Indeed, the free right of each nation to navigate the ocean is now nowhere contested, and it carries with it, as a necessary result, the exclusive jurisdiction on the high seas of the laws of each country over its own vessels.

"Phillimore, in his recent work on International Law, Vol. I. p. 352, says that 'all authorities combine, with the reason of the thing, in declaring that for all offenses on the high seas the territory of the country to which the vessel belongs is to be considered as the locality of the offence, and that the offender must be tried by the tribunals of his country;' and 'it matters not,' he says, 'whether the injured person, or the offender, belongs to a country other than that of the vessel.' The rule is applicable to all on board. It is further well declared that this right to navigate the ocean is a national one, and can not be exercised by an individual except under the patronage and protection of his government. Thus it is holden 'that every ship is bound to carry a flag, and to have on board ship's papers indicating to what nation it belongs, whence it sailed, and whither it is bound, under the penalty of being treated as a pirate.' (I. Phill. Internat. Law, 216.)

"A vessel, wherever she is borne on the high seas, is bound, therefore, to have a national character, and is part and parcel of a recognized government.

"It is contended—

"II. That a vessel impelled by stress of weather, or other unavoidable necessity, has a right to seek shelter in any harbor, *as incident to her right to navigate the ocean*, until the danger is past and she can proceed again in safety.

"This position I propose to sustain on three grounds: By authority; by the concession of the British Government in similar cases; and by its evident necessity as parcel of the free right to navigate the ocean, and therefore a necessary incident of such right.

"1. The effect of stress of weather in exempting vessels from liabilities to local law, when they are driven by it within the

ordinary jurisdiction of another country, is well settled by authority in various classes of cases, viz, in reference to the blockade of harbors and coasts; of prohibited intercourse of vessels between certain ports that are subject to quarantine regulations; intercourse between certain countries, or sections of countries, which is interdicted from motives of mercantile policy, and in cases of liability to general customs duties. (Authorities on these points will be found in the *Frederick Molke*, 1 Rob. Rep. 87; the *Columbia*, id. 156; the *Juffrow Maria Schroeder*, 3 Rob. 153; the *Hoffnung*, 6 id. 116; the *Mary*, 1 Gall. 206; *Prince* v. *U. S.*, 2 Gall. 204; *Peisch* v. *Ware*, 4 Cranch, 347; Lord Raymond, 388, 501; Reeves's Law of Shipping, 203; the *Francis and Eliza*, 8 Wheaton, 398; Sea Laws, arts. 29, 30, and 31, and the *Gertrude*, 3 Story's Rep. 68.)

"In the last-named case the learned judge remarks 'that it can only be a people who have made but little progress in civilization that would not permit foreign vessels to seek safety in their ports, when driven there by stress of weather, except under the charge of paying impost duties on their cargoes, or on penalty of confiscation where the cargo consisted of prohibited goods.' (See also Kent's Commentaries, 145, and authorities there cited.)

"The authority of writers on international law is also directly in point. Vattel holds to the free right of all nations to the use of the ocean, with the exception that a portion of the ocean, immediately contiguous to the land, is subject to each government for the purposes essential to its protection. Even here, however, he says: 'Other nations have a right of passage through such portions of the sea when not liable to suspicion, and in cases of necessity the entire right of the government ceases, as, for instance, where a vessel is obliged to enter a road in order to shelter herself from a tempest. In such case she may enter wherever she can, provided she cause no damage, or repair any damage done. This is a remnant of his primitive freedom of which no man can be supposed to have divested himself; and the vessel may lawfully enter, in spite of such foreign government, if she is unjustly refused admission.' (Vattel, book 1, ch. 23, sec. 288.)

"Again, he says in another section, 'a vessel driven by stress of weather has a right to enter, even by force, into a *foreign port*.' (Vattel, book 2, ch. 9, sec. 123; Puffendorf, book 3, ch. 3, sec. 8.)

"Vattel thus considers this an absolute right that may be asserted at any hazard, and not a right resting in comity or dependent on a license that may be modified or revoked. In the resort to force for the preservation of such rights he is sustained by Phillimore and other modern writers on international law who hold that the violation of rights *stricti juris*, or the absolute rights of nations, 'may be redressed by forcible means.' (Phill. International Law, sec. 143.) Grotius, Puffendorf, and other writers lay down as a general principle the

rule which is applicable to this case: 'That, in extreme necessity, the primitive right of using things revives, as if they had remained in common, and that such necessity in all laws is excepted.' (Grotius, book 2, ch. 2, sec. 6; Puffendorf, book 2, ch. 6, secs. 5 and 6; Vattel, book 2, ch. 9, secs. 119 and 120; Bowyer's Commentaries on Public Law, p. 357.)

"2. The principles of law laid down by these various writers are also sustained by admissions of the British Government, and by the allowance and adjustment of claims of precisely the same character as the one before us.

"In the correspondence between the two governments in reference to this claim, it is admitted by Lord Palmerston, 'that where a ship, containing irrational animals or things, is driven by stress of weather into a foreign port, it would be highly unjust that the owner should be stripped of what belongs to him, through the application of the municipal law of the state to which he had not voluntarily submitted himself.'

"This is an admission of the high injustice of seizing all property, except in slaves; but the British Government have in other cases conceded the application of the same principle to slaves.

"This was done in the case of the *Comet*, to which I have before alluded, which was similar, in all essential particulars, to this case. The *Comet* sailed from the District of Columbia in 1830, for New Orleans, having a number of slaves on board; she was stranded on one of the false keys of the Bahamas, and the crew and persons on board were taken by the wreckers into the port of Nassau, where the slaves were seized by the authorities of the island and liberated.

"The case of the *Encomium* is of the same description. She sailed from Charleston in 1834, with slaves on board; was stranded in the same place, and the crew and persons on board were taken into the same port, where the slaves were seized and liberated by the authorities.

"Claim was presented for redress for these injuries, and after full discussion of the subject, compensation was made by the British Government for the slaves thus liberated; and this compensation was rendered solely on the principle now contended for, that where a vessel is forced by stress of weather into a foreign port, she carries with her her rights existing on the high seas as to the vessel, property, and personal relations of those on board, as sustained by the laws of her own country.

"That such was the ground on which these claims were allowed and paid is manifest, because they were slaves of a foreign country, brought within the limits of the British Government, but not held there in bondage by any British law.

"So far was this from being the case, that the statute of 5 Geo. IV. ch. 113, then in force, expressly prohibited bringing slaves from other countries into places within British jurisdiction, or retaining them there, under heavy penalties; and all

persons offending against this law were declared to be felons, and were liable to be transported beyond sea, or to be confined and kept at hard labor for a term of not less than three, nor more than five years.

"There was, then, no British law in existence by which these slaves could be holden; and the claim to compensation rested solely on the laws of the United States, which were holden to be rightfully operative, and in force against the persons claimed as slaves, under the circumstances in which the vessel was driven into port.

"This result it is impossible to avoid, and the principle asserted is fully sustained by these cases. I am aware that the claim of the *Enterprise*, which was pending at the same time, was disallowed, on the ground of a subsequent change in the local law in reference to slavery. The slaves of the *Comet* and the *Encomium*, however, were not holden by any of the local laws of the island, but were there in violation of them. The repeal of such local law, therefore, can in no manner affect the principle of the decision.

"3. A further reason assigned for the point now under consideration is its evident necessity as a part of the free right of each nation to navigate the ocean, and as a necessary incident of such right.

"Writers on public law, we have seen, assert a right to enter a foreign port, when driven there by stress of weather, on the ground of necessity. This necessity arises from perils on the deep, to which all navigation on the ocean is subject; and if such perils from this cause give the right of refuge, it becomes necessarily what I claim for it—an incidental right to the navigation of the ocean.

"It is a necessity essential to the enjoyment of a clear and undeniable right; and whatever is essential to the enjoyment of a right, or is a necessary means of its use, is, *ex vi termini*, a necessary incident of such right.

"This connection I have not seen adverted to; and it is not laid down by the writers cited, as it was not essential to their purpose to follow out the origin or causes from which the necessity arose. It is clearly embraced, however, in their propositions, and is important in this case, as it determines the true character of the rights arising from this necessity in a manner that admits of no question or controversy.

"The claim is thus an incident to an absolute and essential right of nations, and is not a claim to the mere favor of any people, which they may give or deny at pleasure, out of any supposed exclusive jurisdiction of their own.

"All incidental rights are based on necessities arising from the prior and original right. A right to the end uniformly carries with it a right to the means requisite to attain that end, or, as is stated by Mr. Wheaton, 'draws after it the incidental right of using all the means which are necessary to the

secure enjoyment of the thing itself.' (Wheat. part 2, ch. 4, secs. 13 and 18.)

"Further, incidental rights, of a similar character and attended with precisely the same result as to entry within the territorial jurisdiction of another government, have been asserted in connection with the right to navigate the ocean, and are holden as undoubted law. Thus the right to navigate the ocean is holden to give the right, *as incidental to it*, to persons inhabiting the upper sections of navigable rivers to pass by such rivers through the territory of other governments in order to reach the ocean, and thus participate in the commerce of the world.

"Great Britain claimed and exercised this right with all its incidents against Spain in the navigation of the Mississippi; and when a Spanish governor undertook at one time to forbid it, and cut loose vessels fastened to the shores, it is asserted by Mr. Wheaton that a British vessel moored itself opposite New Orleans, and set out guards, with orders to fire on persons who disturbed her moorings. The governor acquiesced in the right claimed, and it was afterwards exercised without interruption. (Wheaton, part 2, ch. 4, sec. 18; Grotius, book 2, ch. 2, secs. 12 and 13; ch. 3, secs. 7–12; Vattel, book 2, ch. 9, secs. 126–130; ch. 10, secs. 132–134; Puffendorf, book 3, ch. 3, secs. 3–6.)

"The right to the use of navigable rivers, further, is holden to draw after it, as a means necessary to its enjoyment, the right to moor vessels to the banks of such rivers within another country, and the very right we here contend for—'to land in case of distress,' and, where a vessel is damaged, to deposit her cargo on the shore until the vessel can be repaired and it can proceed in safety. (Wheaton's Internat. Law, Part 2, ch. 4, secs. 13–18; Grotius, Book 2, ch. 2, secs. 11–15; Puffendorf, Book 3, ch. 3, secs. 3–8; Vattel, Book 1, ch. 9, sec. 104; Book 2, ch. 9, secs. 123–139.)

"It is holden also in civil law that the use of the shores of navigable rivers and of the ocean is incident to the use of the water. (Inst. Book 2, title 1, secs. 1–5.)

"For the convenient use of navigable rivers by nations bordering upon them, treaties have been usually made, specifying rules and regulations in reference to their use; but it is well settled that such treaties recognize and sustain the right of use, and do not originate it.

"It may be said that the right of shelter from the land, which is claimed as an incident to the use of the ocean, can not be set up at the same time with the right over the ocean, which is admitted to a certain extent as incident to the land. But these rights do not conflict with each other. The right of a state bordering on the ocean to a given extent over the waters immediately adjoining attaches for certain fiscal purposes and purposes of protection. But the jurisdiction thus obtained is

by no means exclusive. Sovereignty does not necessarily imply all power, or that there can not coexist with it, within its own dominions, other independent and coequal rights.

"Indeed, the exception taken furnishes a strong argument in favor of the principle we contend for, because the same rule of justice that gives for certain purposes jurisdiction over the waters, as incident to the use of the land, extends, for like reasons, a right over the land for temporary use and shelter, as incident to the use of the ocean. The rule operates with equal validity and justice both ways, and its application in the one case sustains and justifies it in the other. If either right must give way there seems to be no good reason why the older and better right of the nations to the free navigation of the ocean, with its incidents, should be surrendered to the exclusive claims of any single nation on its borders. But this is not necessary, as both rights in their full perfection may exist together.

"I now come to the third proposition.

"III. That as the right of shelter, by a vessel, from storm and inevitable accident, is incident to her right to navigate the ocean, it necessarily carries with it her rights on the ocean, so far as to retain over the vessel, cargo, and persons on board the jurisdiction of the laws of her country.

"This is clearly the necessary result of the prior position. It is laid down, as an elementary proposition, by Vattel, 'that where an obligation gives a right to things without which it can not be fulfilled, each absolute, necessary, and indispensable obligation produces, in this manner, rights equally absolute, necessary, and indefeasible.' (Vattel, Book 2, ch. 9, sec. 116.)

"Wherever the use of a minor sheet of water may be claimed as incident to that of a larger, it is, while in use, a substitute for it, and draws after it, as of course, all the rights and privileges connected with the enjoyment of the principal right itself.

"The entrance of a vessel into a foreign harbor, when compelled by stress of weather, is a matter of right. She goes there on a highway which, for the time being, is her own. She is, as when on the ocean, part and parcel of the government of her own country, temporarily forced, by causes beyond her control, within a foreign jurisdiction. Her presence there under such circumstances need not excite any more feeling than when on the ocean. It is a part of her voyage, temporarily interrupted by the vicissitudes of the sea, but carrying with it the protection of the sea, and the property and relations of the persons on board can not, in such case, be interfered with by the local law, so as to obstruct her voyage or change such relations, so long as they do not conflict with the law of nations.

"These positions do not seem to be contested, as a general rule; but it is said that, since the abrogation of slavery in

England, the principles thus laid down will not apply to slave property. And this brings me to the fourth point to be considered.

"IV. That the act of 3 and 4 Wm. IV, ch. 73, abolishing slavery in Great Britain and her dependencies, could not have the effect to overrule the rights laid down in the foregoing propositions.

"It has been contended that the law abolishing slavery overruled the law of nations, on the ground that slavery is contrary to natural right, and is, in fact, beyond the protection of all law. Authorities have been cited as tending to sustain this doctrine, going back to the earliest adjudged case in France, where the question was elaborately examined, and it was held that the institution of slavery, in the absence of specific law, could not be sustained under any subsisting usage or custom of that country, as it was contrary to the laws of nature and humanity, and slaves could not breathe in France.

"Long after this, the Somerset case, sustaining the same principle, came up in England, and from that time this has been considered the leading case on the subject; and the declaration founded upon it, 'that slaves can not breathe in England,' has been usually regarded as a sentiment peculiarly applicable to British soil and institutions.

"The doctrine of the Somerset case, and the expressions of numerous distinguished English and American jurists sustaining it, including Chief Justice Marshall, Mr. Justice Story, and Chief Justice Shaw, have been fully cited in this case, 'that slavery is against the law of nature;' 'has no foundation in natural or moral right;' 'is odious,' etc. * * *

"I see no occasion to dissent from the full effect of the adjudications cited or the sentiments expressed; but they do not settle any question of international right arising in this case, or define any line of limitation betwixt conflicting jurisdictions, or sustain at all the point to which they are cited—that slavery can not subsist by valid law.

"What is law is a question of fact; and though its original institution may have been of doubtful morality or justice, it is still law. It is a dangerous doctrine that all law, not originally conceived and promulgated in *abstract right*, is invalid, or is to be instantly overthrown.

"This is readily shown by extending the inquiry to other subjects. By what *abstract* or *natural* right, I might ask, is one man born to rule over another or one set or class of men by birth to become legislators for others? There is no such natural inequality. There is no principle of abstract right to sustain such an order of things. But we must deal with institutions as they are and relations as they subsist. Reforms must advance gradually. The time will doubtless come when all things not founded in right will cease; when there will be no privileged classes by birth; no compulsory support of one religious sect by another to which it is conscientiously opposed; no sales of religious presentations; no slavery.

"But these Gordian knots that have been compacted for centuries and are intertwined and bound up in all the relations of men are not to be severed at a blow. Each nation must deal with them in its own time and manner. Such measures of reform can not be promoted by the illegal interference of one nation with another or by forcing upon shipwrecked individuals temporarily thrown within the limits of another land laws in conflict with their own right of self-government and the established relations of their country.

"These views are sustained by the concurrence of some of the ablest English jurists and the settled adjudications of English law. Thus it has been holden, though the slave trade is declared to be contrary to the principles of justice and humanity, that no state has a right to control the action of any other government on the subject, (The *Amedie*, 1 Dod. 84 n; the *Fortuna*, 1 Dod. 81; the *Diana*, 1 Dod. 101), and that no nation can add to the law of nations by its own arbitrary ordinances (*Pollard v. Bell*, 8 Term Rep. 434; 2 Park on Insurance, 731), or privilege itself to commit a crime against the law of nations by municipal regulations of its own (*Le Louis*, 2 Dod. 351).

"It is also holden that a foreigner, in a British court of justice, may recover damages in respect of a wrongful seizure of slaves. (Maddrazzo *v.* Willes, 3 Barn. & Ald. 353; the *Diana*, 1 Dod. 95.) And in the case of *Le Louis*, 2 Dod. 238, above cited, Sir William Scott (Lord Stowell) says, though the slave trade is unjust and condemned by the laws of England, it is not, therefore, a criminal traffic by the laws of nations; and every nation, independent of its relinquishment by treaty, has a legal right to carry it on. 'No one nation,' he says, 'has a right to force the way to the liberation of Africa by trampling on the independence of other states, or to procure an eminent good by means that are unlawful, or to press forward to a great principle by breaking through other great principles that stand in the way.'

"And when pressed in the same case with the inquiry, 'What would be done if a French ship laden with slaves should be brought into England?' he says, 'I answer without hesitation, restore the possession which has been unlawfully divested; rescind the illegal act done by your own subjects, and leave the foreigner to the justice of his own country.'

"The doctrine that slavery can not be sustained by valid law must be set at rest by these authorities.

"There is but one other ground on which it can be contended that the act of 3 and 4 Will. IV. ch. 73, overrules the principles I have laid down, and that is that the municipal law of England is paramount to the absolute rights of other governments when they come in conflict with each other. Such a position virtually abolishes the entire code of international law. If one state can at pleasure revoke such a law any other state may do the same thing, and the whole system of international intercourse becomes a mere matter of arbitrary will and of universal violence.

"It appears to me, from a full examination of the law applicable to the case, that the *Enterprise* was entitled, under the immediate perils of her condition, to refuge in the Bermudas; that she had a right to remain there a sufficient time to accomplish the purpose of her entry and to depart as she came; that the local authorities could not legally enter on board of her for the purpose of interfering with the condition of persons or things as established by the laws of her country, and that such an exercise of authority over the commerce and institutions of a friendly state is not warranted by the laws of nations.

"For these reasons I am of opinion that the claim before the commission is sustained and that the owners of slaves on board the *Enterprise* are entitled to compensation for the illegal interference with them by the authorities of Bermuda."

Opinion of the British Commissioner.

Hornby, the British commissioner, delivered the following opinion:

"The facts in this case are, shortly, as follows: During the early part of the year 1835, the American brig *Enterprise*, having on board a large number of slaves, while on her voyage from Alexandria, in the District of Columbia, to Charleston, in South Carolina, was driven from her course by prevailing contrary winds, and *being, by the delay thus occasioned, in want of provisions, put into the port of Hamilton*, in the Bermudas. On her arrival she was boarded by the colonial authorities and taken possession of on the ground of having slaves on board. Possession, however, was given up on the authorities being informed of the circumstances under which the vessel had put in.

"Before, however, the ship could leave the harbor a writ of habeas corpus was obtained at the instance of an association of free blacks in the island and served upon the captain, requiring his appearance before the court and the production of the slaves still remaining on board. Upon the argument of the case the court declared that there was no law authorizing the detention of the slaves, and they were accordingly set at liberty.

"Under these circumstances the United States Government claim compensation at the hands of the British Government in respect of the loss sustained by the owners of the slaves by their release, basing their demand on the following propositions: 'That a vessel on the high seas, in time of peace, engaged on a lawful voyage, is, according to the law of nations, under the exclusive jurisdiction of the state to which she belongs; and that *if such vessel is forced, by stress of weather or unavoidable circumstance*, into the port of a friendly power, her country in such case loses none of the rights appertaining to her on the high seas, either over the vessel or the personal relations of those on board.'[1]

[1] United States Senate resolutions, March, 1840.

"Mr. Webster, in his letter to Lord Ashburton on the 1st of August 1842 states the second of these propositions in somewhat different language. He says: 'If a vessel be driven by stress of weather into the port of another nation it would hardly be alleged by anyone that by the mere force of such arrival within the waters of the state the law of that state would so attach to the vessel as to affect existing rights of property between persons on board, whether arising from contract or otherwise. The local law would not operate to make the goods of one man to become the goods of another man; nor ought it to affect their personal obligations or existing relations between themselves.'

"It is undoubtedly true, as a general proposition, that a vessel driven by a stress of weather into a foreign port is not subject to the application of the local laws, so as to render the vessel liable to penalties which would be incurred by having voluntarily come within the local jurisdiction. The reason of this rule is obvious. It would be a manifest injustice to punish foreigners for a breach of certain local laws unintentionally committed by them, and by reason of circumstances over which they had no control.

"Thus, to cite one of the most ordinary instances in which the rule is applied: A storm drives a vessel, having a perfectly legal cargo according to the laws of the country from which it sailed, or to which it is bound, into the port of a country where such a cargo is illegal and contraband. To subject this cargo to the same penalty as if it were clandestinely smuggled would be unjust. Our law, therefore, says: 'The laws of the country which gives you a national character shall be considered as protecting you, and if it is not an illegal cargo in your own country it shall not be so considered in the country into which you have been involuntarily brought.' And this is precisely what was done in the case of the *Enterprise*. The cargo was legal according to the laws of America, illegal according to the laws of England, and if brought within British jurisdiction it rendered the vessel liable to confiscation. It was brought within that jurisdiction, but under circumstances which exempted it from the penalty, and accordingly so far the rule of international law was admitted and allowed to prevail. But more is demanded, for the claim is for indemnity, because the cargo had, by mere act and operation of natural law and of English law, resumed a character denied it by American law. While the vessel is to the extent alluded to free from the operation of local laws, it by no means follows that it is entitled to absolute exemption from the local jurisdiction; as, for example, it can scarcely be contended that persons on board the vessel would not be subject to the local jurisdiction for crimes committed within it. If acts of violence were committed on board against subjects of the country to which the port belonged, or if a subject should be wrongfully detained on board, the local tribunals would be entitled

to interfere to preserve the peace or protect the injured person. This position may be illustrated by the law applicable to the case of vessels of war entering a foreign port. It is admitted by most, if not all, of the writers on international law that national vessels are exempt from the local law. (See the case of the *Santissima Trinidad*, 7 Wheaton, 352; Wheaton's International Law, Vol. I. p. 115; Phillimore's Comm. on International Law, pp. 368, 373.) They are, as it were, entitled to a species of extraterritoriality; yet it has been held by the Executive of the United States, on the authority of two Attorneys-General, that a foreign vessel of war entering its harbor is not entitled to absolute exemption from its jurisdiction.[1] * * *

"This explanation of the law of nations shows that when a vessel is in a foreign port under such circumstances as entitle it to exemption from the application of the local law, the exemption can not be put on the same ground as the immunity from interference of a vessel on the high seas, for there in time of peace it is absolute. There is no right on the part of a foreign court even to inquire into the legality of anything occurring in the vessel of another country while at sea; but within the territories of a country the local tribunals are paramount, and have the right to summon all within the limits of their jurisdiction, and to inquire into the legality of their acts and determine upon them according to the law which may be applicable to the particular case. It appears to me, therefore, that it can not with correctness be said 'that a vessel forced by stress of weather into a friendly port is under the exclusive jurisdiction of the state to which she belongs in the same way as if she were at sea.' She has been brought within another jurisdiction against her will, it is true, but equally against the will and without fault on the part of the foreign power; she brings with her (by the law of nations) immunity from the operation of the local laws for some purposes, but not for all,

[1] Here Mr. Hornby quotes from the opinions of Bradford, Attorney-General, 1794, I. Op. 47, and Lee, Attorney-General, 1799, I. Op. 87. In the former opinion it was held that a writ of habeas corpus might be awarded to bring up an "American subject" unlawfully detained on board a foreign man-of-war, the commander being amenable to the usual jurisdiction of the State where he happened to be, and not entitled to claim the extraterritoriality which is annexed to a foreign minister and his domicil. It must be admitted that the opinion is not in all respects well argued. In the second case Attorney-General Lee advised that criminal and civil process might be served on board a British man-of-war lying within the waters of the United States, basing his opinion on the provision in Article XXIII. of the Jay Treaty of 1794, "that the ships of war of each of the contracting parties shall at all times be hospitably received in the ports of the other, *their officers and crews paying due respect* to the laws and government of the country." But in 1855 and 1856 Attorney-General Cushing asserted the exemption of foreign ships of war from the local jurisdiction. (7 Op. 122; 8 Op. 73.)

and the extent of that immunity is the proper subject of investigation and adjudication by the local tribunals. Let us consider, then, the principles which ought to guide the local courts in this investigation.

"It is true that by what is termed the 'comity of nations' the laws of one country are, in some cases, allowed by another to have operation; but in those cases the foreign law has its authority in the other country from the sanction, and to the extent only of the sanction, given to it there, and not from its original institution. On this subject Vattel observes: 'It belongs exclusively to each nation to form its own judgment of what its conscience prescribes to it—of what it can or can not do, of what is proper or improper for it to do; and of course it rests solely with it to examine and determine whether it can perform any office for another nation without neglecting the duty which it owes to itself; and for any other state to interfere, to compel her to act in a different manner, would be an infringement of the liberty of nations.' (Story's Conflict of Laws, chap. 2, sec. 37, citing Vattel, Prelim. Diss. pp. 61, 62, sec. 14, 16; Story's Conflict of Laws, chap. 2, sec. 25; and see also sec. 24.)

"From these principles it results that no nation can be called upon, or ought, to permit the operation of foreign laws within its territory when those laws are contrary to its interests or its moral sentiments.[1] * * *

"The question then resolves itself into this: In what cases and to what extent does the law of nations require that the local law shall admit the application of the rules of the foreign law instead of its own? It is conceded that the foreign law must be admitted to regulate the rights of property (properly so called) concerning chattels on board the vessel, and for some other purposes; but the question we have now to determine is whether the law of nations requires that the local law, which ignores and forbids slavery, shall admit within its jurisdiction the foreign, which maintains slavery.

"Now, the two fallacies which appear to me to pervade the whole of the argument in support of the claim and deprive it of its whole force are these: First, that slaves are property in the ordinary sense of the word; and, secondly, that international law requires that the right of the master to the person of his slave, derived from local law, shall be recognized everywhere.

"It is true that by the municipal law of particular countries slaves may be treated as, and may even be declared to be, property, and this has, in past times, been the case in some portions of the English dominions; but there is an essential difference

[1] On this question Mr. Hornby cites the opinion of Mr. Justice Story in *Prigg* v. *Commonwealth of Pennsylvania*, 16 Peters, 593; 2 Kent's Comm. 4th ed. p. 457; *Saul* v. *His Creditors*, 5 Mart. (La.) N. S. 569.

between the rights of owners in their slaves and ordinary property. This difference is clearly laid down by an eminent American judge in the case of the *Commonwealth* v. *Aves*, 18 Pickering's Reports, 216. Chief Justice Shaw there says, 'That it is not speaking with strict accuracy to say that a property can be acquired in human beings by local laws. Each State may, for its own convenience, declare that slaves shall be deemed property, and that the relations and laws of personal chattels shall be deemed to apply to them; but it would be a perversion of terms to say that such local laws do *in fact* make them personal property *generally;* they can only determine that the same rules of law shall apply to them as are applicable to property, and this effect will follow only as far as such laws *proprio vigore* can operate.'

"Mr. Webster, however, does not hesitate to place the relation of slavery on the same footing with that of marriage and parental authority; but the answer to this attempted comparison consists in this, that all nations and societies acknowledge marriage and parental authority. They are, indeed, the very foundation of society; they may vary in form, but the essence remains the same; they can not so much be said to be in conformity with the law of nature as to be themselves natural laws. This is not the case with slavery, which is contrary to the law of nature, and, so far from being acknowledged by all nations, is now repudiated by almost all. Property in things, however, being recognized in all countries, it follows that in case of shipwreck 'the local law would not operate to make the goods of one man to become the goods of another.' But to make this *dictum* an authority for the principle contended for, it must first be established that there is no distinction between property in man and property in beasts and things.

"In the case of *Jones* v. *Vanzandt* (2 McLean, 596) it was held that no action could be maintained at common law for assisting a slave to escape, or harboring him after his escape into a free State, and that damages were only recoverable in such a case by virtue of the Constitution of the United States. In giving judgment in that case Mr. Justice McLean observed: 'The traffic in slaves does not come under the constitutional power of Congress to regulate commerce among the several States. *In this view the Constitution does not consider slaves as merchandise.* This was held in the case of Grooves and Slaughter. (18 Peters.) The Constitution nowhere speaks of slaves as property. * * * The Constitution treats of slaves as persons.' 'The view of Mr. Madison, who thought it wrong to admit in the Constitution the idea that there could be property in man, seems to have been carried out in this most important instrument. Whether slaves are referred to in it as the basis of representation, as migrating, or being imported, or as fugitives from labor, they are spoken of as persons.' 'What have we to do with slavery in the abstract? It is admitted by almost all who have examined into the subject to be founded in wrong, in oppression, in power against right.'

"There is yet another case which affords a further striking illustration of the fact that American law recognizes an essential difference between property in slaves and property in things, so as to affect the rights of the owner independently of his will. The second section of the fourth article of the Constitution protects every slave owner from loss of his slaves by means of their flying into a free State; it gives him a right to follow the slave and seize him wherever he may find him. Yet, in the case of *The Commonwealth* v. *Holloway* (2 Sergt. and Rawle, 304), it was held that where a female slave fled into Pennsylvania, and there gave birth to a child, though she herself might be reclaimed by the owner, her child could not but remain free by virtue of the law of the State, which declared that 'no man or woman of any nation shall at any time hereafter be deemed, adjudged, or holden within the territories of this commonwealth, as slaves or servants for life, but as free men and women.' Now, it is obvious that if the property in the female slave were regarded in the same light as property in an animal, the ordinary rule of law, '*partus sequitur ventrem*,' referred to by the learned agent of the British Government, would have been applicable. In that case, as in the present, the slave owner might have said as he now says: 'It was not by my consent that that which by the laws of my country I am entitled to claim as my property has been brought within the operation of your laws. My slave and her increase are mine; am I to be deprived of that increase because it has been by misadventure cast away upon your soil?' But the American law, in the case before me, as the English law, answers: 'It may be that in your own State you would have had the right you claim; but we do not acknowledge that you have a right of property in this human being as you could have in a horse or dog; if you had, your consent alone would be considered in the matter; but as it is, here is an intelligent being who is entitled to be dealt with by our law, which we sit here to administer, and not yours, as a man, and by that law it is declared that no man shall be a slave.' In the case also of *Prigg* v. *The Commonwealth of Pennsylvania* (16 Peters, 608), it was again held that the offspring of a fugitive slave could not be reclaimed by the owner. On the authority, then, of these cases, it may be considered as settled that by the law of the United States the presence or absence of consent or voluntariness on the part of the owner has nothing whatever to do with the question of whether his slave, when *within* the territory of a State, no matter how brought, which does not acknowledge slavery, shall be free or not. The answer that must be given by the local tribunals, when called upon, must depend upon the positive law of the place. In the United States, the Constitution has provided an answer in the fourth article; but when the circumstances are such that the letter of that enactment or some other is not applicable, the American law declares, like the English law, that it does not recognize property in man, but regards them all alike, whether black or white, as entitled to be free.

"Mr. Justice Story thus distinctly explains the general principle of public law on this subject, and the modifications which have been introduced by the United States Constitution: 'By the general law of nations *no nation is bound to recognize the state of slavery as to foreign slaves found within its territorial dominions*, when it is in opposition to its own policy and institutions, in favor of the subject of other nations where slavery is recognized. If it does, it is a matter of comity and not a matter of international right. The state of slavery is deemed to be a municipal regulation, founded upon and limited to the range of territorial laws. This was fully recognized in Somersett's case. It is manifest, then, from this consideration of the law that if the Constitution had not contained this clause, every nonslaveholding State in the Union *would have been at liberty to have declared free all slaves coming within its limits and to have given them entire immunity and protection against the claims of their masters*.' And again he says: 'The duty to deliver up fugitive slaves, in whatever State of the Union they may be found, and of course the corresponding power in Congress to use the appropriate means to enforce the duty, *derive their sole* validity and obligation exclusively from the Constitution of the United States, and are there for the first time recognized and established in that peculiar character.' (See also, id. ch. iv. sec. 96, pp. 165–6, of 3d edit.)

"That foreign nations, then, are not bound by any rule of international law to recognize slaves as property, and award to their owners the immunity which by the comity of nations is usually granted in respect of ordinary chattels, is clear from the course of legislation pursued by the United States; for, if they could be so bound, no law or action of the United States would have been necessary to compel one State denying the right and existence of property in a slave to deliver up a fugitive to another State admitting and maintaining the right, and for this reason that the law of nations, being as binding between State and State as between the United States and foreign countries, would have been sufficient for the purpose, and no special law would have been necessary. By what right, then, or by force of what argument, can the United States insist that Great Britain is to be bound by the law of nations to do that which, by its own legislation, it has proved beyond all question the separate States were not and could not be bound to do?

"It is evident, therefore, from a view of the American authorities alone, that the institution of slavery depends solely upon the laws of each individual State in which it is allowed, and that from its very nature it is only coextensive with the territorial limits of such laws. An American writer thus describes it: 'It is an institution,' says he, 'in which the slave has no voice. It operates *in invitum*. The slave is no party, either practically or theoretically, to the law under which he lives in servitude. It is, moreover, an exceptional law: one which depends solely for its observance on the *continuance of*

the power who made it. *The moment that power ceases, the objects of it are free to exercise their natural rights, which revive to them, because they were held only in subjection or abeyance by superior force*, but which could not be disturbed, alienated, or forfeited, except for some crime, springing as they do from the immutable and eternal principles of nature and justice.'

"It appears to me then to be clearly established by all the authorities on the subject, that nations or states are not bound to recognize the relation of master and slave which may be enacted by foreign law.

"In the case of *Forbes* v. *Cochrane* (2 B. and C. 448) Mr. Justice Holroyd says: 'A man can not found his claim to slaves upon any general right, because by the English law such right can not be considered as warranted by the general law of nations; and if he can claim at all, it must be by virtue of some right which he had acquired by the law of the country where he was domiciled; that when such rights are recognized by law, they must be considered as founded not upon the law of nature, but upon the particular law of that country, and must be coextensive, and only and strictly coextensive, with the territories of that state; but when the party gets out of the territory where it prevails, no matter under what circumstances, and under the *protection of another power, without any wrongful act done by the party giving the protection*, the right of the master, which is founded on the municipal law of the place only, *does not continue*.'

"The fallacy contained in the argument in opposition to this view of the law consists in ignoring the slave as a man, and in supposing him to be possessed of no rights, as against the individual endeavoring to keep him in slavery, which a foreign nation is justified in taking into consideration.

"As a man, the slave is as much entitled to appeal to the protection of our laws as his owner, and his claim must be adjudicated upon in conformity with the same principles. In the country whence he came, his voice could not be heard in the local courts, to assert the rights which he derived from nature, as against the municipal laws of the place where he was domiciled. When he is driven, together with his so-called owner, to the shores of this country or its colonies, those rights of his master which are founded on natural law, such as property, marriage, etc., etc., are respected. Why then are we to be deaf to the appeal of the slave, when he also asks to have his rights, which are equally founded on natural law, respected? We have to choose between the natural law, supported by our own law, and foreign municipal law in direct opposition to both.

"The choice is none of our seeking, it is cast upon us by chance. It would be to make international law a partial tyrant rather than an equal arbitrator between nations—to hold that one country can be bound under any circumstances, without fault of its own, to reject the law of nature and its own law, in favor of a foreign local law in opposition to both. * * *

"Lord Palmerston, in effect, states the principle thus announced when, with the concurrence of those eminent men who now fill the highest judicial seats in the country, viz, the present lord chancellor, the lord chief justice of England, and the judge of the admiralty court, he declares that a distinction exists between laws bearing upon the personal liberty of man and laws bearing upon the property which man may claim in irrational animals or in inanimate things.

"'If a ship,' says his lordship in a dispatch upon this subject, 'containing such animals or things, were driven by stress of weather into a foreign port, the owner of the cargo would not be justly deprived of his property by the operation of any particular law which might be in existence in that port, because in such a case there would be but two parties interested in the transaction—the foreign owner and the local authority; and it would be highly unjust that the former should be stripped of what belongs to him through the forcible application of the municipal law of a state to which he had not voluntarily submitted himself.

"'But in a case in which a ship so driven into a foreign port by stress of weather contains men over whose personal liberty another man claims to have an acquired right, there are three parties to the transaction—the owner of the cargo, the local authority, and the alleged slave; and the third party is no less entitled than the first to appeal to the local authority for such protection as the law of the land may afford him. But if men who have been held in slavery are brought into a country where the condition of slavery is unknown and forbidden, they are necessarily, and by the very nature of things, placed at once in the situation of aliens who have at all times from their birth been free.

"'Such persons can in no shape be restrained of their liberty by their former master any more than by any other person.

"'If they were given up to such former master they would be aggrieved, and would be entitled to sue for damages. But it would be absurd to say that when a state has prohibited slavery within its territory, this condition of thing must arise, namely, that as often as a slave ship shall take refuge in one of the ports of that state, liability must necessarily be incurred, either to the former owner of the slaves, if the slaves be liberated, or to the slaves themselves, if they are delivered up to the former owner.

"'If, indeed, a municipal law be made which violates the law of nations, a question of another kind may arise. But the municipal law which forbids slavery is no violation of the law of nations. It is, on the contrary, in strict harmony with the law of nature; and therefore, when slaves are liberated according to such municipal law, there is no wrong done and there can be no compensation granted.'

"I have hitherto considered this case upon general principles, because, as other cases may occur, it is important to lay

down general rules; but the special circumstances of the case would disentitle the claimants to compensation.

"One ground, if indeed it be not the chief ground, upon which this claim has been rested is that the *Enterprize* was compelled by *necessity* to put into the port of Bermuda, and that on this account the owners of the slaves were entitled to claim exemption from the operation of English law. I do not think, however, that any such case of necessity has been made out as would give rise to the exemption contended for, if under any circumstances it could arise. It is not pretended that the *Enterprize* was forced by storm into Bermuda. All that is asserted is that her provisions ran short by reason of her having been driven out of her course. No case of pressing, overwhelming need is shown to have existed; but, to avoid the inconvenience of short rations (and, considering the nature of the cargo, it was an inconvenience which a very slight delay was likely to occasion), the master put into an English harbor to procure supplies. These facts do not certainly disclose that paramount case of necessity which has been insisted on throughout the argument, and which alone (if any circumstances could give rise to the exemption upon which this claim is supported) could form the basis of such an appeal as the present. If a mere scarcity of provisions, which might arise from so many causes, is to be considered not only as a sufficient excuse for the entrance of a vessel into a British port with a prohibited cargo but is also to entitle it to an exemption from the operation of the English law, it is impossible to say to what the admission of such a principle might lead, or what frauds on the part of slave speculators it might induce.

"With respect to the cases of the *Comet* and *Encomium* it has been insisted that they are not distinguishable in principle from that of the *Enterprize*, and that, as the English Government granted compensation in these cases, we are bound by the precedent thus made. Those vessels, however, were driven into English ports, and the slaves on board were set free before the passing of the act abolishing slavery. There was, therefore, no importation within the meaning of the act (5 Geo. IV. ch. 113) which declared it illegal to import slaves and made it a felony to do so, and consequently there was no breach of the English law. Being then in an English port, the only question was whether there was any law which prevented their owners retaining possession of them. At that time there was not. Slavery was then in full force in the Bahamas, and of the same kind as that to which the American slaves were subject. The possession of the slaves was not therefore unlawful, nor was the relation between them and their masters liable to be dissolved by the mere accidental arrival of both in the colony. But at the time when the *Enterprize* was brought into the port of Hamilton, Great Britain had utterly and forever abolished the status of slavery throughout the British colonies and plantations abroad (see act of 3 and 4 Wm. IV. ch. 73, sec. 9),

and by the act of the colonial legislature the apprenticeship system, created by the act of William IV. was dispensed with. Slavery, therefore, in no form whatever, was known in the Bermudas at the time the *Enterprize* entered the port. It was impossible, therefore, that any judge called upon to administer the law within these islands could, for any purpose or under any circumstances, recognize the relation of master and slave as subsisting within the reach of his authority.

"Under these circumstances I am clearly of opinion that the claim of the owners of the slaves on board the *Enterprize* at the time she put into Port Hamilton can not be sustained, and that it ought, upon every principle of law, to be rejected."

Decision of the Umpire.

The umpire delivered the following decision:

"This claim is presented on behalf of the Charleston Marine Insurance Company of South Carolina, and of the Augusta Insurance Company in Georgia, for the recovery of the value of seventy-two slaves, forcibly taken from the brig *Enterprize*, Elliot Smith, master, on the 20th of February, 1835, in the harbor of Hamilton, Bermuda. The following are the facts and circumstances of the case: The American brig *Enterprize*, Smith, master, sailed from Alexandria, in the District of Columbia, in the United States, on the 22d of January, 1835, bound for Charleston, South Carolina. After encountering head winds and gales, and finding their provisions and water running short, it was deemed best by the master to put into Hamilton, in the island of Bermuda, for supplies. She arrived there on the 11th of February. Having taken in the supplies required, and having completed the repair of the sails, she was ready for sea on the 19th with the pilot on board. During the repairs no one from the shore was allowed to communicate with the slaves. The vessel was kept at anchor in the harbor, and was not brought to the wharf. Being thus ready for sea, Captain Smith proceeded, with his agent, to the custom-house to clear his vessel outward. The collector stated that he had received a verbal order from the council to detain the brig's papers until the governor's pleasure could be known.

"The comptroller and a Mr. Tucker then went to the other public offices, and on their return to the custom house the comptroller, after consulting for a few minutes with the collector, declared that he would not give up the papers that evening, but would report the vessel out the next morning as early as the captain might choose to call for the papers.

"In consequence of this decision, the captain immediately noted his protest in the secretary's office against the collector and comptroller for the detention of his ship's papers, and informed the officer of the customs he should hold them responsible; that he (the captain) feared the colored people of Hamilton would come on board his vessel at night and rescue the slaves, as they had threatened to do.

"The collector then replied there was no danger to be apprehended, that the colored people would not do anything without the advice of the whites, and they knew the laws too well to disturb Captain Smith. At 20 minutes to 6 o'clock p. m., the chief justice sent a writ of habeas corpus on board, and afterwards a file of black soldiers armed, ordering the captain to bring all the slaves before him, the chief justice, which Captain Smith was obliged to do. On the slaves being informed by the chief justice that they were free persons, seventy-two of them declared they would remain on shore, which they did, and only six of them returned on board to proceed on the voyage.

"This is believed to be a faithful sketch of the case, from which it appears that the American brig *Enterprize* was bound on a voyage from one port in the United States to another port of the same country, which was lawful according to the laws of her country and the law of nations. She entered the port of Hamilton in distress for provisions and water. No offence was permitted against the municipal laws of Great Britain or her colonies, and there was no attempt to land or to establish slavery in Bermuda in violation of the laws.

"It was well known that slavery had been conditionally abolished in nearly all the British dominions about six months before, and that the owners of slaves had received compensation, and that six years' apprenticeship was to precede the complete emancipation, during which time apprentices were to be bought and sold as property, and were to be liable to attachment for debt.

"No one can deny that slavery is contrary to the principles of justice and humanity, and can only be established in any country by law. At the time of the transaction on which this claim is founded, slavery existed by law in several countries, and was not wholly abolished in the British dominions. It could not, then, be contrary to the law of nations, and the *Enterprize* was as much entitled to protection as though her cargo consisted of any other description of property. The conduct of the authorities at Bermuda was a violation of the laws of nations, and of those laws of hospitality which should prompt every nation to afford protection and succor to the vessels of a friendly neighbor that may enter their ports in distress.

"The owners of the slaves on board the *Enterprize* are therefore entitled to compensation, and I award to the Augusta Insurance and Banking Company or their legal representatives the sum of sixteen thousand dollars, and to the Charleston Marine Insurance Company, or their legal representatives, the sum of thirty-three thousand dollars, on the fifteenth of January 1855."

Bates, umpire, case of the *Enterprize*, convention between the United States and Great Britain of February 8, 1853. (S. Ex. Doc. 103, 34 Cong. 1 sess. 187–237.)

Case of the "Hermosa."

Two other cases, the *Hermosa* and the *Creole*, involving substantially the same principles as the case of the *Enterprize*, were submitted by the commissioners to the umpire on the opinions delivered by them in the latter case.

The umpire rendered the following decisions:

"The umpire appointed agreeably to the provisions of the convention entered into between Great Britain and the United States on the 8th of February 1853, for the adjustment of claims by a mixed commission, having been duly notified by the commissioners under the said convention that they had been unable to agree upon the decision to be given with reference to the claim of H. N. Templeman against the Government of Great Britain; and having carefully examined and considered the papers and evidence produced on the hearing of the said claim; and having conferred with the said commissioners thereon, hereby reports that the schooner *Hermosa*, Chattin, master, bound from Richmond, in Virginia, to New Orleans, having thirty-eight slaves on board belonging to H. N. Templeman, was wrecked on the 19th October 1840 on the Spanish key Abaco.

"Wreckers came alongside and took off the captain and crew and the thirty-eight slaves, and, contrary to the wishes of the master of the *Hermosa*, who urged the captain of the wrecker to conduct the crew, passengers, and slaves to a port in the United States, they were taken to Nassau, New Providence, where Captain Chattin carefully abstained from causing or permitting said slaves to be landed, or to be put in communication with any person on shore, while he proceeded to consult with the American consul, and to make arrangements for procuring a vessel to take the crew and passengers and the slaves to some port in the United States.

"While the vessel in which they were brought to Nassau was lying at a distance from the wharves in the harbor, certain magistrates wearing uniform, who stated themselves to be officers of the British Government, and acting under the orders of the civil and military authorities of the island, supported by soldiery wearing the British uniform, and carrying muskets and bayonets, took forcible possession of said vessel, and the slaves were transported in boats from said vessel to the shore, and thence, under guard of a file of soldiers, marched to the office of said magistrates, where after some judicial proceedings, they were set free, against the urgent remonstrances of the master of the *Hermosa* and of the American consul.

"In this case there was no attempt to violate the municipal laws of the British colonies. All that the master of the *Hermosa* required was that aid and assistance which was due from one friendly nation to the citizens or subjects of another friendly nation, engaged in a business lawful in their own country, and not contrary to the law of nations.

"Making allowance, therefore, for a reasonable salvage to the wreckers, had a proper conduct on the part of the authorities at Nassau been observed, I award to the Louisiana State Marine and Fire Insurance Company, and the New Orleans Insurance Company (to which institutions this claim has been transferred by H. N. Templeman), or their legal representatives, the sum of sixteen thousand dollars, on the fifteenth January 1885, viz, eight thousand dollars to each company."

Bates, umpire, case of the *Hermosa*, convention between the United States and Great Britain of February 8, 1853. (S. Ex. Doc. 103, 34 Cong. 1 sess. pp. 239–240.)

Case of the "Creole."

"This case having been submitted to the umpire for his decision, he hereby reports that the claim has grown out of the following circumstances:

"The American brig *Creole*, Captain Ensor, sailed from Hampton Roads, in the State of Virginia, on the 27th October 1841, having on board one hundred and thirty-five slaves, bound for New Orleans. On the 7th of November, at 9 o'clock in the evening, a portion of the slaves rose against the officers, crew, and passengers, wounding severely the captain, the chief mate, and two of the crew, and murdering one of the passengers. The mutineers, having got complete possession of the vessel, ordered the mate, under threat of instant death should he disobey or deceive them, to steer for Nassau, in the island of New Providence, where the brig arrived on the 9th of November 1841.

"The American consul was apprised of the situation of the vessel and requested the governor to take measures to prevent the escape of the slaves and to have the murderers secured. The consul received reply from the governor stating that under the circumstances he would comply with the request.

"The consul went on board the brig, placed the mate in command in place of the disabled master, and found the slaves all quiet.

"About noon twenty African soldiers, with an African sergeant and corporal, commanded by a white officer, came on board. The officer was introduced by the consul to the mate as commanding officer of the vessel.

"The consul on returning to the shore was summoned to attend the governor and council, who were in session, and who informed the consul that they had come to the following decision:

"'1st. That the courts of law have no jurisdiction over the alleged offenses.

"'2d. That as an information had been lodged before the governor charging that the crime of murder had been committed on board said vessel while on the high seas, it was expedient that the parties implicated in so grave a charge should not be allowed to go at large, and that an investigation ought therefore to be made into the charges, and examination taken on oath; when, if it should appear that the original information was correct, and that a murder had actually been committed, that all parties implicated in such crime or other acts of violence should be detained here until reference could be made to the Secretary of State to ascertain whether the parties should be delivered over to the United States Government; if not, how otherwise to dispose of them.

"'3d. That as soon as such examinations should be taken, all persons on board the *Creole* not implicated in any of the offences alleged to have been committed on board that vessel must be released from further restraint.'

"Then two magistrates were sent on board. The American consul went also. The examination was commenced on Tuesday the 9th, and was continued on Wednesday the 10th, and then postponed until Friday on account of the illness of Captain Ensor. On Friday morning it was abruptly, and without any explanation, terminated.

"On the same day a large number of boats assembled near the *Creole*, filled with colored persons armed with bludgeons. They were under the immediate command of the pilot who took the vessel into the port, who was an officer of the government, and a colored man. A sloop or larger launch was also towed from the shore and anchored near the brig. The sloop was filled with men armed with clubs, and clubs were passed from her to the persons in the boats. A vast concourse of people were collected on shore opposite the brig.

"During the whole time the officers of the government were on board they encouraged the insubordination of the slaves.

"The Americans in port determined to unite and furnish the necessary aid to forward the vessel and negroes to New Orleans. The consul and the officers and crews of two other American vessels had, in fact, united with the officers, men, and passengers of the *Creole* to effect this. They were to conduct her first to Indian Key, Florida, where there was a vessel of war of the United States.

"On Friday morning the consul was informed that attempts

would be made to liberate the slaves by force, and from the mate he received information of the threatening state of things. The result was that the attorney-general and other officers went on board the *Creole*. The slaves identified as on board the vessel concerned in the mutiny were sent on shore, and the residue of the slaves were called on deck by direction of the attorney-general, who addressed them in the following terms: 'My friends,' or 'my men, you have been detained a short time on board the *Creole* for the purpose of ascertaining what individuals were concerned in the murder. They have been identified and will be detained. The rest of you are free and at liberty to go on shore and wherever you please.'

"The liberated slaves, assisted by the magistrates, were then taken on board the boats, and when landed were conducted by a vast assemblage to the superintendent of police, by whom their names were registered. They were thus forcibly taken from the custody of the master of the *Creole* and lost to the claimants.

"I need not refer to authorities to show that slavery, however odious and contrary to the principles of justice and humanity, may be established by law in any country; and, having been so established in many countries, it can not be contrary to the law of nations.

"The *Creole* was on a voyage, sanctioned and protected by the laws of the United States, and by the law of nations. Her right to navigate the ocean could not be questioned, and as growing out of that right, the right to seek shelter or enter the ports of a friendly power in case of distress or any unavoidable necessity.

"A vessel navigating the ocean carries with her the laws of her own country, so far as relates to the persons and property on board, and to a certain extent retains those rights even in the ports of the foreign nations she may visit. Now, this being the state of the law of nations, what were the duties of the authorities at Nassau in regard to the *Creole*? It is submitted the mutineers could not be tried by the courts of that island, the crime having been committed on the high seas. All that the authorities could lawfully do was to comply with the request of the American consul, and keep the mutineers in custody until a conveyance could be found for sending them to the United States.

"The other slaves being perfectly quiet, and under the command of the captain and owners, and on board an American

ship, the authorities should have seen that they were protected by the law of nations, their rights under which can not be abrogated or varied, either by the emancipation act or any other act of the British Parliament.

"Blackstone, 4th volume, speaking of the law of nations, states: 'Whenever any question arises which is properly the object of its jurisdiction, such law is here adopted in its full extent by the common law.'

"The municipal law of England can not authorize a magistrate to violate the law of nations by invading with an armed force the vessel of a friendly nation that has committed no offense, and forcibly dissolving the relations which by the laws of this country the captain is bound to preserve and enforce on board.

"These rights, sanctioned by the law of nations—viz, the right to navigate the ocean and to seek shelter in case of distress or other unavoidable circumstances, and to retain over the ship, her cargo, and passengers the laws of her own country—must be respected by all nations, for no independent nation would submit to their violation.

"Having read all the authorities referred to in the arguments on both sides, I have come to the conclusion that the conduct of the authorities at Nassau was in violation of the established law of nations, and that the claimants are justly entitled to compensation for their losses. I therefore award to the undermentioned parties, their assigns or legal representatives, the sums set opposite their names, due on the 15th of January 1855."

Bates, umpire, case of the *Creole*, convention between the United States and Great Britain of February 8, 1853. (S. Ex. Doc. 103, 34 Cong. 1 sess. pp. 242–245.) The total amount awarded was $110,330.

Case of the "York."

The British ship *York*, while stranded on the coast of North Carolina, having been driven ashore by stress of weather while proceeding in ballast from Valencia, Spain, to Lewes, Delaware, was destroyed by two United States cruisers to prevent her from falling into the possession of the enemy. An award was unanimously made of $11,935 in gold, based on the value of the wreck at the time of its destruction.

American and British Claims Commission, treaty of May 8, 1871, Article XII. Hale's Report, 51. See also Howard's Report, 148.

Violation of Territory.

In 1854 claimant, by his agents, purchased a large lot of mares, mules, jacks, etc., and some saddle horses in the States of Coahuila and Nueva Leon and ran them across the Rio Grande into Texas in violation both of the laws of Mexico and of the United States. When they were some 9 miles on the Mexican side of the river, in camp, an armed party of Mexican soldiers came up and captured all the stock, removed it to the other side of the river, and delivered it to the Mexican authorities, by whom it was sold. The commissioners, Mr. Wadsworth delivering the opinion, held that the seizure of the property on the soil of the United States and its removal to and sale in Mexico by officials of that country was an injury to claimant for which he was entitled to indemnity under the treaty, notwithstanding his own bad conduct in evading the laws of Mexico.

George H. Giddings v. *Mexico*, No. 61, convention of July 4, 1868, MS. Op. II. 330.

Right of Self-Defense: Calcutta Saltpeter Cases.

By a royal proclamation of November 30, 1861, occasioned by the case of the *Trent*, Her Britannic Majesty, referring to "the customs consolidation act, 1853," prohibited the exportation from the United Kingdom of "gunpowder, saltpeter, nitrate of soda, and brimstone," as articles "capable of being converted into or made useful in increasing the quantity of military or naval stores."

By an ordinance of December 27, 1861, the governor-general of India, referring to the foregoing order, forbade the exportation of saltpeter "from any port of Her Majesty's territories in India, except in a British vessel, bound either to the port of London or to the port of Liverpool." By an ordinance of January 3, 1862, the restriction was modified so as to permit the exportation of saltpeter from India in a British vessel bound to any port of the United Kingdom; and it was ordered that any saltpeter previously loaded on a vessel not coming within the permission should be landed.

On December 27, 1861, there lay in the port of Calcutta three American vessels—the ships *Daring* and *Templar* and the bark *Patmos*. The *Daring* had then taken on board a quantity of saltpeter as part of her cargo, obtained a clearance therefor, and had paid the export duty thereon. After that date she completed the taking in of the remainder of her cargo, consisting of linseed, jute, etc., but including no saltpeter, and was completely laden on the 3d January 1862. The *Templar* had her

cargo all on board, including a quantity of saltpeter, on the 27th December. The *Patmos* also was fully laden, including 2,000 bags of saltpeter, on the 27th December.

The ordinances prohibiting the exportation of saltpeter were revoked February 28, 1862. Meanwhile the three vessels lay at Calcutta. In each case the saltpeter was at the bottom of the hold, so that its removal would have required the landing of the whole cargo; and the masters, believing that the prohibition would be only temporary, deemed it expedient to remain in port instead of attempting to land their cargoes and depart. They respectively protested, however, before the United States consul at Calcutta against the ordinances and the consequent detention of their vessels, claiming damages for demurrage. These claims formed the subject of diplomatic correspondence between the United States and Great Britain in 1862; and they were ultimately presented to the mixed commission under Article XII. of the treaty between the two countries of May 8, 1871.

Report of Mr. Hale.

Mr. Hale, the agent of the United States, made (Report, 32) the following summary of the cases:

"The provisions of the statute of 16th and 17th Victoria, under which the royal proclamation was issued and upon which the ordinances of the governor-general were founded, are recited in the royal proclamation above given. The provisions of the convention between the United States and Great Britain of July 3, 1815, continued by the conventions of 20th October 1818 and of 6th August 1827 and in force at the time of the acts in question, are as follows:

"'ARTICLE III. His Britannic Majesty agrees that the vessels of the United States of America shall be admitted and hospitably received at the principal settlements of the British dominions in the East Indies, videlicet: Calcutta, Madras, Bombay, and Prince of Wales Island; and that the citizens of the said United States may freely carry on trade between the said principal settlements and the said United States, in all articles of which the importation and exportation, respectively, to and from the said territories, shall not be entirely prohibited; provided only, that it shall not be lawful for them, in any time of war between the British Government and any state or power whatever, to export from the said territories, without the special permission of the British Government, any military stores or naval stores, or rice. The citizens of the United States shall pay for their vessels, when admitted, no higher or other duty or charge than shall be payable on the vessels of the most favored European nations, and they shall pay no higher or

other duties or charges on the importation or exportation of the cargoes of the said vessels than shall be payable on the same articles when imported or exported in the vessels of the most favored European nations.

"'But it is expressly agreed that the vessels of the United States shall not carry any articles from the said principal settlements to any port or place, except to some port or place in the United States of America, where the same shall be unladen.

"'It is also understood that the permission granted by this article is not to extend to allow the vessels of the United States to carry on any part of the coasting trade of the said British territories; but the vessels of the United States having, in the first instance, proceeded to one of the said principal settlements of the British dominions in the East Indies, and then going with their original cargoes, or part thereof, from one of the said principal settlements to another, shall not be considered as carrying on the coasting trade. The vessels of the United States may also touch for refreshment, but not for commerce, in the course of their voyage to or from the British territories in India, or to or from the dominions of the Emperor of China, at the Cape of Good Hope, the island of St. Helena, or such other places as may be in the possession of Great Britain in the African or Indian seas; it being well understood that in all that regards this article the citizens of the United States shall be subject, in all respects, to the laws and regulations of the British Government from time to time established.'

Argument for the Claimants.

"On the part of the claimants it was contended that, irrespective of treaty stipulations between the United States and Great Britain, the proclamation and ordinances were in effect an embargo on saltpeter-laden vessels bound for non-British ports, at least during the time it would take to unlade the saltpeter; that it was a civil, as distinguished from a hostile, embargo, not directed against vessels of the United States exclusively, but as a husbanding of resources merely, though in anticipation of probable hostilities, and thereby having some features of a hostile embargo; that even in the case of a hostile embargo, if war does not ensue, innocent sufferers have a just claim for indemnity, recognized by international law and practice; that *a fortiori* there is always a just claim for indemnity by sufferers in the case of a civil embargo; that the fact that the embargo was justified by the municipal law of Great Britain did not relieve that government from liability under international law; that the action of the American commander in the arrest of the *Trent* and the seizure and removal of the two passengers named were not justified by his instructions, and were subsequently disavowed by his government, and therefore no international wrong was ever committed by the United States; and that therefore such action afforded no justification of measures by the British Government in anticipation of war, even if the measures in question would have been justified by the

emergency, if the acts of the officer had been avowed by his government; that if the royal proclamation and the ordinances were not to be considered as constituting an embargo, but only a matter of domestic and police regulation, they certainly constituted a violation of the rights of friendly foreigners, and involved liability for compensation; and that in the case of the *Daring*, the ordinance of the 27th December having clearly given her the right to sail with the cargo already loaded, this permission, with the subsequent acts done and expense incurred by her owners on the faith thereof, in continuing to lade their cargo on top of the saltpeter, in reliance on the ordinance, constituted a contract, and entitled the vessel to the observance of that contract by the Indian authorities.

"Under the treaty between Great Britain and the United States, the claimants respectively contended that the right of the vessels in question to sail with the saltpeter on board was guaranteed by the terms of the treaty; that 'exportation' of saltpeter 'from the said territories' was not 'entirely prohibited' by the terms of the ordinances, for such exportation was allowed to England; that transportation from India to England was an 'exportation from the said territories,' and was so recognized by the terms of the proclamation itself, which recited, 'it shall not be lawful for any person to *export* saltpeter from any port of Her Majesty's territories in India, except in a British vessel bound either to the port of London or to the port of Liverpool;' that the acts in question were plainly not 'in time of war between the British Government and any state or power whatever;' that the language of the treaty providing 'that in all that regards this article, the citizens of the United States shall be subject in all respects to the laws and regulations of the British Government from time to time established,' could not be construed so as to authorize the local authorities to deny rights expressly stipulated for in the treaty, and formed no bar to the right of the claimants to sail with the saltpeter on board their vessels, the same having been lawfully taken on board.

"The claimants' counsel cited the Boedes Lust, 5 Rob. 246; Beawes Mer. Law, 276; U. S. Stats. at L., 381, reimbursing sufferers from the Bordeaux embargo; Dana's Wheaton, p. 4, § 15; p. 373, § 293; 3d Phill. 42; Honeyman *arguendo*, in Aubert *v.* Gray, 3 B. and S. Q. B. 179; letter of Lord Clarendon to Mr. Dallas, of May 15, 1856, Br. and Am. Dip. Cor.; Gardn. Inst. of Int. Law, 546.

Argument for Great Britain.

"Her Majesty's counsel maintained that both under international law, irrespective of treaty stipulation, and under the treaty stipulations between the United States and Great Britain, the proclamation and ordinances in question were lawful and valid, and involved no liability for compensation to parties injured by their provisions; that they were general regulations, not directed against the ships or cargoes of these claimants in particular, nor subjecting the ships or commerce of the United

States to any discrimination or disadvantage not common to all other foreign nations; that even British ships were subjected to the same disadvantages and the right of exporting saltpeter to the mother country reserved to them was a right which never had belonged to the United States; that commercial adventures of this character were, in the nature of things, subject to any modification of law which might affect the anticipated profits, and perhaps defeat them altogether; that the ordinances did not constitute an embargo in any just sense, whether hostile or civil; that they were municipal regulations of trade, not forbidden by any principle known to the law of nations, and that, aside from the treaty between the United States and Great Britain, they were clearly authorized by international law; that a just interpretation of the third article of the convention of 1815 must hold it not to prohibit the British Government from regulating the exportation of products of the Indies, from time to time, as might be deemed expedient, or in its discretion from temporarily prohibiting the exportation of some or all of such products to any foreign nation whatever, and that of the occasion of such prohibition and its extent, every nation must of necessity be for itself the sole judge; that the treaty permitting the trade between the Indian ports and the United States in articles the exportation of which 'shall not be entirely prohibited,' gave no right to those citizens to export saltpeter at the time in question, the exportation of that article being by the terms of the ordinances entirely prohibited; that the word 'exportation' referred to foreign commerce, and not to the transportation from the Indies to the home ports of Great Britain; that the reservation of the right of transportation to such home ports was in no respect prejudicial to the commerce of the United States, they having no right to participate in the trade between Indian ports and the ports of Great Britain; that the treaty itself providing for this trade also provided that the citizens of the United States should be subject in all respects to the laws and regulations of the British Government, and thus expressly subjected them to the operation of ordinances like those in question authorized by the statute upon which they were based; that the ordinances of 27th December and 3d January were just, caused by an act of an armed vessel of the United States in violation of international law, and affording a reasonable apprehension of hostilities to ensue between Great Britain and the United States; that in such case all means of protection and self-defense, not in themselves at variance with the ordinary principles of justice, and impartially used, were permissible to every government, and that this prerogative having been exercised *bona fide* for the safety of the realm on a particular emergency by a prohibition equally affecting native subjects and foreign merchants, the latter have no ground upon principles of international right or justice to require compensation for such an unavoidable diminution of their commercial profits."

Decision. The commission disallowed all the claims, Mr. Frazer dissenting.

Mr. Frazer's Dissenting Opinion. Mr. Frazer read a dissenting opinion, which, after reciting the facts, was as follows:

"1. In the absence of treaty stipulations relating to the subject, it is claimed that the facts constitute a just foundation for a claim.

"2. That the treaty of July 3, 1815, was violated, and therefore there arises a national liability for damages.

"If the case is within the treaty of 1815, it is, of course, immaterial to determine what should be our award in the absence of treaty stipulations. By the convention of August 6, 1827, that of 1815 was continued indefinitely, terminable on one year's notice, which was never given. This was before the statute 24 and 25 Vict., though I do not deem the fact important.

"If by treaty the British Government contracted *not to do* that which before it might lawfully and without liability have done, it can not afterward break its contract without a just liability to answer for the consequences.

"Was there, then, a contract by treaty, by the terms of which Great Britain engaged not to do the things complained of?

"By the third article of the treaty of 1815, His Britannic Majesty agreed that citizens of the United States might 'freely carry on trade between Calcutta, Madras, Bombay, and Prince of Wales Island, and the United States, in all articles of which the importation and exportation to and from *the said territories* shall not be entirely prohibited.' The 'said territories' can only mean Calcutta, Madras, Bombay, and Prince of Wales Island, for those only were the territories previously mentioned. To carry goods from Liverpool, or elsewhere in the United Kingdom, *to* Calcutta for sale, would, it can hardly be questioned, be an *importation* to '*said territories*' in the sense of the treaty; so, then, as long as the importation of a given article from Liverpool to Calcutta was not prohibited, it might also be imported from New York by citizens of the United States. In short, American merchants by that article of the treaty acquired the liberty to compete with British merchants in supplying the markets of '*said territories*.' This is the natural import of the language; and if these claims arose out of similar interference with American *importations to* Calcutta, say the prohibition to unlade an American cargo under a like ordinance, proclaimed after the arrival of the vessel at Calcutta, I can scarcely conceive that a demand for redress would be denied by Her Majesty's government. I think that in such a case the language of the treaty would be deemed too plain to admit of construction. And I can not but think that as to *importations* to 'said territories,' that language expresses the exact intention of the high contracting parties.

"As to *exportations*, it is not, I think, fairly susceptible of controversy that the literal import of the language used concedes to American citizens rights exactly coextensive with those which relate to importations. If not to prohibit the carrying of an article from Liverpool to the market of Calcutta is to allow that article to be *imported to* Calcutta, in the sense of the treaty; then it seems to me plain that not to prohibit the carrying of saltpeter *from* Calcutta *to* Liverpool is to allow saltpeter to be

exported *from* Calcutta. In other words, by the plainest language that could possibly have been employed, the quoted words of the treaty concede to the United States a right to export and import from or to 'those territories' alike, unless either as to the specified articles shall be prohibited entirely, which is not done if exports be allowed *from* 'those territories,' or if imports be allowed *to* 'those territories.'

"The question remains, Was the taking of saltpeter from Calcutta to Liverpool an exportation of that article *from Calcutta* in the sense of the treaty?

"It is admitted in the intelligent argument of Her Majesty's counsel that in some sense the carriage of an article from Calcutta, 'whether to a port in the United Kingdom or to a foreign port, is an *exportation*,' nor can this be questioned philologically. The word itself includes the former as well as the latter, whether reference be had to its strict sense or its popular use. For proof of this use, indeed, it is only necessary to refer to the very ordinances complained of in these cases, in both of which the word is several times used in that very sense, and certainly without impropriety. It is also used by Earl Russell in the same sense, in his correspondence with Mr. Adams concerning these claims. It is also used in the statute laws of both countries, as well to indicate the carrying of goods from distant colonies or possessions as from countries wholly foreign.

"So much for the mere words of the treaty. Looking only at the language quoted, the conclusion would seem to be that Great Britain engaged by the treaty to permit citizens of the United States to export from Calcutta to the United States such articles as she should permit to be exported to the United Kingdom or any other place; *i. e.*, the exportation of which should not be '*entirely* prohibited.' But the words of a treaty must be construed with reference to their subject-matter, so as to forward the intent of the high contracting parties, and not defeat it, and so as to avoid absurd results.

"Now, the intent of the third article of the treaty of 1815 undoubtedly was to give to the United States the liberty of direct trade with the places mentioned in the East Indies; so that Americans might purchase and sell *there*, and with their own ships transport goods to and from their own country, from and to those places. The mischief sought to be remedied was that the United States Government was previously obliged to supply herself with the products of those places at second hand in the markets of Great Britain, and could only exchange her products with them through the same indirect channel.

"Now, it must be seen at once that if the British Government reserved to itself the right asserted (continuing herself to trade there), then the concession which seemed to be made was a mere delusion and snare to American merchants, giving no right which Great Britain might not withdraw at any moment with advantage to her own merchants at home. In short, she could at will resume the entire monopoly of the trade with her East Indian possessions; for it must be borne in mind that the language under consideration, by virtue of which it is contended that the ordinances in question can be justified, applies quite as well to all other commodities as to saltpeter, and to imports as well as to exports. A treaty stipulation with such a meaning would be worse than an utter nullity.

"There are some other clauses found in this article of the treaty which need to be considered. There is the clause usual in commercial treaties, which makes citizens of the United States trading in those places 'subject in all respects to the laws and regulations of the British Government from time to time established.' Of this it is, perhaps, sufficient to say that it can not be supposed that such a clause is a reservation of authority to prohibit the very trade which it was the leading purpose of the article to allow. In the language of Earl Russell concerning the same clause, in the first article of the treaty (letter to Lord Lyons of December 17, 1862), 'it does not mean that the principal engagement itself may be nullified, or may be rendered illusory either in whole or in part * * * but merely that obedience is to be rendered by foreign traders * * * to all the laws and statutes enacted * * * for the ordinary and legitimate purposes of internal government and administration. * * * I have to observe (he adds) that it is a well-known maxim that treaties are to be interpreted in good faith, and in such a manner that they may have their effect and not be rendered vague or illusory.' And Mr. Seward's reply (letter to Lord Lyons of January 9, 1863) contains a virtual admission of the correctness of the principle so well stated by Earl Russell.

"It may be added that it is impossible to perceive the force of the argument that a year's notice should be given to terminate the treaty, if it was provided that it could be effectually nullified by one of the parties at will by an act of legislation.

"But there remains a consideration of much greater weight, as I think, than those which have been alluded to above. Self-preservation and self-defense are sacred rights of nations as well as of individuals, and nothing in a treaty should be taken to have impaired the right of a nation to make prudent preparations for them by husbanding its means of war, when that event seems probable, unless the terms of the stipulation will admit of no other construction.

"There is a provision in the article under consideration which shows clearly that the exigency of possible war was distinctly in mind when the treaty was concluded. Indeed, such were the events then existing in the history of both countries that it would have been remarkable if it had not been. The provision is in those words:

"'Provided only that it shall not be lawful for them (citizens of the United States), in any time of war between the British Government and any state or power whatever, to export from the said territories, without the special permission of the British Government, any military stores or naval stores, or rice.'

"This exception to the general liberty to trade conceded before is free from all ambiguity. That it covers only the case of actual war, shows most clearly that it was not deemed important and was not intended to make any reservation for the case of war merely apprehended. The one thing being expressed, all else is excluded. *Expressio unius est exclusio alterius.* This maxim of interpretation is sensible and sound, and I think never was more applicable in any case than here.

"If I have correctly interpreted the treaty, then it is of no consequence whatever that the ordinances applied to all nations alike. A specific engagement definite in its terms can be fulfilled only by the performance

of it in all its substantial parts. It is not to be confounded with an engagement to extend only the privileges which shall be allowed to other powers or to the most favored nation.

"These considerations seem to me to establish very clearly the validity of these claims, and I am of opinion that damages should be awarded accordingly."

Duty to Restore Property Piratically Captured.

George Houghton, a British merchant, was on his way from the Canary Islands to Madeira, in a Spanish vessel, when, on May 23, 1816, the vessel was seized and robbed by pirates, most of the crew being put to death. Houghton alleges that he lost £1,500 in gold and silver by the robbery. Soon afterward the vessel was taken by a United States cruiser, and her piratical crew were tried for piracy. The vessel herself was sold, and part of the proceeds, together with half of what was found on board at the time of the seizure, were paid into the United States Treasury. Houghton claimed before the commission under the convention between the United States and Great Britain of February 8, 1853, such just compensation from the United States as the commissioners might deem it right to award him, after deduction of proper salvage and expenses. The following decision was rendered:

"This case has been submitted to us by the claimants and counsel as one entitled, as far as we can consider it, to our sympathy and to such relief as may be granted within the powers committed to us.

"The prominent facts set forth in the memorial of the claimant are clearly shown. The property of which he was divested in no manner passed to those who deprived him of it, and its capture by a government vessel of the United States did not change the right of ownership, except to the extent of such just claim of salvage as should be allowed on this account.

"On every principle of justice and equity, and, as we believe, of sound international law, the claimant is entitled to remuneration to the extent named. It is to be regretted, however, that application was not early made to sustain the claim by the requisite proof before the proper tribunal appointed for this purpose, but we do not consider this omission should preclude him from all relief here.

"The right to recover in such case is not a mere matter of clemency on our part. The obligation to make compensation or restoration where property has been piratically seized on the high seas has been recognized in the treaties between the two governments, and their aid mutually pledged both to punish such offences and to restore such property.

"The twentieth article of the treaty of amity, commerce, and navigation concluded between the United States and Great Britain on the 19th of November 1794 provides that the governments will exert themselves to bring to condign punishment all persons concerned in piratical offences, and that 'all ships with the goods or merchandises taken by them and brought into the port of either of the said parties shall be seized, as far as they can be discovered, and shall be restored to the owners, or their factors or agents, duly deputed and authorized in writing by them (proper evidence being first given in the court of admiralty for proving the property), even in case such effects should have passed into other hands by sale, if it be proved that the buyers knew or had reason to suspect that they had been piratically taken.' (1 Laws of the United States, ed. 1815, p. 218.)

"This provision contemplates the seasonable application and proper proof of ownership to be filed in the court of admiralty to secure such claim. The justice of it is, however, acknowledged and we feel ourselves empowered to go behind the mere form of relief, and grant some compensation for the loss incurred, and we therefore allow the claim, deducting such reasonable expenses and salvage as is established by the laws of the United States."

Upham, commissioner, delivering the opinion of the commission, convention between the United States and Great Britain of February 8, 1896. (S. Ex. Doc. 103, 34 Cong. 1 sess. p. 162.) An award was made in favor of Houghton for $2,500.

Trading and Cutting Timber in Oregon without License.

The *Albion*, a British vessel, sailed from London with a cargo of merchandise to trade with the Indians on the northwest coast of America, designing to return with a load of spars for the British navy. She had a license from the British Government to engage in trade with the Indians, provided she did not deal in furs, and to cut timber within the British territories on that coast. She had also a license from the Hudson's Bay Company to cut timber, on certain specified terms, on Vancouver's Island, and the master of the vessel was authorized to arrange for and cut timber on the American side of the straits, opposite the island, if he could obtain authority for that purpose.

The vessel arrived out in 1850 at Vancouver's Island; and, not being able to obtain timber conveniently by arrangement with the Hudson's Bay Company, proceeded to the American coast in Oregon Territory, and, finding no person to contract with, commenced to trade with the Indians and to cut and fell

timber there. Information was communicated to Astoria of her proceedings, and Mr. Adair, the collector of that port, ordered her seizure for entering the United States territory, felling timber, and trading with the Indians in violation of law. She was seized in April 1850 at Dungeness, having cut forty-two spars, from sixty to ninety-six feet in length, and from eighteen to twenty-six inches square at the butt, part of which were on board the vessel; the others were lying by her side. The officers reported that she had some clothing, hardware, blankets, etc., on board, but the larger part of her cargo had been sold to Indians or settlers. The vessel was libeled and condemned, and was sold in the autumn of 1850.

After the seizure a petition was presented at Washington beseeching the clemency of the United States so far as it might be extended, and on January 11, 1851, Mr. Corwin, the Secretary of the Treasury, gave conditional instructions to the prosecuting officer of the government "to release the *Albion* in case there had been no legal condemnation of the vessel at the date on which he should receive the instructions of the Department, and on payment of the costs attending the seizure."

The vessel had been condemned and sold some two months prior to the date of these instructions, so that they could not be carried out.

A claim in behalf of the owners was preferred before the commission under the convention between the United States and Great Britain of February 8, 1853. The commissioners concurred in thinking that as the country was remote and unsettled and the government there newly established and little known, and as the wrong done was slight in comparison with the penalty inflicted, it was proper to carry out the measure of clemency which the Government of the United States had originally designed, and to place the claimant in the same situation as he would have occupied if the instructions of the Secretary of the Treasury had been received in time. Bates, the umpire, "awarded $20,000 on account of the hardship of the case and for the reason that the remoteness of the Territory was such as to prevent the clemency intended by the government seasonably reaching them."

Commission under the convention between the United States and Great Britain of February 8, 1853. (S. Ex. Doc. 103, 34 Cong. 1 sess. 376–381.)

Date of Origin of a Claim.

"The umpire appointed agreeably to the provisions of the convention entered into between Great Britain and the United States on the 8th of February 1853 for the adjustment of claims by a mixed commission having been duly notified by the commissioners under the said convention that they had been unable to agree upon the decision to be given with reference to the claim of the Hon. James Crook, owner of the schooner *Lord Nelson*, against the Government of the United States, and having carefully examined and considered the papers and evidence produced on the hearing of the said claim, and having conferred with the said commissioners thereon, hereby reports that the schooner *Lord Nelson* was captured on the 5th June 1812, thirteen days before the declaration of war, by the United States brig *Oneida*, Captain Woolsey, on Lake Ontario, for an alleged breach of the embargo laws; the vessel was taken to Sackett's Harbor, where, after war was declared, the schooner and cargo were condemned and the proceeds paid into court. When peace was made the owners of the *Lord Nelson* and cargo claimed their property as captured in time of peace, and proceedings were permitted in the court of the United States and a decree passed ordering the proceeds of the vessel and cargo, amounting to $4,971, to be paid over to the claimants, when it was found the officer of the court whose business it was to take care of the money had absconded, leaving no assets. A petition was afterwards presented to the President of the United States, who pressed this claim on the attention of Congress, but no appropriation was made.

"The period when the transaction took place which is the foundation of this claim places it without the jurisdiction of this commission.

"No compensation can, therefore, be awarded to the owners of the *Lord Nelson*."

Bates, umpire, December 14, 1854, commission under the convention between the United States and Great Britain of February 8, 1853. (MSS., Dept. of State.)

Administration of Estates: Treaty Question.

By Article XXXIX. of the treaty of friendship, Commerce, and Navigation between the United States and Peru of July 26, 1851,[1] the high contracting parties agreed "that, in the absence of the legal heirs or representatives, the consuls or

[1] This treaty was terminated on notice given in accordance with its provisions in 1863.

vice-consuls of either party shall be ex officio the executors or administrators of the citizens of their nation who may die within their consular jurisdiction, or of their countrymen dying at sea, whose property may be brought within their jurisdiction." Under this provision a claim against the United States arose in 1857. It finally came before the mixed commissioners under the convention between the United States and Peru of January 12, 1863. The four commissioners rendered the following unanimous opinion and award:

"In the month of May 1857 the Peruvian citizen Juan del Carmen Vergil, returning from New York to the Pacific, died on board the steamer *Empire City*. The agents of the company to which that steamer belonged placed his personal effects in the hands of the 'public administrator of the city of New York.'

"The minister of Peru in the United States, in July of the same year, represented to the Secretary of State that the Peruvian consul in the same city had made proper representation to entitle him to the charge of these effects under existing treaty stipulations, but that, failing to secure the rights therein guaranteed to him, it was necessary to interpose diplomatic offices.

"The Secretary of State immediately instructed the law officer of the Government of the United States in the city of New York 'to take such steps as would secure compliance with the provisions of the treaty.'

"The conflicting claims of the public administrator and of the consul of Peru appear to have been heard before the surrogate's court of New York at different times up to the 2nd December 1858, after which no record is found of further judicial investigation, although it continued to be the subject of diplomatic correspondence up to December 1862.

"When the attention of the Secretary of State (Mr. Cass) was first invited to this case, no objection was presented to the views expressed by Mr. Osma in reference to the Peruvian consul's right to take possession of Vergil's property under the treaty of 26th July 1851; so far from it, it will have been observed that prompt measures were taken to secure the observance of the stipulations of the 39th article of that treaty.

"When it had become evident that the proceedings were unsuccessful, the question was referred to the Attorney-General of the United States 'for his opinion as to the requisite measures to be pursued in order to give effect to the stipulations of the treaty.'

"That officer declared that the detaining of the goods of the deceased from the Peruvian consul was unlawful and a wrong which may justly be complained of. He thought, however, that the Peruvian consul and minister were in fault in endeavoring to obtain 'redress where there is no authority to furnish it,' and he added that the judicial authorities would have given them this justice 'for the asking.'

"Dismissing any further question upon the principles involved in this claim, in regard to which there is no disagreement among the commissioners, it remains only to arrive at a just measure of the value of Vergil's effects as they were delivered to the public administrator and claimed by the consul of Peru.

"Consul Casado wrote to the Peruvian minister on 9 October 1858, that Vergil had 'some jewelry and two thousand dollars, together with some bales of merchandise, the value of which he did not know.' * * * The official record, transmitted by the district attorney of the United States in New York to the Secretary of State on the 13th December last, gives a precise memorandum of the accounts of the public administrator in reference to Vergil's effects. From this it appears that he charged himself with cash found in Vergil's trunk, $101. Add to which the appraised value of his other effects, which was $347.96, making a total of $448.96.

"Having discovered in the expediente presented in this case on the part of Peru the name of Messrs. Templemann & Bergmann, of Lima, as gentlemen having business transactions and correspondence with Vergil, Mr. Bergmann of that firm was invited to appear before the commission and communicate any information he might have upon the subject of Vergil's property. The papers and statements presented by this intelligent and, as is known to the mercantile community here, upright gentleman do not definitely determine the actual value of Mr. Vergil's property at the time of his death. But they are sufficiently conclusive to warrant the belief that the detention of Vergil's effects by the public administrator of New York worked damages and losses to his estate which are not covered by the value of his property as appraised added to the money found in his possession.

"Taking into consideration the following elements, viz, the money, the effects of which Vergil died possessed, and the damages actually resulting from the embarrassment to which his property was unjustly subjected, it is believed that nine hundred dollars is a reasonable measure of redress in the case. The commission therefore award to the legal representatives of Juan del Carmen Vergil nine hundred dollars with interest at 6 per cent for five years, amounting in the whole to eleven hundred and seventy dollars in the silver money of the United States or its equivalent."

Claim for a Gratuity.

"The *expediente* sets forth in substance—

"That in 1812 Alexander Scott, a citizen of the United States, residing in Washington, having been appointed a political agent by President Madison to proceed to Venezuela, then at war with Spain for independence, to look after the commercial and other interests of the United States in that quarter, delayed his departure from some

time in March till late in May, in order to secure the aid of his country toward relieving the distress and suffering of the people of Caracas and vicinity, caused by the then recent disastrous earthquake in that part of South America; that he 'obtained its consent and authority for purchasing and transporting' fifty thousand dollars' worth of provisions 'to the city of Caracas for the relief and sustenance of the suffering inhabitants;' that the provisions (which arrived in June and July) were gratefully received by Venezuela 'with many flattering demonstrations of respect and gratitude toward' Mr. Scott; that owing to heavy personal expenses incurred during and in consequence of this service (which continued till January, 1813), he was reduced from affluence to straitened circumstances. He died in 1839. Elizabeth B. Scott, his widow, who had accompanied him and shared the labor and privations of the undertaking, in 1855 sent her memorial, embodying these statements substantially, to the Venezuelan Government through the American legation at Caracas, asking, to use her own language, 'at the hands of a high-minded and honorable country such a return of reciprocal kindness as they may think fit to bestow in view of the sacrifices made.'

"No sum was named either of the expenses or losses incurred or of indemnity desired. Afterwards letters from time to time were forwarded in her behalf through said legation to that government, in one of which $25,000 were suggested as a proper sum to be paid for the services rendered. The letters, while depicting in strong colors the great benefits to Venezuela of Mr. Scott's mission, and the needs of the petitioner, claimed as a consequence from his sacrifices for that country, disclose no new material fact.

"This claim was presented to the former commission by the American minister at Caracas May 14, 1868. That was the first time the United States Government or its agency took or was asked to take cognizance of it further than to forward the matter as above stated.

"To 'this claim' Venezuela by her counsel demurs, 'upon the ground that it is based entirely on the supposed right to an exercise of gratitude by Venezuela, and does not allege any breach of contract or wrong cognizable by a tribunal of justice, this without admitting the claim of special gratitude.'

"As we understand it, a 'claim' within the meaning of the treaty implies a *right* on the one hand and an *obligation* on the

other. It has reference to some alleged wrongful conduct of the government upon which it is made. That conduct may have been active or passive; the government may have done what it ought not to have done, or refused or neglected to do what it ought to have done in respect to the subject-matter of the claim. And injury or damage must be alleged to have resulted from that conduct to the claimant under circumstances giving him the right under the treaty through his own government to demand, and imposing on the delinquent government the obligation to allow indemnity therefor.

"This claim is not of that character. No wrongful conduct is or can be imputed to Venezuela in respect to its subject-matter. All she did was thankfully to receive a gift of provisions sent by the Government of the United States to her people in distress. The claim, if otherwise good on the face of the papers, would be obnoxious to an objection for delay in presentation for reasons stated in No. 36. The demurrer will be sustained and the case dismissed.

"It may be worth while to add a few facts about this case obtained from the public records. Having been commissioned in 1811 to go to Venezuela as agent for the Government of the United States, Mr. Scott started in March, 1812, and got as far as Baltimore, where he found there were no vessels going to Venezuela because of the then recent embargo. While thus detained in Baltimore, Congress passed the act of May 8, 1812, 'for the relief of citizens of Venezuela,' authorizing the President to purchase $50,000 worth of provisions and 'to tender the same in the name of the Government of the United States to that of Venezuela for the relief of the citizens who have suffered by the late earthquake.' He was directed by President Madison to proceed to that country in one of the vessels carrying the provisions and aid in their distribution. He was paid by the United States, as its agent, for his services, including $700 paid him while detained in Baltimore, $4.115, and thereafter employed in its service."

Little, commissioner, for the commission, *Elizabeth B. Scott* v. *Venezuela* No. 12, United States and Venezuela Claims Commission, convention of December 5, 1885.

The principle of this case was cited and affirmed by the commission in the case of *Margaret Watson de Clark* v. *Venezuela*, No. 19, Andrade, commissioner, delivering the following opinion:

"It appears that Margaret Clark, of the city of Baltimore, widow of Captain John Clark, who spent a considerable portion of his life and in

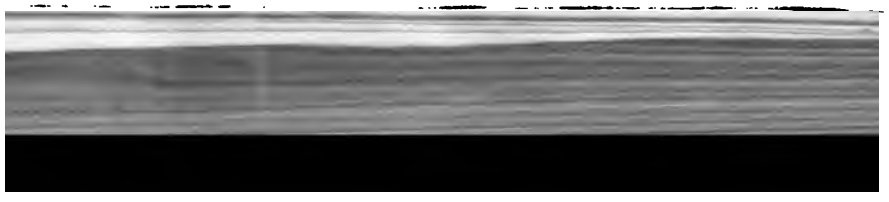
1847 died in the naval service of Venezuela, had been 'conceded' a pension of $20 per month by that government on account of such service. This pension was regularly paid up to May 31, 1856, to her, and thereafter to March 1, 1858, to her authorized agent, one Seth Driggs, to wit: $419.40 in *cinco billetes de deuda antigua de Tesoreria sin interés*, which he claimed to have lost. She died in said city November 4, 1863. The petition here was filed before the former commission by said Driggs on behalf of her heirs at law, citizens of the United States, claiming the pension from May 31, 1856, till her death, with interest. There is no evidence before us that this claim was ever presented to the Government of the United States or to its legation at Caracas beyond the fact of its consideration by the former commissioners and umpire; nor is there any evidence submitted touching the merits of the claim.

"The claim is not such as the treaty contemplates, and must be disallowed on that ground (see No. 12), even if there were no lack of evidence and no difficulty about due presentation."

Liability for Collision.

"In the case of Joseph W. Roach, No. 154, the claim was for the value of the brigantine *Maderia* and her cargo, which was alleged to have been, on the 3d October 1863, run into by the *Clyde*, a steamer transport owned by the United States, and the vessel and her cargo thereby sunk and totally lost. That the collision took place in the course of a lawful voyage of the *Maderia* from the port of Saint John's, Porto Rico, to the port of New York; and that the *Clyde* was then upon a voyage for the Government of the United States, and under the charge of officers of that Government. That the collision happened entirely through the neglect and default of the officers of the *Clyde*. The memorial claimed damages $14,969.50, besides interest. The proofs filed sustained the allegations in the memorial as to the loss of the vessel and cargo by the default of the officers of the *Clyde*, and showed that the matter had been investigated by the claims commission of the War Department, and a report was made by that commission in January 1867, assessing the damages of the claimant at $11,373.98, besides interest. The only question raised in the case was as to the amount of damages to be allowed. The commission unanimously awarded the claimant $14,081."

American and British Claims Commission, treaty of May 8, 1871, Article XII. Hale's Report, 159.





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